IN THE SUPREME COURT OF FLORIDA

In the Matter of Standard Jury Instructions in Contract and Business Cases.
_____/

Committee Report Number 12-01

REPORT (NO. 12-01) OF THE COMMITTEE ON STANDARD JURY INSTRUCTIONS IN CONTRACT AND BUSINESS CASES

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REPORT (NO. 12-01) OF THE
COMMITTEE ON STANDARD JURY INSTRUCTIONS
IN CONTRACT AND BUSINESS CASES

To the Chief Justice and Justices of
the Supreme Court of Florida:

The Committee on Standard Jury Instructions in Contract and Business Cases recommends that the Supreme Court of Florida adopt Florida Standard Jury Instructions (Contract and Business) as set forth in Appendix A to this report. This report is filed pursuant to article V, section 2(a), of the Florida Constitution.

I. Drafting History of the Proposed Instructions

The Supreme Court of Florida created a committee to draft an original set of standard jury instructions to be used in contract and business cases. The committee was comprised of trial attorneys, appellate attorneys, and judges with experience in such cases.

The committee surveyed other states which already drafted standard jury instructions in contract and business cases. The goal was to identify a state possessing instructions which could serve as a template for drafting a similar set of instructions in Florida. The committee decided that the State of California possessed such instructions. The Judicial Council of California graciously agreed to permit the use of its instructions as a model for the drafting of these instructions. The committee expresses its deep appreciation to the Judicial Council of California for that cooperation.

The committee, divided into six subcommittees, researched and drafted proposed instructions which followed Florida law. Upon completion of the subcommittees' work, the full committee met to review and revise each proposed instruction for accuracy and conformity with Florida law. To improve juror understanding, the committee has used "plain English" terminology wherever possible without altering the instructions' substantive meaning.

The Florida Supreme Court, through its committee liaison, Justice R. Fred Lewis, instructed the committee that, upon completion of the instructions, the committee should prepare to publish the instructions as a stand-alone book separate from the pre-existing Standard Jury Instructions in Civil Cases. To accomplish that purpose, the committee received permission from the Florida Supreme Court Committee on Standard Jury Instructions in Civil Cases to duplicate the "How to Use This Book" section as well as Sections 100, 200, 300, 600, 700, and 800 for use in the Contract and Business Cases book. Thus, this committee's work product is limited to Sections 400 and 500 in its proposed *Florida Standard Jury Instructions in Contract and Business Cases* book. This committee expresses its deep appreciation to the Civil Cases committee for its cooperation and substantial effort in drafting what comprises a significant portion of the Contract and Business Cases book.

The Committee is indebted to The Florida Bar and to its staff, especially Jodi Jennings, who has provided valuable assistance in the preparation and publication of the Contract and Business Cases book. The Committee finally expresses its appreciation to the Supreme Court of Florida and its committee liaison, Justice R. Fred Lewis, for having made this effort possible.

II. APPENDICES

Appendix A:	Proposed *Florida Standard Jury Instructions in Contract and Business Cases* (line numbers are provided for easier reference if necessary)
Appendix B:	*Florida Bar News* notice July 1, 2011
Appendix C:	*Florida Bar News* notice December 15, 2011
Appendix D:	*Florida Bar News* notice April 1, 2012
Appendix E:	Comments received
Appendix F:	Committee meeting minutes

III. DISSENTING VIEWS FROM THE COMMITTEE

There are no dissenting views from the Committee. The Committee unanimously recommends that the Court approve the proposed *Florida Standard Jury Instructions in Contract and Business Cases* for publication and use.

IV. COMMENTS RECEIVED

The proposed instructions were published for comments on July 1, 2011; December 15, 2011; and April 1, 2012. Two comments were received. Both comments were directed to a proposed instruction on the affirmative defense of promissory estoppel. The comments questioned whether the proposed instruction was duplicative of the proposed instruction on the affirmative

defense of equitable estoppel. As a result of the comments, the Committee withdrew the proposed instruction on the affirmative defense of promissory estoppel from this petition and will further analyze the issue at a later date.

V. CONCLUSION

WHEREFORE, for the above reasons, the Committee respectfully requests that the Court approve these instructions for publication and inclusion as an original book of standard jury instructions for contract and business cases.

Dated: _____, 2012

Respectfully submitted,

_____
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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this report complies with the font requirements of Florida Rule of Appellate Procedure 9.210 by using Times New Roman 14-point font.

By: _____
Jonathan D. Gerber

APPENDIX A

FLORIDA STANDARD JURY INSTRUCTIONS IN CONTRACT AND BUSINESS CASES

The Florida Supreme Court
Committee on Standard Jury Instructions
in Contract and Business Cases

Table of Contents

PREFACE

The Florida Supreme Court created a committee to draft an original set of standard jury instructions to be used in contract and business cases. The committee was comprised of trial attorneys, appellate attorneys, and judges with experience in such cases.

The committee surveyed other states which already drafted standard jury instructions in contract and business cases. The goal was to identify a state whose instructions could serve as a template for drafting a similar set of instructions in Florida. The committee decided that the State of California possessed such instructions. The Judicial Council of California graciously agreed to permit the use of its instructions as a model for the drafting of these instructions. The committee expresses its deep appreciation to the Judicial Council of California for that cooperation.

The committee, divided into six subcommittees, researched and drafted proposed instructions which followed Florida law. Upon completion of the subcommittees' work, the full committee met to review and revise each proposed instruction for accuracy and conformity with Florida law. To improve juror understanding, the committee has used "plain English" terminology wherever possible without altering the instructions' substantive meaning.

The Florida Supreme Court, through its committee liaison, Justice R. Fred Lewis, instructed the committee that, upon completion of the instructions, the committee should prepare to publish the instructions as a stand-alone book separate from the pre-existing Standard Jury Instructions in Civil Cases. To accomplish that purpose, the committee received permission from the Florida Supreme Court Committee on Standard Jury Instructions in Civil Cases to duplicate "How to Use This Book" as well as Sections 100, 200, 300, 600, 700, and 800 for use in this book. This committee expresses its deep appreciation to the Civil Cases committee for their cooperation and for their substantial effort in drafting what comprises a significant portion of this book.

The Committee is indebted to The Florida Bar and to its staff, especially Jodi Jennings, who has provided valuable assistance in the preparation and publication of this work. The Committee finally expresses its appreciation to the Florida Supreme Court and its committee liaison, Justice R. Fred Lewis, for having made this effort possible.

The Florida Supreme Court Committee on Standard
Jury Instructions in Contract and Business Cases

HOW TO USE THIS BOOK

This book contains standard jury instructions prepared by the Florida Supreme Court Committee on Standard Jury Instructions in Contract and Business Cases. Because it is impossible to cover every circumstance or issue with standard instructions, this book includes only those instructions which occur with enough frequency to have warranted their preparation.

Although the Florida Supreme Court has approved this book, the Court has not expressed an opinion as to the instructions' correctness. Also, because of changes in the law, these instructions may become outdated or in need of revision or supplementation. For these reasons, parties remain free to contest a standard instruction's legal correctness or to request additional or alternative instructions.

A. Getting Started.

When compiling a set of proposed instructions, the following minimum steps should be taken:

1. Determine the current and complete law required for instructing the jury in your case.

2. Make sure you are using the current version of Florida Standard Jury Instructions (FSJI). The official version of FSJI (Contract and Business) is located at the committee's website, www.floridasupremecourt.org/contract_jury_ instructions/ index.shtml. You also can check for the latest updates by accessing the most recent publication date on the "Court Decisions & Rules" link of the Florida Supreme Court's website homepage, www.floridasupremecourt.org. Also, check the "Rule Cases" link on the Clerk's Office webpage for instructions. Ensure that all updates from The Florida Bar are fully and correctly inserted in printed versions of the book, and check the committee's website for any approved instructions that have not yet reached publication.

3. Compile a complete set of proposed instructions for your case from the instructions in this book and, if necessary, by modifying standard instructions or drafting your own case-specific instructions using other appropriate sources.

B. Using This Book for the First Time.

The introductory passages below provide useful guidance for preparation of jury instructions by first-time users of this book. Assembling a set of proposed instructions for the trial judge follows custom and organization which may vary somewhat depending on the type of case, and the judge may have specific requirements as well. The standard instructions in this book are included as examples of how a set of instructions is customarily assembled. Even if these standard instructions are not specifically applicable to your particular case, they can assist you in organizing your proposed instructions. Remember that standard instructions may not fully cover the law in any given case, and case-specific instructions may be required.

C. Finding the Right Instruction.

The instructions are listed by subject matter in the table of contents and in alphabetical order by name in the index. At the start of each section, there is a list of the instructions in that section. All instructions are numbered and presented in numerical order. An instruction may be located by number by quickly scanning the numbers in the running heads.

D. Ensuring the Instruction Is Current.

Supplements to this book will have pages containing the date when the committee last revised the page. No date means the page was part of the original book. The authorities identified below certain instructions may include the dates for authorities on which the committee based the instruction. If the law has changed, the instruction may need to be modified accordingly. The committee's process of revising standard instructions can be lengthy because it involves discovering the need for a change, researching the law, preparing and revising proposed instructions, and publishing the proposed instructions for comment. Based on comments received, the proposed instructions may again be modified. Only after this process is completed does the committee submit the proposed instructions to the Florida Supreme Court for approval. Even if the Court approves new instructions, the instructions may not have appeared in a printed update to this book. All new instructions and revisions to this book, including the latest Florida Supreme Court opinions and text of instructions, are published on the Florida Supreme Court's website homepage, www.floridasupremecourt.org, and at www.floridasupremecourt.org/contract_jury_ instructions/ index.shtml. Check the site to ensure that the book you are using is up-to-date and to ensure that you have the instruction's most current version.

E. Assembling a Set of Instructions.

This book is arranged in the order in which the trial judge normally will instruct the jury, together with additional sections covering oaths, voir dire, and instructions for evidentiary and supplemental issues. To improve juror understanding, the committee has used "plain English" terminology wherever possible without altering the instructions' substantive meaning.

F. Drafting Case-Specific Instructions.

In most cases, standard jury instructions will be used to instruct the jury in whole or part. However, the committee has not developed standard instructions on substantive issues for all types of contract and business cases. The trial judge has the responsibility to choose and give appropriate and complete instructions in a given case, whether or not the instructions are "standard." *See, e.g.*, *In the Matter of the Use by the Trial Courts of the Standard Jury Instructions*, 198 So.2d 319 (Fla. 1967).

When drafting case-specific instructions, the format, sequence, and technique used in the standard instructions should be followed to the extent possible. Any instructions in this book on introductory and procedural matters must be used to the extent that they correctly apply in a

given case. Florida Rule of Civil Procedure Form 1.985 sets forth the procedure to be followed when varying from the standard jury instructions in this book.

G. Referring to Instructions by Number.

Refer to instructions by number to facilitate cross-referencing in electronic versions, in case citations, and in publications by other publishers.

H. Providing Written Instructions to the Jury.

Florida Rule of Civil Procedure 1.470(b) provides that the court shall furnish a written copy of its instructions to each juror. The trial judge must include all instructions. *All Bank Repos, Inc. v. Underwriters of Lloyds of London*, 582 So.2d 692, 695 (Fla. 4th DCA 1991). The committee *strongly* encourages the trial judge to provide the written instructions to the jury before the judge's oral instructions so that jurors can follow along when the judge reads the instructions aloud. When assembling the written instructions which the judge will supply to the jury, omit all titles, comments, and instructional notes.

I. When Instructions Should Be Given.

Florida Rule of Civil Procedure 1.470(b) provides that instructions may be given during the trial and either before or after final argument. The timing of instructions is a matter within the sound discretion of the trial judge.

The committee envisions that before voir dire, the judge will give a brief explanation of the case. Once the jury has been selected, and before opening statements, the committee *strongly* recommends that the judge give jury instructions on the case. In most cases, the committee believes that it will be possible to give the jury a complete set of instructions. There will, however, be instances in which some instructions may depend on the admission of certain evidence or the judge's rulings, and it will not be possible to give a complete set of instructions. In those instances, the committee recommends giving a set of instructions as complete as possible to the jury.

These instructions are organized to facilitate giving the final instructions before final argument. The committee also *strongly* recommends that the judge consider giving the substantive law instructions before final argument. If the judge gives the instructions before final argument, the judge must give the final procedural instructions after counsel conclude final arguments.

J. Included Instructions.

A brief description of the individual sections follows:

SECTION 100: OATHS, contains the standard oaths which may be necessary before and during trial.

SECTION 200: PRELIMINARY INSTRUCTIONS, contains instructions for use during jury selection and after the jury has been selected and sworn. The instructions for after the jury has been selected include the jury's duties and conduct. Because the committee contemplates that the judge will give the jury a full substantive instruction before trial begins, reference will also have to be made to some of the following sections.

SECTION 300: EVIDENCE INSTRUCTIONS, contains instructions on how the jury must deal with various items of evidence or the judge's rulings.

SECTION 400: SUBSTANTIVE INSTRUCTIONS, contains the principal issues which the jury is to resolve and the legal principles which govern the resolution of those issues, organized according to specific causes of action.

It may not be sufficient in all cases merely to define and submit these basic issues to the jury. It may be necessary, for example, to instruct the jury concerning a preliminary issue. It also may be necessary to withdraw from the jury's consideration an issue about which there has been some controversy during the trial.

The instructions in section 400 are suitable for framing the issues regardless of whether the claim made is an original claim, a counterclaim, or a cross-claim. These instructions also can be used when one party makes two or more claims in the same action.

In cases in which a counterclaim or cross-claim exists, the judge ordinarily will concentrate on each claim separately, selecting the instructions from section 400 that are appropriate to that particular claim, charge the jury with respect to the issues on that claim including defense issues, and return again to the beginning of section 400 to give the instructions appropriate to the issues on the next claim.

SECTION 500: DAMAGES, contains instructions on damages arranged so that the various elements of damage proper for consideration in any given case may be selected. The model charges contain guidance on straightforward and complicated or multiple claim cases. It is up to the judge to find a convenient manner to instruct on multiple claims without misleading the jury.

SECTION 600: SUBSTANTIVE INSTRUCTIONS — GENERAL, contains basic instructions necessary in almost every case, such as weighing evidence.

SECTION 700: CLOSING INSTRUCTIONS, sets forth closing instructions and an instruction introducing the forms of verdict.

SECTION 800: SUPPLEMENTAL MATTERS, sets forth instructions for issues during jury deliberation and for discharging the jury.

K. Variance from Standard Instructions.

The trial judge has the discretion to insert or omit minor words in a given instruction for clarity. The committee does not discourage such minor editorial modifications to conform a standard instruction to a given case or circumstance, provided the substance of the instruction is unchanged.

While minor, non-substantive modifications are permitted, Florida Rule of Civil Procedure Form 1.985 provides:

> The forms of Florida Standard Jury Instructions appearing on the court's website at www.floridasupremecourt.org/jury-instructions/instructions.html may be used by the trial judges of this state in charging the jury in civil actions to the extent that the forms are applicable, unless the trial judge determines that an applicable form of instruction is erroneous or inadequate. In that event the trial judge shall modify the form or give such other instruction as the judge determines necessary to accurately and sufficiently instruct the jury in the circumstances of the action. In that event the trial judge shall state on the record or in a separate order the manner in which the judge finds the standard form erroneous or inadequate and the legal basis of that finding. Similarly, in all circumstances in which the notes accompanying the Florida Standard Jury Instructions contain a recommendation that a certain type of instruction not be given, the trial judge may follow the recommendation unless the judge determines that the giving of such an instruction is necessary to accurately and sufficiently instruct the jury, in which event the judge shall give such instruction as the judge deems appropriate and necessary. In that event the trial judge shall state on the record or on a separate order the legal basis of the determination that such instruction is necessary.

See McConnell v. Union Carbide Corp., 937 So.2d 148, 153 (Fla. 4th DCA 2006), discussing the limited range of judicial discretion.

Note, however, that the contents of this book are approved for publication by the Florida Supreme Court subject to the following disclaimer, which appears in whole or in part in opinions approving standard instructions:

> [W]e express no opinion on the correctness of these instructions and remind all interested parties that this authorization forecloses neither requesting additional or alternative instructions nor contesting the legal correctness of these instructions. We further caution all interested parties that the notes and comments associated with the instructions reflect only the opinion of the committee and are not necessarily indicative of the views of this Court as to their correctness or applicability.

Standard Jury Instructions-Civil Cases (No. 99-2), 777 So.2d 378, 379 (Fla. 2000).

L. Use of Special Verdicts.

Special verdicts are required or used in many cases. When that occurs, the committee recommends that the questions on the special verdict be incorporated into the jury instructions. An ideal place to do so is in the Burden of Proof instructions, where the "your verdict should be …" language should be changed to "answer question number ___ yes (or no)." This will be assist the jury in understanding how to decide the case and complete the special verdict form.

M. Understanding the Signals in This Book.

Boldface type, brackets, parentheses, italics, Notes on Use, and Sources and Authorities are used in standard instructions to give certain directions as follows:

Boldface type identifies words upon which the trial judge must instruct the jury.

Brackets express variables or alternatives which the judge should select for instructing the jury. Bracketed material always appears in boldface type because some or all of the enclosed words must be provided as part of the instruction. The Notes on Use often provide guidance on the variables appropriate in a given circumstance.

Parentheses signify the need for the trial judge to insert a proper name, a specific item or element, or some other variable. Because the words within the parentheses are directional in nature and not spoken to the jury, they do not appear in boldface type. They merely serve as signals to insert names, titles, or other words that must be provided as part of the instruction. In like manner, throughout the instructions the parties are referred to as "claimant" and "defendant," and these labels may appear in parentheses. The committee does not intend that these labels be used in the instructions which the judge gives to the jury. The judge should name or refer to the parties in the most convenient and clear way.

Italics identify directions to the trial judge.

Notes on Use may appear immediately after an instruction to provide guidance in the use of an instruction. Where the committee determines that an instruction on a particular subject does not materially assist the jury, or that the instruction is likely to be argumentative or negative, or is for other reasons inappropriate, the Notes on Use will contain the committee's recommendation that the judge give no instruction. Notes on Use also are used to set out the committee's reasons for recommending particular treatment.

Sources and Authorities may appear immediately after an instruction to provide the sources and authorities upon which the committee based the instructions. The committee uses only illustrative cases and avoids long lists of cases.

FLORIDA SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS IN CONTRACT AND BUSINESS CASES

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Supreme Court Liaison: The Honorable R. Fred Lewis, Tallahassee

Past Members of the Committee:

The Honorable Thomas B. Smith, Orlando, *Chair*
The Honorable Bernard Nachman, *Vice Chair*
Mr. Robert E. Austin, Jr., Leesburg

SECTION 100 – OATHS

101.1 OATH OF JURORS BEFORE VOIR DIRE

Do you solemnly swear or affirm that you will answer truthfully all questions asked of you as prospective jurors [so help you God]?

101.2 OATH OF JUROR AFTER VOIR DIRE

Do you solemnly swear or affirm that you will well and truly try this case between the [plaintiff(s)] [petitioner(s)] and [defendant(s)] [respondent(s)], and a true verdict render according to the law and evidence [so help you God]?

101.3 OATH OF A WITNESS

Do you solemnly swear or affirm that the evidence you are about to give will be the truth, the whole truth, and nothing but the truth [so help you God]?

101.4 OATH OF AN INTERPRETER

Do you solemnly swear or affirm that you will make a true interpretation to the witness of all questions or statements made to [him] [her] in a language which that person understands, and a true interpretation of the witness' statements into the English language [so help you God]?

SECTION 200 – PRELIMINARY INSTRUCTIONS

QUALIFICATIONS INSTRUCTION

Many of you have cell phones, computers, and other electronic devices. Even though you have not yet been selected as a juror, there are some strict rules that you must follow about using your cell phones, electronic devices and computers. You must not use any device to search the Internet or to find out anything related to any cases in the courthouse.

Between now and when you have been discharged from jury duty by the judge, you must not provide or receive any information about your jury service to anyone, including friends, co-workers, and family members. You may tell those who need to know where you are that you have been called for jury duty. If you are picked for a jury, you may tell people that you have been picked for a jury and how long the case may take. However, you must not give anyone any information about the case itself or the people involved in the case. You must also warn people not to try to say anything to you or write to you about your jury service or the case. This includes face-to-face, phone or computer communications.

In this age of electronic communication, I want to stress that you must not use electronic devices or computers to talk about this case, including tweeting, texting, blogging, e-mailing, posting information on a website or chat room, or any other means at all. Do not send or accept any messages, including e-mail and text messages, about your jury service. You must not disclose your thoughts about your jury service or ask for advice on how to decide any case.

After you are called to the courtroom, the judge will give you specific instructions about these matters. A judge will tell you when you are released from this instruction. All of us are depending on you to follow these rules, so that there will be a fair and lawful resolution of every case.

NOTE ON USE

This instruction should be given in addition to and at the conclusion of the instructions normally given to the prospective jurors. The portion of this instruction dealing with communication with others and outside research may need to be modified to include other specified means of communication or research as technology develops.

A. DURING JURY SELECTION

201.1 DESCRIPTION OF THE CASE
(Before Voir Dire)

Welcome. [I] [The clerk] will now administer your oath.

Now that you have been sworn, I'd like to give you an idea about what we are here to do.

This is a civil trial. A civil trial is different from a criminal case, where a defendant is charged by the state prosecutor with committing a crime. The subject of a civil trial is a disagreement between people or companies [or others, as appropriate], where the claims of one or more of these parties have been brought to court to be resolved. It is called "a trial of a lawsuit."

This is a case about (insert brief description of claim(s) and defense(s) brought to trial in this case)**.**

The principal witnesses who will testify in this case are (list witnesses)**.**

201.2 INTRODUCTION OF PARTICIPANTS AND THEIR ROLES

Who are the people here and what do they do?

Judge/Court: **I am the Judge. You may hear people occasionally refer to me as "The Court." That is the formal name for my role. My job is to maintain order and decide how to apply the rules of the law to the trial. I will also explain various rules to you that you will need to know in order to do your job as the jury. It is my job to remain neutral on the issues of this lawsuit.**

Attorneys: **The attorneys to whom I will introduce you have the job of representing their clients. That is, they speak for their client here at the trial. They have taken oaths as attorneys to do their best and to follow the rules for their profession.**

Plaintiff's Counsel: **The attorney on this side of the courtroom,** (introduce by name), **represents** (client name) **and is the person who filed the lawsuit here at the courthouse. [His] [Her] job is to present [his] [her] client's side of things to you. [He] [She] and [his] [her] client will be referred to most of the time as "the plaintiff."**

Defendant's Counsel: **The attorney on this side of the courtroom,** (introduce by name), **represents** (client name)**, the one who has been sued. [His] [Her] job is to present [his] [her] client's side of things to you. [He] [She] and [his] [her] client will usually be referred to here as "the defendant."**

Court Clerk: **This person sitting in front of me,** (name), **is the court clerk. [He] [She] is here to assist me with some of the mechanics of the trial process, including the numbering and collection of the exhibits that are introduced in the course of the trial.**

Court Reporter: **The person sitting at the stenographic machine,** (name)**, is the court reporter. [His] [Her] job is to keep an accurate legal record of everything we say and do during this trial.**

Bailiff: **The person over there,** (name), **is the bailiff. [His] [Her] job is to maintain order and security in the courtroom. The bailiff is also my representative to the jury. Anything you need or any problems that come up for you during the course of the trial should be brought to [him] [her]. However, the bailiff cannot answer any of your questions about the case. Only I can do that.**

Jury: **Last, but not least, is the jury, which we will begin to select in a few moments from among all of you. The jury's job will be to decide what the facts are and what the facts mean. Jurors should be as neutral as possible at this point and have no fixed opinion about the lawsuit.**

In order to have a fair and lawful trial, there are rules that all jurors must follow. A basic rule is that jurors must decide the case only on the evidence presented in the

courtroom. You must not communicate with anyone, including friends and family members, about this case, the people and places involved, or your jury service. You must not disclose your thoughts about this case or ask for advice on how to decide this case.

I want to stress that this rule means you must not use electronic devices or computers to communicate about this case, including tweeting, texting, blogging, e-mailing, posting information on a website or chat room, or any other means at all. Do not send or accept any messages to or from anyone about this case or your jury service.

You must not do any research or look up words, names, [maps], or anything else that may have anything to do with this case. This includes reading newspapers, watching television or using a computer, cell phone, the Internet, any electronic device, or any other means at all, to get information related to this case or the people and places involved in this case. This applies whether you are in the courthouse, at home, or anywhere else.

All of us are depending on you to follow these rules, so that there will be a fair and lawful resolution to this case. Unlike questions that you may be allowed to ask in court, which will be answered in court in the presence of the judge and the parties, if you investigate, research or make inquiries on your own outside of the courtroom, the trial judge has no way to assure they are proper and relevant to the case. The parties likewise have no opportunity to dispute the accuracy of what you find or to provide rebuttal evidence to it. That is contrary to our judicial system, which assures every party the right to ask questions about and rebut the evidence being considered against it and to present argument with respect to that evidence. Non-court inquiries and investigations unfairly and improperly prevent the parties from having that opportunity our judicial system promises. If you become aware of any violation of these instructions or any other instruction I give in this case, you must tell me by giving a note to the bailiff.

NOTE ON USE FOR 201.2

The portion of this instruction dealing with communication with others and outside research may need to be modified to include other specified means of communication or research as technology develops.

201.3 EXPLANATION OF THE VOIR DIRE PROCESS

Voir Dire:

The last thing I want to do, before we begin to select the jury, is to explain to you how the selection process works.

Questions/Challenges: **This is the part of the case where the parties and their lawyers have the opportunity to get to know a little bit about you, in order to help them come to their own conclusions about your ability to be fair and impartial, so they can decide who they think should be the jurors in this case.**

How we go about that is as follows: First, I'll ask some general questions of you. Then, each of the lawyers will have more specific questions that they will ask of you. After they have asked all of their questions, I will meet with them and they will tell me their choices for jurors. Each side can ask that I exclude a person from serving on a jury if they can give me a reason to believe that he or she might be unable to be fair and impartial. That is what is called a challenge for cause. The lawyers also have a certain number of what are called peremptory challenges, by which they may exclude a person from the jury without giving a reason. By this process of elimination, the remaining persons are selected as the jury. It may take more than one conference among the parties, their attorneys, and me before the final selections are made.

Purpose of Questioning: **The questions that you will be asked during this process are not intended to embarrass you or unnecessarily pry into your personal affairs, but it is important that the parties and their attorneys know enough about you to make this important decision. If a question is asked that you would prefer not to answer in front of the whole courtroom, just let me know and you can come up here and give your answer just in front of the attorneys and me. If you have a question of either the attorneys or me, don't hesitate to let me know.**

Response to Questioning: **There are no right or wrong answers to the questions that will be asked of you. The only thing that I ask is that you answer the questions as frankly and as honestly and as completely as you can. You [will take] [have taken] an oath to answer all questions truthfully and completely and you must do so. Remaining silent when you have information you should disclose is a violation of that oath as well. If a juror violates this oath, it not only may result in having to try the case all over again but also can result in civil and criminal penalties against a juror personally. So, again, it is very important that you be as honest and complete with your answers as you possibly can. If you don't understand the question, please raise your hand and ask for an explanation or clarification.**

In sum, this is a process to assist the parties and their attorneys to select a fair and impartial jury. All of the questions they ask you are for this purpose. If, for any reason, you do not think you can be a fair and impartial juror, you must tell us.

NOTES ON USE FOR 201.3

1. The publication of this recommended instruction is not intended to intrude upon the trial judge's own style and manner of delivery. It may be useful in cataloging the subjects to be covered in an introductory instruction.

2. The portion of this instruction dealing with communication with others and outside research may need to be modified to include other specified means of communication or research as technology develops.

B. AFTER JURY SELECTED AND SWORN

202.1 INTRODUCTION

Administer oath:

You have now taken an oath to serve as jurors in this trial. Before we begin, I am going to tell you about the rules of law that apply to this case and let you know what you can expect as the trial proceeds.

It is my intention to give you [all] [most] of the rules of law but it might be that I will not know for sure all of the law that will apply in this case until all of the evidence is presented. However, I can anticipate most of the law and give it to you at the beginning of the trial so that you will better understand what to be looking for while the evidence is presented. If I later decide that different or additional law applies to the case, I will tell you. In any event, at the end of the evidence I will give you the final instructions on which you must base your verdict. At that time, you will have a complete written set of the instructions so you do not have to memorize what I am about to tell you.

(Continue with the Substantive Law, Damages, and General Instructions from the applicable sections of this book, followed by the applicable parts of 202.2 through 202.5)

NOTE ON USE FOR 202.1

The committee recommends giving the jury at the beginning of the trial a complete as possible set of instructions on the Substantive Law, Damages, and General Instructions.

202.2 EXPLANATION OF THE TRIAL PROCEDURE

Now that you have heard the law, I want to let you know what you can expect as the trial proceeds.

Opening Statements: **In a few moments, the attorneys will each have a chance to make what are called opening statements. In an opening statement, an attorney is allowed to give you [his] [her] views about what the evidence will be in the trial and what you are likely to see and hear in the testimony.**

Evidentiary Phase: **After the attorneys' opening statements the plaintiffs will bring their witnesses and evidence to you.**

Evidence: **Evidence is the information that the law allows you to see or hear in deciding this case. Evidence includes the testimony of the witnesses, documents, and anything else that I instruct you to consider.**

Witnesses: **A witness is a person who takes an oath to tell the truth and then answers attorneys' questions for the jury. The answering of attorneys' questions by witnesses is called "giving testimony." Testimony means statements that are made when someone has sworn an oath to tell the truth.**

The plaintiff's lawyer will normally ask a witness the questions first. That is called direct examination. Then the defense lawyer may ask the same witness additional questions about whatever the witness has testified to. That is called cross-examination. Certain documents or other evidence may also be shown to you during direct or cross-examination. After the plaintiff's witnesses have testified, the defendant will have the opportunity to put witnesses on the stand and go through the same process. Then the plaintiff's lawyer gets to do cross-examination. The process is designed to be fair to both sides.

It is important that you remember that testimony comes from witnesses. The attorneys do not give testimony and they are not themselves witnesses.

Objections: **Sometimes the attorneys will disagree about the rules for trial procedure when a question is asked of a witness. When that happens, one of the lawyers may make what is called an "objection." The rules for a trial can be complicated, and there are many reasons for attorneys to object. You should simply wait for me to decide how to proceed. If I say that an objection is "sustained," that means the witness may not answer the question. If I say that the objection is "overruled," that means the witness may answer the question.**

When there is an objection and I make a decision, you must not assume from that decision that I have any particular opinion other than that the rules for conducting a

trial are being correctly followed. If I say a question may not be asked or answered, you must not try to guess what the answer would have been. That is against the rules, too.

Side Bar Conferences: **Sometimes I will need to speak to the attorneys about legal elements of the case that are not appropriate for the jury to hear. The attorneys and I will try to have as few of these conferences as possible while you are giving us your valuable time in the courtroom. But, if we do have to have such a conference during testimony, we will try to hold the conference at the side of my desk so that we do not have to take a break and ask you to leave the courtroom.**

Recesses: **Breaks in an ongoing trial are usually called "recesses." During a recess you still have your duties as a juror and must follow the rules, even while having coffee, at lunch, or at home.**

Instructions Before Closing Arguments: **After all the evidence has been presented to you, I will instruct you in the law that you must follow. It is important that you remember these instructions to assist you in evaluating the final attorney presentations, which come next, and, later, during your deliberations, to help you correctly sort through the evidence to reach your decision.**

Closing Arguments: **The attorneys will then have the opportunity to make their final presentations to you, which are called closing arguments.**

Final Instructions: **After you have heard the closing arguments, I will instruct you further in the law as well as explain to you the procedures you must follow to decide the case.**

Deliberations: **After you hear the final jury instructions, you will go to the jury room and discuss and decide the questions I have put on your verdict form. [You will have a copy of the jury instructions to use during your discussions.] The discussions you have and the decisions you make are usually called "jury deliberations." Your deliberations are absolutely private and neither I nor anyone else will be with you in the jury room.**

Verdict: **When you have finished answering the questions, you will give the verdict form to the bailiff, and we will all return to the courtroom where your verdict will be read. When that is completed, you will be released from your assignment as a juror.**

What are the rules?

Finally, before we begin the trial, I want to give you just a brief explanation of rules you must follow as the case proceeds.

Keeping an Open Mind: **You must pay close attention to the testimony and other evidence as it comes into the trial. However, you must avoid forming any final opinion or telling anyone else your views on the case until you begin your deliberations. This rule**

requires you to keep an open mind until you have heard all of the evidence and is designed to prevent you from influencing how your fellow jurors think until they have heard all of the evidence and had an opportunity to form their own opinions. The time and place for coming to your final opinions and speaking about them with your fellow jurors is during deliberations in the jury room, after all of the evidence has been presented, closing arguments have been made, and I have instructed you on the law. It is important that you hear all of the facts and that you hear the law and how to apply it before you start deciding anything.

Consider Only the Evidence: **It is the things you hear and see in this courtroom that matter in this trial. The law tells us that a juror can consider only the testimony and other evidence that all the other jurors have also heard and seen in the presence of the judge and the lawyers. Doing anything else is wrong and is against the law. That means that you must not do any work or investigation of your own about the case. You must not obtain on your own any information about the case or about anyone involved in the case, from any source whatsoever. This includes reading newspapers, watching television or using a computer, cell phone, the Internet, any electronic device, or any other means at all, to get information related to this case or the people and places involved in this case. This applies whether you are in the courthouse, at home, or anywhere else. You must not visit places mentioned in the trial or use the internet to look at maps or pictures to see any place discussed during trial.**

Do not provide any information about this case to anyone, including friends or family members. Do not let anyone, including the closest family members, make comments to you or ask questions about the trial. Jurors must not have discussions of any sort with friends or family members about the case or the people and places involved. So, do not let even the closest family members make comments to you or ask questions about the trial. In this age of electronic communication, I want to stress again that just as you must not talk about this case face-to-face, you must not talk about this case by using an electronic device. You must not use phones, computers or other electronic devices to communicate. Do not send or accept any messages related to this case or your jury service. Do not discuss this case or ask for advice by any means at all, including posting information on an Internet website, chat room or blog.

No Mid-Trial Discussions: **When we are in a recess, do not discuss anything about the trial or the case with each other or with anyone else. If attorneys approach you, don't speak with them. The law says they are to avoid contact with you. If an attorney will not look at you or speak to you, do not be offended or form a conclusion about that behavior. The attorney is not supposed to interact with jurors outside of the courtroom and is only following the rules. The attorney is not being impolite. If an attorney or anyone else does try to speak with you or says something about the case in your presence, please inform the bailiff immediately.**

Only the Jury Decides: **Only you get to deliberate and answer the verdict questions at the end of the trial. I will not intrude into your deliberations at all. I am required to be**

neutral. You should not assume that I prefer one decision over another. You should not try to guess what my opinion is about any part of the case. It would be wrong for you to conclude that anything I say or do means that I am for one side or another in the trial. Discussing and deciding the facts is your job alone.

NOTES ON USE FOR 202.2

1. This instruction is intended for situations in which at the end of the case the jury is going to be instructed before closing argument. The committee strongly recommends instructing the jury before closing argument. If, however, the court is going to instruct the jury after closing argument, this instruction will have to be amended.

2. The publication of this recommended instruction is not intended to intrude upon the trial judge's own style and manner of delivery. It may be useful in cataloging the subjects to be covered in an introductory instruction.

3. The portion of this instruction dealing with communication with others and outside research may need to be modified to include other specified means of communication or research as technology develops.

202.3 NOTE-TAKING BY JURORS

If you would like to take notes during the trial, you may do so. On the other hand, of course, you are not required to take notes if you do not want to. That will be left up to you individually.

You will be provided with a note pad and a pen for use if you wish to take notes. Any notes that you take will be for your personal use. However, you should not take them with you from the courtroom. During recesses, the bailiff will take possession of your notes and will return them to you when we reconvene. After you have completed your deliberations, the bailiff will deliver your notes to me. They will be destroyed. No one will ever read your notes.

If you take notes, do not get so involved in note-taking that you become distracted from the proceedings. Your notes should be used only as aids to your memory.

Whether or not you take notes, you should rely on your memory of the evidence and you should not be unduly influenced by the notes of other jurors. Notes are not entitled to any greater weight than each juror's memory of the evidence.

NOTES ON USE FOR 202.3

1. The court should furnish all jurors with the necessary pads and pens for taking notes. Additionally, it may be desirable for jurors to be furnished with envelopes to place the notes for additional privacy.

2. Fla. R. Jud. Admin. 2.430(k) provides that at the conclusion of the trial, the court shall collect and immediately destroy all juror notes.

3. Fla. R. Civ. P. 1.455 provides that the trial court may, in its discretion, authorize the use of juror notebooks to contain documents and exhibits as an aid to the jurors in performing their duties.

4. When it is impractical to take exhibits into the jury room, this instruction should be modified to describe how the jury will have access to the exhibits.

202.4 JUROR QUESTIONS

During the trial, you may have a question you think should be asked of a witness. If so, there is a procedure by which you may request that I ask the witness a question. After all the attorneys have completed their questioning of the witness, you should raise your hand if you have a question. I will then give you sufficient time to write the question on a piece of paper, fold it, and give it to the bailiff, who will pass it to me. You must not show your question to anyone or discuss it with anyone.

I will then review the question with the attorneys. Under our law, only certain evidence may be considered by a jury in determining a verdict. You are bound by the same rules of evidence that control the attorneys' questions. If I decide that the question may not be asked under our rules of evidence, I will tell you. Otherwise, I will direct the question to the witness. The attorneys may then ask follow-up questions if they wish. If there are additional questions from jurors, we will follow the same procedure again.

By providing this procedure, I do not mean to suggest that you must or should submit written questions for witnesses. In most cases, the lawyers will have asked the necessary questions.

NOTE ON USE FOR 202.4

Fla. R. Civ. P. 1.452 mandates that jurors be permitted to submit written questions directed to witnesses or the court.

202.5 JURY TO BE GUIDED BY OFFICIAL ENGLISH TRANSLATION/INTERPRETATION

[A] [Some] witness[es] may testify in (language to be used) **which will be interpreted in English.**

The evidence you are to consider is only that provided through the official court interpreters. Although some of you may know (language used)**, it is important that all jurors consider the same evidence. Therefore, you must accept the English interpretation. You must disregard any different meaning**.

If, however, during the testimony there is a question as to the accuracy of the English interpretation, you should bring this matter to my attention immediately by raising your hand. You should not ask your question or make any comment about the interpretation in the presence of the other jurors, or otherwise share your question or concern with any of them. I will take steps to see if your question can be answered and any discrepancy resolved. If, however, after such efforts a discrepancy remains, I emphasize that you must rely only upon the official English interpretation as provided by the court interpreter and disregard any other contrary interpretation.

NOTE ON USE FOR 202.5

When instructing the jury at the beginning of the trial, this instruction should be used in lieu of 601.3. See *United States v. Franco*, 136 F.3d 622, 626 (9th Cir. 1998); *United States v. Fuentes-Montijo*, 68 F.3d 352, 355-56 (9th Cir. 1995).

SECTION 300 – EVIDENCE INSTRUCTIONS

301.1 DEPOSITION TESTIMONY, INTERROGATORIES, STIPULATED TESTIMONY, STIPULATIONS, AND ADMISSIONS

a. Deposition or prior testimony:

Members of the jury, the sworn testimony of (name)**, given before trial, will now be presented. You are to consider and weigh this testimony as you would any other evidence in the case.**

b. Interrogatories:

Members of the jury, answers to interrogatories will now be read to you. Interrogatories are written questions that have been presented before trial by one party to another. They are answered under oath. You are to consider and weigh these questions and answers as you would any other evidence in the case.

c. Stipulated testimony:

Members of the jury, the parties have agreed that if (name of witness) **were called as a witness, [he] [she] would testify** (read or describe the testimony)**. You are to consider and weigh this testimony as you would any other evidence in the case.**

d. Stipulations:

Members of the jury, the parties have agreed to certain facts. You must accept these facts as true. (Read the agreed facts)**.**

e. Admissions:

1. Applicable to all parties:

Members of the jury, (identify the party or parties that have admitted the facts) **[has] [have] admitted certain facts. You must accept these facts as true.** (Read the admissions)**.**

2. Applicable to fewer than all parties:

Members of the jury, (identify the party or parties that have admitted the facts) **[has] [have] admitted certain facts. You must accept these facts as true in deciding the issues between** (identify the affected parties)**, but these facts should not be used in deciding the issues between** (identify the unaffected parties)**.** (Read the admissions)**.**

NOTE ON USE FOR 301.1

The committee recommends that the appropriate explanation be read immediately before a deposition, or an interrogatory and answer, stipulated testimony, a stipulation, or an admission are read in evidence, and that no instruction on the subject be repeated at the conclusion of the trial.

301.2 INSTRUCTION WHEN FIRST ITEM OF DOCUMENTARY, PHOTOGRAPHIC, OR PHYSICAL EVIDENCE IS ADMITTED

The (describe item of evidence) **has now been received in evidence. Witnesses may testify about or refer to this or any other item of evidence during the remainder of the trial. This and all other items received in evidence will be available to you for examination during your deliberations at the end of the trial.**

NOTE ON USE FOR 301.2

This instruction should be given when the first item of evidence is received in evidence. It may be appropriate to repeat this instruction when items received in evidence are not published to the jury. It may be combined with 301.5 in appropriate circumstances. It may also be given in conjunction with 301.4 if a witness has used exhibits which have been admitted in evidence and demonstrative aids which have not.

301.3 INSTRUCTION WHEN EVIDENCE IS FIRST PUBLISHED TO JURORS

The (describe item of evidence) **has been received in evidence. It is being shown to you now to help you understand the testimony of this witness and other witnesses in the case, as well as the evidence as a whole. You may examine** (describe item of evidence) **briefly now. It will also be available to you for examination during your deliberations at the end of the trial.**

NOTE ON USE FOR 301.3

This instruction may be given when an item received in evidence is handed to the jurors. It may be combined with 301.5 in appropriate circumstances.

301.4 INSTRUCTION REGARDING VISUAL OR DEMONSTRATIVE AIDS

a. Generally:

This witness will be using (identify demonstrative or visual aid(s)) **to assist in explaining or illustrating [his] [her] testimony. The testimony of the witness is evidence; however, [this] [these]** (identify demonstrative or visual aid(s)) **[is] [are] not to be considered as evidence in the case unless received in evidence, and should not be used as a substitute for evidence. Only items received in evidence will be available to you for consideration during your deliberations.**

b. Specially created visual or demonstrative aids based on disputed assumptions:

This witness will be using (identify demonstrative aid(s)) **to assist in explaining or illustrating [his] [her] testimony. [This] [These] item[s] [has] [have] been prepared to assist this witness in explaining [his] [her] testimony. [It] [They] may be based on assumptions which you are free to accept or reject. The testimony of the witness is evidence; however, [this] [these]** (identify demonstrative or visual aid(s)) **[is] [are] not to be considered as evidence in the case unless received in evidence, and should not be used as a substitute for evidence. Only items received in evidence will be available to you for consideration during your deliberations.**

NOTES ON USE FOR 301.4

1. Instruction 301.4a should be given at the time a witness first uses a demonstrative or visual aid which has not been specially created for use in the case, such as a skeletal model.

2. Instruction 301.4b is designed for use when a witness intends to use demonstrative or visual aids which are based on disputed assumptions, such as a computer-generated model. This instruction should be given at the time the witness first uses these demonstrative or visual aids. This instruction should be used in conjunction with 301.3 if a witness uses exhibits during testimony, some of which are received in evidence, and some of which are not.

301.5 EVIDENCE ADMITTED FOR A LIMITED PURPOSE

The (describe item of evidence) **has now been received into evidence. It has been admitted only [for the purpose of** (describe purpose)**] [as to** (name party)**]. You may consider it only [for that purpose] [as it might affect** (name party)**]. You may not consider that evidence [for any other purpose] [as to [any other party] [**(name other party(s)**].**

301.6 JURY TO BE GUIDED BY OFFICIAL ENGLISH TRANSLATION/INTERPRETATION

Introduction:

The law requires that the court appoint a qualified interpreter to assist a witness who does not readily speak or understand the English language in testifying. The interpreter does not work for either side in this case. [He] [She] is completely neutral in the matter and is here solely to assist us in communicating with the witness. [He] [She] will repeat only what is said and will not add, omit, or summarize anything. The interpreter in this case is (name of interpreter)**. The oath will now be administered to the interpreter.**

Oath to Interpreter:

Do you solemnly swear or affirm that you will make a true interpretation to the witness of all questions or statements made to [him] [her] in a language which that person understands, and interpret the witness's statements into the English language, to the best of your abilities [so help you God]?

Foreign Language Testimony:

You are about to hear testimony of a witness who will be testifying in (language used)**. This witness will testify through the official court interpreter. Although some of you may know** (language used)**, it is important that all jurors consider the same evidence. Therefore, you must accept the English translation of the witness's testimony. You must disregard any different meaning.**

If, however, during the testimony there is a question as to the accuracy of the English interpretation, you should bring this matter to my attention immediately by raising your hand. You should not ask your question or make any comment about the interpretation in the presence of the other jurors, or otherwise share your question or concern with any of them. I will take steps to see if your question can be answered and any discrepancy resolved. If, however, after such efforts a discrepancy remains, I emphasize that you must rely only upon the official English interpretation as provided by the court interpreter and disregard any other contrary interpretation.

NOTE ON USE FOR 301.6

This instruction should be given to the jury immediately before the testimony of a witness who will be testifying through the services of an official court interpreter. Compare *United States v. Franco*, 136 F.3d 622, 626 (9th Cir. 1998) (jury properly instructed that it must accept translation of foreign-language tape-recording when accuracy of translation is not in issue); *United States v. Fuentes-Montijo*, 68 F.3d 352, 355–56 (9th Cir. 1995).

301.7 JURY TO BE GUIDED BY OFFICIAL ENGLISH TRANSCRIPT OF RECORDING IN FOREIGN LANGUAGE (ACCURACY NOT IN DISPUTE)

You are about to listen to a tape recording in (language used)**. Each of you has been given a transcript of the recording which has been admitted into evidence. The transcript is a translation of the foreign language tape recording.**

Although some of you may know (language used)**, it is important that all jurors consider the same evidence. Therefore, you must accept the English translation contained in the transcript and disregard any different meaning.**

If, however, during the testimony there is a question as to the accuracy of the English translation, you should bring this matter to my attention immediately by raising your hand. You should not ask your question or make any comment about the translation in the presence of the other jurors, or otherwise share your question or concern with any of them. I will take steps to see if your question can be answered and any discrepancy resolved. If, however, after such efforts a discrepancy remains, I emphasize that you must rely only upon the official English translation as provided by the court interpreter and disregard any other contrary translation.

NOTE ON USE FOR 301.7

This instruction is appropriate immediately prior to the jury hearing a tape-recorded conversation in a foreign language if the accuracy of the translation is not an issue. See, *e.g.*, *United States v. Franco*, 136 F.3d 622, 626 (9th Cir. 1998); *United States v. Fuentes-Montijo*, 68 F.3d 352, 355–56 (9th Cir. 1995).

301.8 JURY TO BE GUIDED BY OFFICIAL ENGLISH TRANSLATION/INTERPRETATION — TRANSCRIPT OF RECORDING IN FOREIGN LANGUAGE (ACCURACY IN DISPUTE)

You are about to listen to a tape recording in (language used)**. Each of you has been given a transcript of the recording. The transcripts were provided to you by [the plaintiff] [the defendant] so that you could consider the content of the recordings. The transcript is an English translation of the foreign language tape recording.**

Whether a transcript is an accurate translation, in whole or in part, is for you to decide. In considering whether a transcript accurately describes the meaning of a conversation, you should consider the testimony presented to you regarding how, and by whom, the transcript was made. You may consider the knowledge, training, and experience of the translator, as well as the nature of the conversation and the reasonableness of the translation in light of all the evidence in the case. You should not rely in any way on any knowledge you may have of the language spoken on the recording; your consideration of the transcripts should be based on the evidence introduced in the trial.

NOTE ON USE FOR 301.8

This instruction is appropriate immediately prior to the jury hearing a tape-recorded conversation in a foreign language if the accuracy of the translation is an issue. See, *e.g.*, *United States v. Jordan*, 223 F.3d 676, 689 (7th Cir. 2000). See also Seventh Circuit Federal Criminal Jury Instructions §3.18.

301.9 DISREGARD STRICKEN MATTER

NOTE ON USE FOR 301.9

No standard instruction is provided. The court should give an instruction that is appropriate to the circumstances. In drafting a curative instruction, the court must decide on a measured response that will do more good than harm, going no further than necessary. The language of curative instructions should be carefully selected so as not to punish a party or attorney.

301.10 INSTRUCTION BEFORE RECESS

NOTE ON USE FOR 301.10

No standard instruction is provided. The jury should be given an appropriate reminder in advance of any recess.

SECTION 400 – SUBSTANTIVE INSTRUCTIONS

NOTE ON USE

These substantive instructions should be followed by the applicable sections from Damages, Substantive Instructions — General, and Closing Instructions (Before Final Argument).

These instructions are numbered 416 (as a series) to not conflict with the instructions already numbered 401 through 415 by the Florida Supreme Court Committee on Standard Jury Instructions in Civil Cases.

416.1 BREACH OF CONTRACT — INTRODUCTION

(Claimant) **claims that [he] [she] [it] and** (defendant) **entered into a contract for** (insert brief summary of alleged contract)**.**

(Claimant) **claims that** (defendant) **breached this contract by** (briefly state alleged breach)**, and that the breach resulted in damages to** (claimant).

(Defendant) **denies** (insert denial of any of the above claims)**.** (Defendant) **also claims** (insert affirmative defense)**.**

NOTE ON USE FOR 416.1

This instruction is intended to introduce the jury to the issues involved in the case. It should be read before the instructions on the substantive law.

416.2 THIRD-PARTY BENEFICIARY

(Claimant) **is not a party to the contract. However,** (claimant) **may be entitled to damages for breach of the contract if [he] [she] [it] proves that** (insert names of the contracting parties) **intended that** (claimant) **benefit from their contract.**

It is not necessary for (claimant) **to have been named in the contract. In deciding what** (insert names of the contracting parties) **intended, you should consider the contract as a whole, the circumstances under which it was made, and the apparent purpose the parties were trying to accomplish.**

SOURCES AND AUTHORITIES FOR 416.2

See RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981):

> [A] beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and ... the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

While the Supreme Court has not commented directly on the applicability of the Restatement (Second) of Contracts § 302 (1981) (but note Justice Shaw's partial concurrence in *Metropolitan Life Ins. Co. v. McCarson*, 467 So.2d 277, 280-81 (Fla. 1985)), all five district courts of appeal have cited the Restatement (Second) of Contracts § 302 (1981). *Civix Sunrise, GC, LLC v. Sunrise Road Maintenance Assn., Inc*., 997 So.2d 433 (Fla. 2d DCA 2008); *Technicable Video Systems, Inc. v. Americable of Greater Miami, Ltd*., 479 So.2d 810 (Fla. 3d DCA 1985); *Cigna Fire Underwriters Ins. Co. v. Leonard*, 645 So.2d 28 (Fla. 4th DCA 1994); *Warren v. Monahan Beaches Jewelry Center, Inc*., 548 So.2d 870 (Fla. 1st DCA 1989); *Publix Super Markets, Inc. v. Cheesbro Roofing, Inc*., 502 So.2d 484 (Fla. 5th DCA 1987). *See also A.R. Moyer, Inc. v. Graham*, 285 So.2d 397, 402 (Fla. 1973), and *Carvel v. Godley*, 939 So.2d 204, 207-208 (Fla. 4th DCA 2006) ("The question of whether a contract was intended for the benefit of a third person is generally regarded as one of construction of the contract. The intention of the parties in this respect is determined by the terms of the contract as a whole, construed in the light of the circumstances under which it was made and the apparent purpose that the parties are trying to accomplish.").

416.3 CONTRACT FORMATION — ESSENTIAL FACTUAL ELEMENTS

(Claimant) **claims that the parties entered into a contract. To prove that a contract was created,** (claimant) **must prove all of the following:**

1. The essential contract terms were clear enough that the parties could understand what each was required to do;

2. The parties agreed to give each other something of value. [A promise to do something or not to do something may have value]; and

3. The parties agreed to the essential terms of the contract. When you examine whether the parties agreed to the essential terms of the contract, ask yourself if, under the circumstances, a reasonable person would conclude, from the words and conduct of each party, that there was an agreement. The making of a contract depends only on what the parties said or did. You may not consider the parties' thoughts or unspoken intentions.

Note: If neither offer nor acceptance is contested, then element #3 should not be given.

If (Claimant) **did not prove all of the above, then a contract was not created.**

NOTE ON USE FOR 416.3

This instruction should be given only when the existence of a contract is contested. If both parties agree that they had a contract, then the instructions relating to whether a contract was actually formed would not need to be given. At other times, the parties may be contesting only a limited number of contract formation issues. Also, some of these issues may be decided by the judge as a matter of law. Users should omit elements in this instruction that are not contested so that the jury can focus on the contested issues. Read the bracketed language only if it is an issue in the case.

SOURCES AND AUTHORITIES FOR 416.3

1. The general rule of contract formation was enunciated by the Florida Supreme Court in *St. Joe Corp. v. McIver*, 875 So.2d 375, 381 (Fla. 2004) ("An oral contract ... is subject to the basic requirements of contract law such as offer, acceptance, consideration and sufficient specification of essential terms.").

2. The first element of the instruction refers to the definiteness of essential terms of the contract. "The definition of 'essential term' varies widely according to the nature and complexity of each transaction and is evaluated on a case-by-case basis." *Lanza v. Damian Carpentry, Inc*., 6 So.3d 674, 676 (Fla. 1st DCA 2009). *See also Leesburg Community Cancer Center v. Leesburg Regional Medical Center*, 972 So.2d 203, 206 (Fla. 5th DCA 2007) ("We start with the basic premise that no person or entity is bound by a contract absent the essential

elements of offer and acceptance (its agreement to be bound to the contract terms), supported by consideration.").

3. The second element of the instruction requires giving something of value. In Florida, to constitute valid consideration there must be either a benefit to the promisor or a detriment to the promisee. *Mangus v. Present*, 135 So.2d 417, 418 (Fla. 1961). The detriment necessary for consideration need not be an actual loss to the promisee, but it is sufficient if the promisee does something that he or she is not legally bound to do. *Id.*

4. The final element of this instruction requires an objective test. "[A]n objective test is used to determine whether a contract is enforceable." *Robbie v. City of Miami*, 469 So.2d 1384, 1385 (Fla. 1985). The intention as expressed controls rather than the intention in the minds of the parties. "The making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs-not on the parties having meant the same thing but on their having said the same thing." *Gendzier v. Bielecki*, 97 So.2d 604, 608 (Fla. 1957).

416.4 BREACH OF CONTRACT – ESSENTIAL FACTUAL ELEMENTS

To recover damages from (defendant) **for breach of contract,** (claimant) **must prove all of the following:**

1. (Claimant) **and** (defendant) **entered into a contract;**

2. (Claimant) **did all, or substantially all, of the essential things which the contract required [him] [her] [it] to do [or that [he] [she] [it] was excused from doing those things];**

3. [All conditions required by the contract for (defendant's) **performance had occurred;]**

4. [(Defendant) **failed to do something essential which the contract required [him] [her] [it] to do] [**(Defendant) **did something which the contract prohibited [him] [her] [it] from doing and that prohibition was essential to the contract]; and**

Note: If the allegation is that the defendant breached the contract by doing something that the contract prohibited, use the second option.

5. (Claimant) **was harmed by that failure.**

NOTE ON USE FOR 416.4

In many cases, some of the above elements may not be contested. In those cases, users should delete the elements that are not contested so that the jury can focus on the contested issues.

SOURCES AND AUTHORITIES FOR 416.4

1. An adequately pled breach of contract action requires three elements: (1) a valid contract; (2) a material breach; and (3) damages. *Friedman v. New York Life Ins. Co.*, 985 So.2d 56, 58 (Fla. 4th DCA 2008). This general rule was enunciated by various Florida district courts of appeal. See *Murciano v. Garcia*, 958 So.2d 423, 423-24 (Fla. 3d DCA 2007); *Abbott Laboratories, Inc. v. General Elec. Capital*, 765 So.2d 737, 740 (Fla. 5th DCA 2000); *Mettler, Inc. v. Ellen Tracy, Inc.*, 648 So.2d 253, 255 (Fla. 2d DCA 1994); *Knowles v. C.I.T. Corp.*, 346 So.2d 1042, 1043 (Fla. 1st DCA 1977).

2. To maintain an action for breach of contract, a claimant must first establish performance on the claimant's part of the contractual obligations imposed by the contract. *Marshall Construction, Ltd. v. Coastal Sheet Metal & Roofing, Inc.*, 569 So.2d 845, 848 (Fla. 1st DCA 1990). A claimant is excused from establishing performance if the defendant anticipatorily repudiated the contract. *Hosp. Mortg. Grp. v. First Prudential Dev. Corp.*, 411 So.2d 181, 182-83 (Fla. 1982). Repudiation constituting a prospective breach of contract may

be evidenced by words or voluntary acts but refusal must be distinct, unequivocal and absolute. *Mori v. Matsushita Elec. Corp. of Am.*, 380 So.2d 461, 463 (Fla. 3d DCA 1980).

3. "Substantial performance is performance 'nearly equivalent to what was bargained for.'" *Strategic Resources Grp., Inc. v. Knight-Ridder, Inc*., 870 So.2d 846, 848 (Fla. 3d DCA 2003). "Substantial performance is that performance of a contract which, while not full performance, is so nearly equivalent to what was bargained for that it would be unreasonable to deny the promisee the full contract price subject to the promisor's right to recover whatever damages may have been occasioned him by the promisee's failure to render full performance." *Ocean Ridge Dev. Corp. v. Quality Plastering, Inc*., 247 So.2d 72, 75 (Fla. 4th DCA 1971).

4. The doctrine of substantial performance applies when the variance from the contract specifications is inadvertent or unintentional and unimportant so that the work actually performed is substantially what was called for in the contract. *Lockhart v. Worsham*, 508 So.2d 411, 412 (Fla. 1st DCA 1987). "In the context of contracts for construction, the doctrine of substantial performance is applicable only where the contractor has not willfully or materially breached the terms of his contract or has not intentionally failed to comply with the specifications." *National Constructors, Inc. v. Ellenberg*, 681 So.2d 791, 793 (Fla. 3d DCA 1996).

5. "There is almost always no such thing as 'substantial performance' of payment between commercial parties when the duty is simply the general one to pay." *Hufcor/Gulfstream, Inc. v. Homestead Concrete & Drainage, Inc.*, 831 So.2d 767, 769 (Fla. 4th DCA 2002).

416.5 ORAL OR WRITTEN CONTRACT TERMS

[Contracts may be written or oral.]

[Contracts may be partly written and partly oral.]

Oral contracts are just as valid as written contracts.

NOTE ON USE FOR 416.5

Give the bracketed alternative that is most applicable to the facts of the case. If the complete agreement is in writing, this instruction should not be given.

SOURCES AND AUTHORITIES FOR 416.5

1. An "agreement, partly written and partly oral, must be regarded as an oral contract, the liability arising under which is not founded upon an instrument of writing." *Johnson v. Harrison Hardware Furniture Co.*, 160 So. 878, 879 (Fla. 1935).

2. An oral contract is subject to the basic requirements of contract law such as offer, acceptance, consideration, and sufficient specification of essential terms. *St. Joe Corp. v. McIver*, 875 So.2d 375, 381 (Fla. 2004).

3. "The complaint alleged the execution of an oral contract, the obligation thereby assumed, and a breach. It therefore set forth sufficient facts which taken as true, would state a cause of action for breach of contract." *Perry v. Cosgrove*, 464 So.2d 664, 667 (Fla. 2d DCA 1985).

4. As long as an essential ingredient is not missing from an agreement, courts have been reluctant to hold contracts unenforceable on grounds of uncertainty, especially where one party has benefited from the other's reliance. *Gulf Solar, Inc. v. Westfall*, 447 So.2d 363 (Fla. 2d DCA 1984); *Community Design Corp. v. Antonell*, 459 So.2d 343 (Fla. 3d DCA 1984). When the existence of a contract is clear, the jury may properly determine the exact terms of an oral contract. *Perry v. Cosgrove*, 464 So.2d 664, 667 (Fla. 2d DCA 1985).

5. "To state a cause of action for breach of an oral contract, a plaintiff is required to allege facts that, if taken as true, demonstrate that the parties mutually assented to 'a certain and definite proposition' and left no essential terms open." *W.R. Townsend Contracting, Inc. v. Jensen Civil Construction, Inc.*, 728 So.2d 297 (Fla. 1st DCA 1999). *See also Carole Korn Interiors, Inc. v. Goudie*, 573 So.2d 923 (Fla. 3d DCA 1990) (company which provided interior design services sufficiently alleged cause of action for breach of oral contract, when company alleged that: it had entered into oral contract with defendants for interior design services; company had provided agreed services; defendants breached contract by refusing to remit payment; and company suffered damages); *Rubenstein v. Primedica Healthcare, Inc.*, 755 So.2d 746, 748 (Fla. 4th DCA 2000) ("In this case, appellant sufficiently pled that

Primedica, upon acquiring Shapiros' assets, which included their oral agreement with appellant, mutually assented to appellant's continued employment under the same terms and conditions as with Shapiro. Further, he alleged that he suffered damages as a result of his termination.").

416.6 CONTRACT IMPLIED IN FACT

Contracts can be created by the conduct of the parties, without spoken or written words. Contracts created by conduct are just as valid as contracts formed with words.

Conduct will create a contract if the conduct of both parties is intentional and each knows, or under the circumstances should know, that the other party will understand the conduct as creating a contract.

In deciding whether a contract was created, you should consider the conduct and relationship of the parties as well as all of the circumstances.

NOTE ON USE FOR 416.6

Use this instruction where there is no express contract, oral or written, between the parties, and the jury is being asked to infer the existence of a contract from the facts and circumstances of the case.

SOURCES AND AUTHORITIES FOR 416.6

1. "[A]n implied contract is one in which some or all of the terms are inferred from the conduct of the parties and the circumstances of the case, though not expressed in words." 17A AM. JUR. 2d Contracts § 12 (2009).

2. "In a contract implied in fact the assent of the parties is derived from other circumstances, including their course of dealing or usage of trade or course of performance." *Rabon v. Inn of Lake City, Inc.*, 693 So.2d 1126, 1131 (Fla. 1st DCA 1997); *McMillan v. Shively*, 23 So.3d 830, 831 (Fla. 1st DCA 2009).

3. In *Commerce Partnership 8098 Limited Partnership v. Equity Contracting Co.*, 695 So.2d 383, 387 (Fla. 4th DCA 1997), the Fourth District held:

> A contract implied in fact is one form of an enforceable contract; it is based on a tacit promise, one that is inferred in whole or in part from the parties' conduct, not solely from their words." 17 AM. JUR. 2d Contracts § 3 (1964); Corbin, CORBIN ON CONTRACTS §§ 1.18-1.20 (Joseph M. Perillo ed. 1993). When an agreement is arrived at by words, oral or written, the contract is said to be "express." 17 AM. JUR. 2d Contracts § 3. A contract implied in fact is not put into promissory words with sufficient clarity, so a fact finder must examine and interpret the parties' conduct to give definition to their unspoken agreement. *Id.*; CORBIN ON CONTRACTS § 562 (1960). It is to this process of defining an enforceable agreement that Florida courts have referred when they have indicated that contracts implied in fact "rest upon the assent of the parties." *Policastro v. Myers*, 420 So.2d 324, 326 (Fla. 4th DCA 1982); *Tipper v. Great Lakes Chemical Co.*, 281 So.2d 10, 13 (Fla. 1973). The supreme court described the mechanics of this process in *Bromer v. Florida Power & Light Co.*, 45 So.2d 658, 660 (Fla. 1950):

> [A] [c]ourt should determine and give to the alleged implied contract "the effect which the parties, as fair and reasonable men, presumably would have agreed upon if, having in mind the possibility of the situation which has arisen, they had contracted expressly thereto." 12 AM. JUR. 2d 766.

See Mecier v. Broadfoot, 584 So.2d 159, 161 (Fla. 1st DCA 1991).

Common examples of contracts implied in fact are when a person performs services at another's request, or "where services are rendered by one person for another without his expressed request, but with his knowledge, and under circumstances" fairly raising the presumption that the parties understood and intended that compensation was to be paid. *Lewis v. Meginniss*, 12 So. 19, 21 (Fla. 1892); *Tipper*, 281 So.2d at 13. In these circumstances, the law implies the promise to pay a reasonable amount for the services. *Lewis*, 12 So. at 21; *Lamoureux v. Lamoureux*, 59 So.2d 9, 12 (Fla. 1951); *A.J. v. State*, 677 So.2d 935, 937 (Fla. 4th DCA 1996); *Dean v. Blank*, 267 So.2d 670 (Fla. 4th DCA 1972); *Solutec Corp. v. Young & Lawrence Associates, Inc.*, 243 So.2d 605, 606 (Fla. 4th DCA 1971).

. . . .

For example, a common form of contract implied in fact is where one party has performed services at the request of another without discussion of compensation. These circumstances justify the inference of a promise to pay a reasonable amount for the service. The enforceability of this obligation turns on the implied promise, not on whether the defendant has received something of value. A contract implied in fact can be enforced even where a defendant has received nothing of value.

416.7 CONTRACT IMPLIED IN LAW

(Claimant) **claims that** (defendant) **owes [him] [her] [it] money for** (insert brief summary of allegations)**. To establish this claim,** (claimant) **must prove all of the following:**

1. (Claimant) **gave a benefit to** (defendant)**;**

2. (Defendant) **knew of the benefit;**

3. (Defendant) **accepted or retained the benefit; and**

4. The circumstances are such that (defendant) **should, in all fairness, be required to pay for the benefit.**

SOURCES AND AUTHORITIES FOR 416.7

1. "To describe the cause of action encompassed by a contract implied in law, Florida courts have synonymously used a number of different terms – quasi contract, unjust enrichment, restitution, constructive contract, and quantum meruit." *Commerce Partnership 8098 Limited Partnership v. Equity Contracting Co.*, 695 So.2d 383, 386 (Fla. 4th DCA 1997) (internal quotations and footnotes omitted). However, a contract implied in law "is not based upon the finding, by a process of implication from the facts, of an agreement between the parties. A contract implied in law is a legal fiction, an obligation created by the law without regard to the parties' expression of assent by their words or conduct. The fiction was adopted to provide a remedy where one party was unjustly enriched, where that party received a benefit under circumstances that made it unjust to retain it without giving compensation." *Id*. "The elements of a cause of action for a quasi contract are that: (1) the plaintiff has conferred a benefit on the defendant; (2) the defendant has knowledge of the benefit; (3) the defendant has accepted or retained the benefit conferred and (4) the circumstances are such that it would be inequitable for the defendant to retain the benefit without paying fair value for it. Because the basis for recovery does not turn on the finding of an enforceable agreement, there may be recovery under a contract implied in law even where the parties had no dealings at all with each other." *Id*. (internal citations omitted).

2. The committee has drafted this instruction because a claim to establish a contract implied in law may be a claim in equity for the court to decide or a claim at law for a jury to decide. *See Della Ratta v. Della Ratta*, 927 So.2d 1055, 1060 n.2 (Fla. 4th DCA 2006) ("In Florida, all implied contract actions, including unjust enrichment, were part of the action of assumpsit, which was an action at law under the common law. Although some Florida courts have described quasi contracts as being 'equitable in nature,' the term has been used in the sense of 'fairness,' to describe that quality which makes an enrichment unjust, and not as a reference to the equity side of the court.") (internal citations omitted).

416.8 CONTRACT FORMATION — OFFER

Both an offer and an acceptance are required to create a contract. (Defendant) **contends a contract was not created because there was never any offer. To establish that an offer was made,** (claimant) **must prove:**

1. (Claimant) **communicated to** (defendant) **that [he] [she] [it] was willing to enter into a contract with** (defendant)**;**

2. The communication[s] contained the essential terms of the offer; and

3. Based on the communication, (defendant) **could have reasonably concluded that a contract with these terms would result if [he] [she] [it] accepted the offer.**

If (claimant) **did not prove all of the above, then no offer was made and no contract was created.**

NOTE ON USE FOR 416.8

Do not give this instruction unless the defendant has testified or offered other evidence in support of his or her contention. This instruction assumes that the defendant is alleging that the claimant never made an offer. Change the identities of the parties in the indented paragraphs if, under the facts of the case, the roles of the parties are switched (*e.g.*, if defendant was the alleged offeror). If the existence of an offer is not contested, then this instruction is unnecessary.

SOURCES AND AUTHORITIES FOR 416.8

1. The court in *Lee County v. Pierpont*, 693 So.2d 994 (Fla. 2d DCA 1997), defined "offer" as follows: "A proposal to do a thing or pay an amount, usually accompanied by an expected acceptance, counter-offer, return promise or act. A manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." *Id*. at 996 (citation omitted).

2. "The rule that it is possible for parties to make an enforceable contract binding them to prepare and execute a subsequent agreement is well recognized. However, if the document or contract that the parties agree to make is to contain any material term that is not already agreed on, no contract has yet been made; and the so-called 'contract to make a contract' is not a contract at all." *John I. Moss, Inc. v. Cobbs Co.*, 198 So.2d 872, 874 (Fla. 3d DCA 1967).

3. In *Socarras v. Claughton Hotels, Inc*., 374 So.2d 1057, 1060 (Fla. 3d DCA 1979), the court found that a "handwritten note evidences only [the defendant's] willingness to negotiate a contract with potential purchasers who might be interested in the general terms that he outlined. The note did not incorporate all of the essential terms necessary to make an

enforceable contract for the sale of the land. It reflected only the state of negotiations at that point, preliminary negotiations which never ripened into a formal agreement."

416.9 CONTRACT FORMATION — REVOCATION OF OFFER

Both an offer and an acceptance are required to create a contract. (Defendant) **contends that the offer was withdrawn before the offer was accepted. To establish that the offer was not withdrawn,** (claimant) **must prove one of the following:**

1. (Defendant) **did not withdraw the offer; or**

2. (Claimant) **accepted the offer before** (defendant) **withdrew it; or**

3. (Defendant's) **withdrawal of the offer was never communicated to** (claimant)**.**

If (claimant) **did not prove any of the above, then the offer was withdrawn and no contract was created.**

NOTES ON USE FOR 416.9

1. Do not give this instruction unless the defendant has testified or offered other evidence to support this contention.

2. This instruction assumes that the defendant is claiming to have revoked the offer. Change the identities of the parties in the indented paragraphs if, under the facts of the case, the roles of the parties are switched (*e.g.*, if the defendant was the alleged offeree).

SOURCES AND AUTHORITIES FOR 416.9

1. "A mere offer not assented to constitutes no contract, for there must be not only a proposal, but an acceptance thereof. So long as a proposal is not acceded to, it is binding upon neither party, and it may be retracted." *Gibson v. Courtois*, 539 So.2d 459, 460 (Fla. 1989).

2. "In the United States, the law is virtually uniform that a revocation requires communication and that an acceptance prior to a communicated revocation constitutes a binding contract." *Lance v. Martinez-Arango*, 251 So.2d 707, 709 (Fla. 3d DCA 1971).

3. "Where an offer has not been accepted by the offeree, the offeror may revoke the offer provided the communication of such revocation is received prior to acceptance." *Kendel v. Pontious*, 244 So.2d 543, 544 (Fla. 3d DCA 1971).

416.10 CONTRACT FORMATION — ACCEPTANCE

Both an offer and acceptance are required to create a contract. (Defendant) **contends that a contract was not created because the offer was never accepted. To establish acceptance of the offer,** (claimant) **must prove** (defendant) **communicated [his] [her] [its] agreement to the terms of the offer.**

[If (defendant) **agreed only to certain conditions, or if [he] [she] [it] introduced a new term into the bargain, then there was no acceptance.]**

NOTES ON USE FOR 416.10

1. Do not give this instruction unless the defendant has testified or offered other evidence in support of the defendant's contention.

2. This instruction assumes that the defendant has denied accepting the claimant's offer. Change the identities of the parties in the indented paragraphs if, under the facts of the case, the roles of the parties are switched (e.g., if defendant was the alleged offeror).

SOURCE AND AUTHORITY FOR 416.10

The general rule is that an acceptance is not valid, and thus is ineffective to form a contract, unless it is communicated to the offeror. *Kendel v. Pontious*, 261 So.2d 167, 169-70 (Fla. 1972).

416.11 CONTRACT FORMATION — ACCEPTANCE BY SILENCE OR CONDUCT

Ordinarily, if a party does not say or do anything in response to another party's offer, then [he] [she] [it] has not accepted the offer. However, if (claimant) **proves that [both [he] [she] [it] and** (defendant) **understood silence or inaction to mean that the offer was accepted] [the benefits of the offer were accepted] [**(offeree) **had a legal duty to speak from a past relationship between** (claimant) **and** (defendant)**,** (claimant)**'s and** (defendant)**'s previous dealings, or** (identify other circumstances creating a legal duty to speak)**], then there was an acceptance.**

NOTES ON USE FOR 416.11

1. This instruction should be read in conjunction with and immediately after Instruction 416.10, *Contract Formation–Acceptance* if acceptance by silence is an issue.

2. Pending further development of the law, the committee takes no position as to what "other circumstances" create a legal duty to speak. The committee does not consider the factors listed to be exclusive and, if the court determines that the jury may consider "other circumstances," the court should modify this instruction.

SOURCES AND AUTHORITIES FOR 416.11

1. "[A]n offeree who does any act inconsistent with the offeror's ownership of offered property is bound in accordance with the offered terms. In addition, such an exercise of dominion even though not intended as acceptance ... is a sufficient manifestation of assent ...." *Stevenson v. Stevenson*, 661 So.2d 367, 369 (Fla. 4th DCA 1995) (citing RESTATEMENT (SECOND) OF CONTRACTS § 69(2) and comment (e), and *Scocozzo v. General Dev. Corp.*, 191 So.2d 572, 579 (Fla. 1966)).

2. Section 69 of the Restatement (Second) of Contracts states that if an offeree fails to reply to an offer, his or her silence and inaction operate as an acceptance in the following cases only:

(1) if an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation;

(2) if the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer; or

(3) if, because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he or she does not intend to accept.

3. An offeree's silent acceptance of benefits from the offeror constitutes acceptance. *See Hendricks v. Stark*, 126 So. 293, 297 (Fla. 1930) ("It has been repeatedly held that a person by the acceptance of benefits, may be estopped from questioning the validity and effect of a contract; and, where one has an election to ratify or disaffirm a conveyance, he can either claim under or against it, but he cannot do both, and, having adopted one course with knowledge of the facts, he cannot afterwards pursue the other.").

416.12 SUBSTANTIAL PERFORMANCE

(Defendant) **claims that** (claimant) **did not perform all of the essential things which the contract required, and therefore** (defendant) **did not have to perform [his] [her] [its] obligations under the contract. To defeat this claim,** (claimant) **must prove both of the following:**

1. (Claimant) **performed in good faith; and**

2. (Claimant's) **performance was so nearly equivalent to what was bargained for that it would be unreasonable to deny [him] [her] [it] the full contract price less an appropriate reduction, if any, for** (claimant's) **failure to fully perform.**

NOTE ON USE FOR 416.12

The measure of any reduction referred to in element 2 should be addressed in the damages instructions.

SOURCES AND AUTHORITIES FOR 416.12

1. "There is almost always no such thing as 'substantial performance' of payment between commercial parties when the duty is simply the general one to pay. Payment is either made in the amount and on the date due, or it is not." *Enriquillo Export & Import, Inc. v. M.B.R. Indus., Inc.*, 733 So.2d 1124, 1127 (Fla. 4th DCA 1999).

2. "Substantial performance is that performance of a contract which, while not full performance, is so nearly equivalent to what was bargained for that it would be unreasonable to deny the promisee the full contract price subject to the promisor's right to recover whatever damages may have been occasioned him by the promisee's failure to render full performance." *Ocean Ridge Dev. Corp. v. Quality Plastering, Inc.*, 247 So.2d 72, 75 (Fla. 4th DCA 1971).

416.13 MODIFICATION

(Claimant) **claims that the original contract was modified, or changed.** (Defendant) **denies that the contract was modified. Therefore,** (Claimant) **must prove that the parties agreed to the modification.**

The parties to a contract may agree to modify its terms. You must decide whether a reasonable person would conclude from the words and conduct of (claimant) **and** (defendant) **that they agreed to modify the contract. You cannot consider the parties' hidden intentions.**

A contract in writing may be modified by a contract in writing, by a subsequent oral agreement between the parties, or by the parties' subsequent conduct [, if the modified agreement has been accepted and acted upon by the parties in such a manner as would work a fraud on either party to refuse to enforce it].

SOURCES AND AUTHORITIES FOR 416.13

1. In *St. Joe Corporation v. McIver*, 875 So.2d 375 (Fla. 2004), our Supreme Court said:

> It is well established that the parties to a contract can discharge or modify the contract, however made or evidenced, through a subsequent agreement. Whether the parties have validly modified a contract is usually a question of fact.
>
> Under Florida law, the parties' subsequent conduct also can modify the terms in a contract. We note, however, that a party cannot modify a contract unilaterally. All the parties whose rights or responsibilities the modification affects must consent.

Id. at 381-82 (internal citations omitted).

2. The parol evidence rule does not bar the introduction of evidence of a subsequent oral contract modifying a written agreement. *H.I. Resorts, Inc. v. Touchton*, 337 So.2d 854, 856 (Fla. 2d DCA 1976).

3. "A written contract or agreement may be altered or modified by an oral agreement if the latter has been accepted and acted upon by the parties in such a manner as would work a fraud on either party to refuse to enforce it ... An oral modification under these circumstances is permissible even though there was in the written contract a provision prohibiting its alteration except in writing." *Professional Ins. Corp. v. Cahill*, 90 So.2d 916, 918 (Fla. 1956).

4. "[T]he actions of the parties may be considered as a means of determining the interpretation that they themselves have placed upon the contract." *Lalow v. Codomo*, 101 So.2d 390 (Fla. 1958).

5. "A written contract can be modified by subsequent oral agreement between the parties or by the parties' course of dealing ... Whether a written contract has been modified by subsequent oral agreement or by course of dealing is a question of fact for the jury." *Kiwanis Club of Little Havana, Inc. v. de Kalafe*, 723 So.2d 838, 841 (Fla. 3d DCA 1998).

416.14 INTERPRETATION — DISPUTED TERM(S)

(Claimant) **and** (defendant) **dispute the meaning of the following term(s) contained in their contract:** (insert text of term(s)).

(Claimant) **claims that the term(s) means:** (insert claimant's interpretation of the term(s)). (Defendant) **claims that the term(s) means:** (insert defendant's interpretation of the term(s)). (Claimant) **must prove that [his] [her] [its] interpretation of the term(s) is correct**.

In deciding what the term(s) of a contract mean, you must decide what the parties agreed to at the time the contract was created.

In order to determine what the parties agreed to, you should consider the plain and ordinary meaning of the language used in the contract as well as the circumstances surrounding the making of the contract. The agreement of the parties is determined only by what the parties said, wrote, or did. You may not consider the parties' thoughts or unspoken intentions.

Note: The following instruction should be given if the court is going to give additional instructions related to disputed term(s).

[I will now instruct you on other methods that you should use in resolving the dispute over term(s) in the contract:]

NOTE ON USE FOR 416.14

Read any of Instructions 416.15 through 416.20 (as appropriate) on tools for interpretation after reading the last bracketed sentence. The instructions on interpretation are not exhaustive and the court may give any additional instruction on interpretation applicable to the facts and circumstances of the particular case provided it is supported by Florida law.

SOURCES AND AUTHORITIES FOR 416.14

1. The interpretation of a contract is normally a matter of law that is determined by the court. *Smith v. State Farm Mut. Auto. Ins. Co.*, 231 So.2d 193, 194 (Fla. 1970); *Strama v. Union Fidelity Life Ins. Co.*, 793 So.2d 1129, 1132 (Fla. 1st DCA 2001). Under certain circumstances, however, such as when the terms of a contract are ambiguous or susceptible to different interpretations, an issue of fact is presented which should be submitted to the jury. *First Nat'l Bank of Lake Park v. Gay*, 694 So.2d 784, 788 (Fla. 4th DCA 1997); *State Farm Fire & Cas. Co. v. De Londono*, 511 So.2d 604, 605 (Fla. 3d DCA 1987). "The initial determination of whether the contract term is ambiguous is a question of law for the court, and, if the facts of the case are not in dispute, the court will also be able to resolve the ambiguity as a matter of law." *Strama*, 793 So.2d at 1132; *Ellenwood v. Southern United Life Ins. Co.*, 373 So.2d 392, 394 (Fla. 1st DCA 1979).

2. In Florida, an objective test is used to determine the agreement of the parties. *Fivecoat v. Publix Super Markets, Inc.*, 928 So.2d 402, 403 (Fla. 1st DCA 2006). The agreement of the parties "is ascertained from the language used in the instrument and the objects to be accomplished …." *Rylander v. Sears Roebuck & Co.*, 302 So.2d 478, 479 (Fla. 3d DCA 1974); *Jones v. Treasure*, 984 So.2d 634, 638 (Fla. 4th DCA 2008). When determining the agreement of the parties, a court need not consider whether or not the parties reached a subjective meeting of the minds as to the terms of a contract. *Robbie v. City of Miami*, 469 So.2d 1384, 1385 (Fla. 1985). "The making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs – not on the parties having meant the same thing but on their having said the same thing." *Id.* (quoting *Gendzier v. Bielecki*, 97 So.2d 604, 608 (Fla. 1957)). Accordingly, the plain meaning of the language used by the parties controls as the best indication of the parties' agreement. *SPP Real Estate (Grand Bay), Inc. v. Joseph J. Portuondo, P.A.*, 756 So.2d 182, 184 (Fla. 3d DCA 2000). Thus, the terms in a contract should be interpreted in accordance with their plain and ordinary meaning. *Kel Homes, LLC v. Burris*, 933 So.2d 699, 702 (Fla. 2d DCA 2006).

3. The norms of contractual interpretation may vary in certain areas of the law. For example, although the existence of an ambiguous contractual term typically creates an issue of fact as to the intent of the parties which should be resolved by the jury, this principle of law is not applicable to contracts between contractors and subcontractors with regard to risk-shifting provisions. *Dec Elec., Inc. v. Raphael Constr. Corp.*, 558 So.2d 427, 428-29 (Fla. 1990). In such instances, the intention of the parties may be determined from the written contract as a matter of law because the nature of the transaction makes it appropriate for a court to resolve the apparent ambiguity. *Id.* "The reason is that the relationship between the parties is a common one and usually their intent will not differ from transaction to transaction, although it may be differently expressed." *Id*. at 429. The norms of contractual interpretation also do not apply to insurance contracts, as ambiguities are always to be construed against the insurer and in favor of coverage.

416.15 INTERPRETATION — MEANING OF ORDINARY WORDS

You should assume that the parties intended the disputed term(s) in their contract to have their plain and ordinary meaning, unless you decide that the parties intended the disputed term(s) to have another meaning.

NOTE ON USE FOR 416.15

The phrase "plain and ordinary" is used throughout the charge to describe the meaning of words. The Committee found no distinction between the phrases "usual and customary" and "plain and ordinary" as those phrases are used in case law. The Committee chooses to use the phrase "plain and ordinary" in the instruction because the phrase is more commonly used.

SOURCES AND AUTHORITIES FOR 416.15

1. This principle is well-established under Florida law. *Hamilton Constr. Co. v. Bd. of Pub. Instruction of Dade Cnty.*, 65 So.2d 729, 731 (Fla. 1953); *Langley v. Owens*, 42 So. 457, 460 (Fla. 1906); *Winn-Dixie Stores, Inc. v. 99 Cent Stuff-Trial Plaza, LLC*, 811 So.2d 719, 722 (Fla. 3d DCA 2002); *Institutional & Supermarket Equipment, Inc. v. C & S Refrigeration, Inc.*, 609 So.2d 66, 68 (Fla. 4th DCA 1992); *Bingemann v. Bingemann*, 551 So.2d 1228, 1231 (Fla. 1st DCA 1989).

2. Plain and ordinary meaning is often described as the meaning of words as found in the dictionary. *Beans v. Chohonis*, 740 So.2d 65, 67 (Fla. 3d DCA 1999). Also, plain and ordinary meaning is the natural meaning that is most commonly understood in relation to the subject matter and circumstances of the case. *Sheldon v. Tiernan*, 147 So.2d 167, 169 (Fla. 2d DCA 1962).

416.16 INTERPRETATION — MEANING OF DISPUTED TECHNICAL OR SPECIAL WORDS

Disputed term(s) in the contract should be given the meaning used by people in that trade, business, or technical field unless the parties agree that the disputed term(s) should have another meaning.

SOURCES AND AUTHORITIES FOR 416.16

1. Contractual terms should be construed in accordance with their plain and ordinary meaning unless the parties intended the contractual terms to have a different or special meaning. *Madson v. Madson*, 636 So.2d 759, 761 (Fla. 2d DCA 1994).

2. Contracts may be written in light of established custom or trade usage in an industry, and contracts involving such transactions should be interpreted in light of such custom or trade usage. The responsibility for determining trade usage is customarily one for the jury. *Fred S. Conrad Construction Co. v. Exchange Bank of St. Augustine*, 178 So.2d 217, 221 (Fla. 1st DCA 1965).

3. Extrinsic evidence may be admitted to explain technical terminology even if the contract is unambiguous. *NCP Lake Power, Inc. v. Florida Power Corp.*, 781 So.2d 531, 536 (Fla. 5th DCA 2001).

4. Evidence showing the meaning of technical terms is not an exception to the parol evidence rule because it does not vary or contradict the written instrument, but merely places the fact finder in the position of the parties when the contract was made. *Southeast Banks Trust Co., N.A. v. Higginbotham Chevrolet-Oldsmobile, Inc.*, 445 So.2d 347, 348-49 (Fla. 5th DCA 1984).

416.17 INTERPRETATION — CONSTRUCTION OF CONTRACT AS A WHOLE

In deciding what the disputed term(s) of the contract mean, you should consider the whole contract, not just isolated parts. You should use each part to help you interpret the others, so that all the parts make sense when taken together.

SOURCES AND AUTHORITIES FOR 416.17

1. "In reviewing the contract in an attempt to determine its true meaning, the court must review the entire contract without fragmenting any segment or portion." *J.C. Penney Co., Inc. v. Koff*, 345 So.2d 732, 735 (Fla. 4th DCA 1977).

2. Every provision in a contract should be given meaning and effect and apparent inconsistencies reconciled if possible. *Excelsior Ins. Co. v. Pomona Park Bar & Package Store*, 369 So.2d 938, 941 (Fla. 1979); *Royal Am. Realty, Inc. v. Bank of Palm Beach & Trust Company*, 215 So.2d 336 (Fla. 4th DCA 1968); *Transport Rental Systems, Inc. v. Hertz Corp.*, 129 So.2d 454 (Fla. 3d DCA 1961).

3. "We rely upon the rule of construction requiring courts to read provisions of a contract harmoniously in order to give effect to all portions thereof." *City of Homestead v. Johnson*, 760 So.2d 80, 84 (Fla. 2000). *See also Sugar Cane Growers Cooperative of Fla., Inc. v. Pinnock*, 735 So.2d 530, 535 (Fla. 4th DCA 1999) (holding contracts should be interpreted to give effect to all provisions); *Paddock v. Bay Concrete Indus., Inc.*, 154 So.2d 313, 315 (Fla. 2d DCA 1963) ("All the various provisions of a contract must be so construed, if it can reasonably be done, as to give effect to each.").

416.18 INTERPRETATION — CONSTRUCTION BY CONDUCT

In deciding what the disputed term(s) of the contract mean, you should consider how the parties acted before and after the contract was created.

SOURCES AND AUTHORITIES FOR 416.18

In the face of ambiguity on an issue, a jury is free to look at the subsequent conduct of the parties to determine the parties' intent and the contract's meaning. *See Rafael J. Roca, P.A. v. Lytal, Reiter, Clark, Roca, Fountain & Williams*, 856 So.2d 1, 5 (Fla. 4th DCA 2003) ("Where an agreement is ambiguous, the meaning of the agreement may be ascertained by looking to the interpretation the parties have given the agreement and the parties' conduct throughout their course of dealings."); *Mayflower Corp. v. Davis*, 655 So.2d 1134, 1137 (Fla. 1st DCA 1994) ("Courts have also looked to the conduct of the parties throughout their course of dealings to determine their intentions and the meaning of the agreement.").

416.19 INTERPRETATION — REASONABLE TIME

If a contract does not state a specific time within which a party is to perform a requirement of the contract, then the party must perform the requirement within a reasonable time. What is a reasonable time depends on the facts of each case, including the subject matter and purpose of the contract and the expressed intent of the parties at the time they entered into the contract.

SOURCES AND AUTHORITIES FOR 416.19

1. Whenever a contract fails to provide a specific time for performance, the law implies a reasonable time for performance. *Patrick v. Kirkland*, 43 So. 969, 971 (Fla. 1907); *De Cespedes v. Bolanos*, 711 So.2d 216, 218 (Fla. 3d DCA 1998); *Fleming v. Burbach Radio, Inc*., 377 So.2d 723, 724 (Fla. 4th DCA 1980).

2. The decision of what constitutes a reasonable time for performance is ordinarily a question of fact for the jury or fact-finder. *L.P. Sims v. Am. Hardware Mut. Ins. Co.*, 429 So.2d 21, 22 (Fla. 2d DCA 1982).

3. The determination of what constitutes a reasonable time for performance depends on the facts of each case, such as the subject matter of the contract, the situation of the parties, and the parties' agreement when they entered into the contract. *Sound City, Inc. v. Kessler*, 316 So.2d 315, 317 (Fla. 1st DCA 1975); *Cocoa Props., Inc. v. Commonwealth Land Title Ins. Co*., 590 So.2d 989, 991 (Fla. 2d DCA 1991); *Sharp v. Machry*, 488 So.2d 133, 137 (Fla. 2d DCA 1986).

416.20 INTERPRETATION — CONSTRUCTION AGAINST DRAFTER

You must first attempt to determine the meaning of the ambiguous term(s) in the contract from the evidence presented and the previous instructions. If you cannot do so, only then should you consider which party drafted the disputed term(s) in the contract and then construe the language against that party.

NOTES ON USE FOR 416.20

1. This instruction endeavors to explain to the jury that this principle should be secondary to the consideration of other means of interpretation, principally the consideration of parol evidence that may explain the parties' intent at the time they entered into the contract. *See W. Yellow Pine Co. v. Sinclair*, 90 So. 828, 831 (Fla. 1922) (the rule to construe against the drafter should not be used if other rules of construction reach the intent of the parties); *The School Bd. of Broward Cnty. v. The Great Am. Ins. Co.*, 807 So.2d 750 (Fla. 4th DCA 2002) (the rule to construe against the drafter is a secondary rule of interpretation and should be used as a last resort when all ordinary interpretive guides have been exhausted); *DSL Internet Corp. v. TigerDirect, Inc.*, 907 So.2d 1203, 1205 (Fla. 3d DCA 2005) (the against-the-drafter rule is a rule of last resort and is inapplicable if there is evidence of the parties' intent). There is a risk that the jury may place too much emphasis on this rule, to the exclusion of evidence and other approaches; therefore, this instruction should be given with caution.

2. The Committee has been unable to find case law authority applying this principle when the contract contains language stating the contract will not be interpreted against the drafter. If the contract at issue or an applicable statute provides that the contract will not be construed against the drafter, the Committee would suggest that this be taken into consideration before this instruction is used, particularly given the secondary rule of interpretation principle expressed in the preceding paragraph and established Florida law that every provision in a contract should be given meaning and effect. *See Excelsior Ins. Co. v. Pomona Park Bar & Package Store*, 369 So.2d 938, 941 (Fla. 1979) (holding that every provision in a contract should be given meaning); *see also* section 542.335(1)(h), Florida Statutes (providing an example in the context of not construing a restrictive covenant against the drafter).

3. The Committee strongly recommends the use of this instruction in connection with a verdict form that clarifies, by special interrogatory, what the term or phrase is that the court has declared to be ambiguous. *See First Nat'l Bank of Lake Park v. Gay*, 694 So.2d 784, 789 (Fla. 4th DCA 1997) (discussing that interrogatory verdict forms should track the same issues and defenses in the jury instructions).

SOURCES AND AUTHORITIES FOR 416.20

1. The existence of this interpretation principle is well established. "An ambiguous term in a contract is to be construed against the drafter." *City of Homestead v. Johnson*, 760 So.2d 80, 84 (Fla. 2000). "Generally, ambiguities are construed against the drafter of the

instrument." *Hurt v. Leatherby Ins. Co.*, 380 So.2d 432, 434 (Fla. 1980). "[A] provision in a contract will be construed most strongly against the party who drafted it …" *Sol Walker & Co. v. Seaboard Coast Line R.R. Co.*, 362 So.2d 45, 49 (Fla. 2d DCA 1978). Where the language of contract is ambiguous or doubtful, it should be construed against the party who drew the contract and chose the wording. *Vienneau v. Metropolitan Life Ins. Co.*, 548 So.2d 856 (Fla. 4th DCA 1989); *Am. Agronomics Corp. v. Ross*, 309 So.2d 582 (Fla. 3d DCA 1975). "To the extent any ambiguity exists in the interpretation of [a] contract, it will be strictly construed against the drafter." *Goodwin v. Blu Murray Ins. Agency, Inc.*, 939 So.2d 1098 (Fla. 5th DCA 2006); *Russell v. Gill*, 715 So.2d 1114 (Fla. 1st DCA 1998).

2. If only one party drafted a contract, then the jury should consider that party to be the drafter in the context of this instruction. However, if more than one party contributed to drafting a contract, provision, or term, then the jury should consider the drafter to be the party that actually chose the wording at issue. *Finberg v. Herald Fire Ins. Co.*, 455 So.2d 462 (Fla. 3d DCA 1984); *Bacon v. Karr*, 139 So.2d 166 (Fla. 2d DCA 1962). An additional tool the jury can utilize to determine who is the drafter is they can interpret the language at issue against the party which benefits from the language. *Belen School, Inc. v. Higgins*, 462 So.2d 1151 (Fla. 4th DCA 1984); *Watson v. Poe*, 203 So.2d 14 (Fla. 4th DCA 1967).

416.21 EXISTENCE OF CONDITIONS PRECEDENT DISPUTED

(Defendant) **claims that the contract with** (claimant) **provides that [he] [she] [it] was not required to** (insert duty) **unless** (insert condition precedent).

(Defendant) **must prove that the parties agreed to this condition. If** (defendant) **proves this, then** (claimant) **must prove that** (insert condition precedent) **[was performed] [occurred] [was waived].**

If (claimant) **does not prove that** (insert condition precedent) **[was performed] [occurred] [was waived]**, **then** (defendant) **was not required to** (insert duty).

NOTES ON USE FOR 416.21

1. This instruction should be given only where both the existence and the occurrence of a condition precedent are disputed. If only the occurrence of a condition precedent is disputed, use Instruction 416.22 Occurrence of Agreed Condition Precedent.

2. If the issue of waiver arises, the court should define waiver as set forth in Instruction 416.30 Affirmative Defense – Waiver.

SOURCES AND AUTHORITIES FOR 416.21

1. "A condition precedent is an act or event, other than a lapse of time, that must occur before a binding contract will arise. … A condition may be either a condition precedent to the formation of a contract or a condition precedent to performance under an existing contract." *Mitchell v. DiMare*, 936 So.2d 1178, 1180 (Fla. 5th DCA 2006).

2. "Provisions of a contract will only be considered conditions precedent or subsequent where the *express* wording of the disputed provision conditions formation of a contract and or performance of the contract on the completion of the conditions." *Gunderson v. Sch. Dist. of Hillsborough Cnty.*, 937 So.2d 777, 779 (Fla. 1st DCA 2006).

3. In pleading, the performance or occurrence of a condition precedent may be alleged generally, but a denial of the performance or occurrence of a condition precedent *shall* be made specifically and with particularity. Fla. R. Civ. P. 1.120(c). When a claimant alleges generally the occurrence of a condition precedent, and the defendant fails to deny the occurrence with particularity, then the defendant has no right to demand proof from the claimant of the occurrence of such condition. *See Cooke v. Ins. Co. of N. Am.*, 652 So.2d 1154, 1156 (Fla. 2d DCA 1995); *Scarborough Assocs. v. Financial Federal Savings & Loan Ass'n of Dade Cnty.*, 647 So.2d 1001, 1004 (Fla. 3d DCA 1994). However, once the defendant has made a specific denial of a condition precedent to a contract, the burden reverts to the claimant to prove the satisfaction of the condition precedent. *Griffin v. Am. Gen. Life & Accident Ins. Co.*, 752 So.2d 621, 623 n.1 (Fla. 2d DCA 1999).

416.22 OCCURRENCE OF AGREED CONDITION PRECEDENT

The parties agreed in their contract that (defendant) **would not have to** (insert duty) **unless** (insert condition precedent)**.** (Defendant) **contends that this condition did not occur and that [he] [she] [it] did not have to** (insert duty)**. To overcome this contention,** (claimant) **must prove that** (insert condition precedent) **[was performed] [occurred] [was waived].**

If (claimant) **does not prove that** (insert condition precedent) **[was performed] [occurred] [was waived], then** (defendant) **was not required to** (insert duty)**.**

NOTES ON USE FOR 416.22

1. If both the existence and the occurrence of a condition precedent are disputed, use Instruction 416.21 Existence of Conditions Precedent Disputed.

2. If the issue of waiver arises, the court should define waiver as set forth in Instruction 416.30 Affirmative Defense – Waiver.

SOURCES AND AUTHORITIES FOR 416.22

In pleading, the performance or occurrence of a condition precedent may be alleged generally, but a denial of the performance or occurrence of a condition precedent *shall* be made specifically and with particularity. Fla. R. Civ. P. 1.120(c). When a claimant alleges generally the occurrence of a condition precedent, and the defendant fails to deny the occurrence with particularity, then the defendant has no right to demand proof from the claimant of the occurrence of such condition. *See Cooke v. Ins. Co. of N. Am.*, 652 So.2d 1154, 1156 (Fla. 2d DCA 1995); *Scarborough Assocs. v. Financial Federal Savings & Loan Ass'n of Dade Cnty*., 647 So.2d 1001, 1004 (Fla. 3d DCA 1994). However, once the defendant has made a specific denial of a condition precedent to a contract, the burden reverts to the claimant to prove the satisfaction of the condition precedent. *Griffin v. Am. Gen. Life & Accident Ins. Co*., 752 So.2d 621, 623 n.1 (Fla. 2d DCA 1999).

416.23 ANTICIPATORY BREACH

(Claimant) **claims that** (defendant) **anticipatorily breached the contract between the parties.**

To establish this claim, (claimant) **must prove both of the following:**

1. (Defendant) **breached the contract by clearly and positively indicating, by words or conduct, or both, that [he] [she] [it] would not or could not perform the contract; and**

2. (Claimant) **was willing and able to perform the contract at the time** (defendant) **breached the contract.**

SOURCES AND AUTHORITIES FOR 416.23

1. "Where performances are to be exchanged under an exchange of promises, one party's repudiation of a duty to render performance discharges the other party's remaining duties to render performance." *Hosp. Mortg. Grp. v. First Prudential Dev. Corp.*, 411 So.2d 181, 182 (Fla. 1982) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 253 (1979)).

2. "[R]epudiation may be evidenced by words or voluntary acts but the refusal must be distinct, unequivocal, and absolute." *Mori v. Matsushita Elec. Corp. of Am.*, 380 So.2d 461, 463 (Fla. 3d DCA 1980).

3. "[T]he non-breaching party is required to plead and prove compliance with all conditions precedent or the ability to comply if the performance has been excused by the repudiation." *Hosp. Mortg. Grp.*, 411 So.2d at 183. *But see Custer Med. Ctr. v. United Auto. Ins. Co.*, 62 So.3d 1086, 1096 (Fla. 2010) ("[A] defending party's assertion that a plaintiff has failed to satisfy conditions precedent necessary to trigger contractual duties under an existing agreement is generally viewed as *an affirmative defense,* for which the defensive pleader has the burden of pleading and persuasion."); Fla. R. Civ. P. 1.120(c) ("In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.").

416.24 BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

In the contract in this case, there is an implied promise of good faith and fair dealing. This means that neither party will do anything to unfairly interfere with the right of any other party to the contract to receive the contract's benefits; however, the implied promise of good faith and fair dealing cannot create obligations that are inconsistent with the contract's terms. (Claimant) **contends that** (defendant) **violated the duty to act in good faith and fairly under [a] specific part[s] of the contract. To establish this claim,** (claimant) **must prove all of the following:**

1. (Claimant) **and** (defendant) **entered into a contract;**

2. (Claimant) **did all, or substantially all, of the significant things that the contract required [him] [her] [it] to do [or that [he] [she] [it] was excused from having to do those things];**

3. All conditions required for (defendant's) **performance had occurred;**

4. (Defendant's) **actions [or omissions] unfairly interfered with** (claimant's) **receipt of the contract's benefits;**

5. (Defendant's) **conduct did not comport with** (claimant's) **reasonable contractual expectations under [a] specific part(s) of the contract; and**

6. (Claimant) **was harmed by** (defendant's) **conduct.**

NOTE ON USE FOR 416.24

The question of whether a particular contract is one in which an implied covenant of good faith and fair dealing applies is a question for the trial court to answer in the first instance.

SOURCES AND AUTHORITIES FOR 416.24

1. The implied covenant of good faith and fair dealing exists in virtually all contractual relationships. *Sepe v. City of Safety Harbor*, 761 So.2d 1182, 1184 (Fla. 2d DCA 2000); RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).

2. The purpose of the implied covenant of good faith is "to protect the reasonable expectations of the contracting parties." *Ins. Concepts & Design, Inc. v. Healthplan Services, Inc.*, 785 So.2d 1232, 1234-35 (Fla. 4th DCA 2001). *See also Cox v. CSX Intermodal, Inc.*, 732 So.2d 1092, 1097 (Fla. 1st DCA 1999) ("[T]he implied covenant of good faith and fair dealing is designed to protect the contracting parties' reasonable expectations.").

3. The implied covenant of good faith "is a gap filling default rule" which comes into play "when a question is not resolved by the terms of the contract or when one party has the power to make a discretionary decision without defined standards." *Speedway SuperAmerica, LLC v. Tropic Enterprises, Inc.*, 966 So.2d 1, 3 n.2 (Fla. 1st DCA 2007); *see also Cox*, 732 So.2d at 1097.

4. "Because the implied covenant is not a stated contractual term, to operate it attaches to the performance of a specific or express contractual provision." *Snow v. Ruden, McClosky, Smith, Schuster & Russell, P.A.*, 896 So.2d 787, 792 (Fla. 2d DCA 2005).

5. The implied covenant of good faith cannot override an express contractual provision. *Snow*, 896 So.2d at 791-92; *see also Ins. Concepts*, 785 So.2d at 1234.

6. "The implied obligation of good faith cannot be used to vary the terms of an express contract." *City of Riviera Beach v. John's Towing*, 691 So.2d 519, 521 (Fla. 4th DCA 1997); *see also Ins. Concepts*, 785 So.2d at 1234-35 ("Allowing a claim for breach of the implied covenant of good faith and fair dealing 'where no enforceable executory contractual obligation' remains would add an obligation to the contract that was not negotiated by the parties.") (citations omitted).

7. Good faith means honesty, in fact, in the conduct of contractual relations. *Burger King Corp. v. C.R. Weaver*, 169 F.3d 1310, 1315 (11th Cir. 1999) (citing *Harrison Land Dev. Inc. v. R & H Holding Co.*, 518 So.2d 353, 355 (Fla. 4th DCA 1987)); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981).

416.25 AFFIRMATIVE DEFENSE – MUTUAL MISTAKE OF FACT

(Defendant) **claims that [he] [she] [it] should be able to set aside the contract because the parties were mistaken about** (insert description of mistake). **To establish this defense,** (defendant) **must prove the following:**

1. The parties were mistaken about (insert description of mistake)**; and**

2. (Defendant) **did not bear the risk of mistake. A party bears the risk of a mistake when**

[the parties' agreement assigned the risk to [him] [her] [it]]*
[or]
[[he] [she] [it] was aware, at the time the contract was made, that [he] [she] [it] had only limited knowledge about the facts relating to the mistake but decided to proceed with the contract].**

** The court should give the first option only if the court finds that the contract is ambiguous regarding whether the contract assigns the risk to the defendant.*
***The court should give the second option only if there is competent, substantial evidence that, at the time the contract was made, the defendant had only limited knowledge with respect to the facts relating to the mistake but treated the limited knowledge as sufficient.*

NOTES ON USE FOR 416.25

1. The court should not give this instruction if it determines that the alleged mistake was not material.

2. The court should not give this instruction if it finds that the contract unambiguously assigns the risk to the defendant or if the court assigns the risk of mistake to the defendant on the ground that it is reasonable under the circumstances to do so.

SOURCES AND AUTHORITIES FOR 416.25

1. "A party may avoid a contract by proving mutual mistake regarding a basic assumption underlying the contract. However, to prevail on this basis the party must also show he did not bear the risk of mistake." *Leff v. Ecker*, 972 So.2d 965, 966 (Fla. 3d DCA 2007) (citation omitted).

2. "A party bears the risk of a mistake when (a) the risk is allocated to him by agreement of the parties or (b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or (c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so." *Rawson v. UMLIC VP, L.L.C.*, 933 So.2d 1206, 1210 (Fla. 1st DCA 2006) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 154 (1979)).

416.26 AFFIRMATIVE DEFENSE – UNILATERAL MISTAKE OF FACT

(Defendant) **claims that [he] [she] [it] should be able to set aside the contract because [he] [she] [it] was mistaken about** (insert description of mistake). **To establish this defense,** (defendant) **must prove all of the following:**

1. (Defendant) **was mistaken about** (insert description of mistake) **at the time the parties made the contract;**

2. [The effect of the mistake is such that enforcement of the contract would be unconscionable]

[or]

[(Claimant) **had reason to know of the mistake or [he] [she] [it] caused the mistake.]**

and

3. (Defendant) **did not bear the risk of mistake. A party bears the risk of a mistake when**

[the parties' agreement assigned the risk to [him] [her] [it]]*

[or]

[[he] [she] [it] was aware, at the time the contract was made, that [he] [she] [it] had only limited knowledge about the facts relating to the mistake but decided to proceed with the contract].**

** The court should give the first option only if the court finds that the contract is ambiguous regarding whether the contract assigns the risk to the defendant.*

***The court should give the second option only if there is competent, substantial evidence that, at the time the contract was made, the defendant had only limited knowledge with respect to the facts relating to the mistake but treated the limited knowledge as sufficient.*

NOTES ON USE FOR 416.26

1. The court should not give this instruction if it determines that the alleged mistake was not material.

2. The court should not give this instruction if it finds that the contract unambiguously assigns the risk to the defendant or if the court assigns the risk of mistake to the defendant on the ground that it is reasonable under the circumstances to do so.

SOURCES AND AUTHORITIES FOR 416.26

1. A contract may be "set aside on the basis of unilateral mistake unless (a) the mistake is the result of an inexcusable lack of due care or (b) the other party has so changed its position

in reliance on the contract that rescission would be unconscionable." *BMW of N. Am. v. Krathen*, 471 So.2d 585, 588 (Fla. 4th DCA 1985) (citing *Maryland Cas. Co. v. Krasnek*, 174 So.2d 541 (Fla. 1965); *Orkin Exterminating Co. v. Palm Beach Hotel Condo. Ass'n, Inc.*, 454 So.2d 697 (Fla. 4th DCA 1984); *Pennsylvania Nat'l Mutual Cas. Ins. Co., v. Anderson*, 445 So.2d 612 (Fla. 3d DCA 1984)).

2. Sections 153 and 154 of the Restatement (Second) of Contracts (1979) provide:

§ 153. When Mistake of One Party Makes a Contract Voidable.

Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in § 154, and

(a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or

(b) the other party had reason to know of the mistake or his fault caused the mistake.

§ 154. When a Party Bears the Risk of a Mistake.

A party bears the risk of a mistake when

(a) the risk is allocated to him by agreement of the parties, or

(b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or

(c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.

416.27 AFFIRMATIVE DEFENSE – UNDUE INFLUENCE

(Defendant) **claims that [he] [she] [it] should be able to set aside the contract because** (claimant) **unfairly pressured [him] [her] [it] into agreeing to the contract. To establish this defense,** (defendant) **must prove both of the following:**

1. (Claimant) **used [a relationship of trust and confidence] [or] [**(defendant)**'s weakness of mind] [or] [**(defendant)**'s needs or distress] to control, persuade, or pressure** (defendant) **into agreeing to the contract; and**

2. (Defendant) **would not otherwise have voluntarily agreed to the contract.**

SOURCES AND AUTHORITIES FOR 416.27

1. "Undue influence must amount to over-persuasion, duress, force, coercion, or artful or fraudulent contrivances to such a degree that there is a destruction of free agency and willpower." *Jordan v. Noll*, 423 So.2d 368, 370 (Fla. 1st DCA 1982).

2. "[M]ere weakness of mind, unaccompanied by any other inequitable incident, if the person has sufficient intelligence to understand the nature of the transaction and is left to act upon his own free will, is not a sufficient ground to set aside an agreement." *Donnelly v. Mann*, 68 So.2d 584, 586 (Fla. 1953) (citations omitted).

3. "To constitute 'undue influence' the mind ... must be so controlled or affected by persuasion or pressure, artful or fraudulent contrivances, or by the insidious influences of persons in close confidential relations with him, that he is not left to act intelligently, understandingly, and voluntarily, but ... subject to the will or purposes of another." *Peacock v. Du Bois*, 105 So. 321, 322 (Fla. 1925) (citation omitted).

416.28 AFFIRMATIVE DEFENSE – FRAUD

To establish the defense of fraud, (defendant) **must prove all of the following:**

1. (Claimant) **represented that** (insert alleged fraudulent statement) **and that representation was material to the transaction;**

2. (Claimant) **knew that the representation was false;**

3. (Claimant) **made the representation to persuade** (defendant) **to agree to the contract;**

4. (Defendant) **relied on the representation; and**

5. (Defendant) **would not have agreed to the contract if [he] [she] [it] had known that the representation was false.**

On this defense, (Defendant) **may rely on a false statement, even though its falsity could have been discovered if** (defendant) **had made an investigation. However,** (defendant) **may not rely on a false statement if [he] [she] [it] knew it was false or its falsity was obvious to [him] [her] [it]. In making this determination, you should consider the totality of the circumstances surrounding the type of information transmitted, the nature of the communication between the parties, and the relative positions of the parties.**

SOURCES AND AUTHORITIES FOR 416.28

1. Fraud must be pled as an affirmative defense or it is waived. *Cocoves v. Campbell*, 819 So.2d 910, 912 (Fla. 4th DCA 2002); *Peninsular Fla. Dist. Council of Assemblies of God v. Pan Am. Inv. & Dev. Corp.*, 450 So.2d 1231, 1232 (Fla. 4th DCA 1984); *Ash Chem., Inc. v. Dep't of Envtl. Regulation*, 706 So.2d 362, 363 (Fla. 5th DCA 1998).

2. In order to raise an affirmative defense of fraud, the "pertinent facts and circumstances constituting fraud must be pled with specificity, and all the essential elements of fraudulent conduct must be stated." *Zikofsky v. Robby Vapor Systems, Inc.*, 846 So.2d 684, 684 (Fla. 4th DCA 2003) (citation omitted).

3. The party seeking to use the defense of fraud must specifically identify misrepresentations or omissions of fact. *Cocoves v. Campbell*, 819 So.2d 910, 912-13 (Fla. 4th DCA 2002).

4. Fraud must be pled with particularity. *Cocoves v. Campbell*, 819 So.2d 910, 913 (Fla. 4th DCA 2002); *Thompson v. Bank of New York*, 862 So.2d 768 (Fla. 4th DCA 2003).

5. Mere statements of opinion are insufficient to constitute the defense of fraud. *Thompson v. Bank of New York*, 862 So.2d 768, 769 (Fla. 4th DCA 2003); *Carefree Vills. Inc. v. Keating Props., Inc.*, 489 So.2d 99, 102 (Fla. 2d DCA 1986).

6. The elements of fraudulent misrepresentation are: "(1) a false statement concerning a material fact; (2) the representor's knowledge that the representation is false; (3) an intention that the representation induce another to act on it; and (4) consequent injury by the party acting in *reliance* on the representation." *Butler v. Yusem*, 44 So.3d 102, 105 (Fla. 2010).

7. "Justifiable reliance is not a necessary element of fraudulent misrepresentation." *Butler v. Yusem*, 44 So.3d 102, 105 (Fla. 2010).

416.29 AFFIRMATIVE DEFENSE—NEGLIGENT MISREPRESENTATION

The committee recognizes that some authority exists suggesting that negligent misrepresentation can be asserted as an affirmative defense to a breach of contract claim. *See Rocky Creek Retirement Properties, Inc. v. The Estate of Virginia B. Fox*, 19 So.3d 1105, 1110 (Fla. 2d DCA 2009). However, the law supporting this defense has not been sufficiently developed to enable the committee to propose an instruction on this defense. Pending further development in the law, the committee takes no position on this issue.

416.30 AFFIRMATIVE DEFENSE – WAIVER

(Defendant) **claims that [he] [she] [it] did not have to** (insert description of performance) **because** (claimant) **gave up [his] [her] [its] right to have** (defendant) **perform [this] [these] obligation[s]. This is called a "waiver."**

To establish this defense, (defendant) **must prove all of the following:**

1. (Claimant's) **right to have** (defendant) (insert description of performance) **actually existed**;

2. (Claimant) **knew or should have known [he] [she] [it] had the right to have** (defendant) (insert description of performance); **and**

3. (Claimant) **freely and intentionally gave up [his] [her] [its] right to have** (defendant) (insert description of performance).

A waiver may be oral or written or may arise from conduct which shows that (claimant) **gave up that right.**

If (defendant) **proves that** (claimant) **gave up [his] [her] [its] right to have** (defendant) (insert description of performance), **then** (defendant) **was not required to perform [this] [these] obligation[s].**

SOURCES AND AUTHORITIES FOR 416.30

1. "Waiver" is the voluntary and intentional relinquishment of a known right. *Raymond James Fin. Servs., Inc. v. Saldukas*, 896 So.2d 707, 711 (Fla. 2005); *Bueno v. Workman*, 20 So.3d 993, 998 (Fla. 4th DCA 2009); *Winans v. Weber*, 979 So.2d 269, 274 (Fla. 2d DCA 2007).

2. The elements necessary to establish waiver are: the existence of a right, privilege, or advantage; the actual or constructive knowledge thereof; and an intention to relinquish that right, privilege, or advantage. *Bueno v. Workman*, 20 So.3d 993, 998 (Fla. 4th DCA 2009); *Winans v. Weber*, 979 So.2d 269, 274 (Fla. 2d DCA 2007).

3. There can be no waiver if the party against whom the waiver is invoked did not know all of the material facts, or was misled about the material facts. *Winans v. Weber*, 979 So.2d 269, 274 (Fla. 2d DCA 2007); *L.R. v. Dep't of Children & Families*, 822 So.2d 527, 530 (Fla. 4th DCA 2002).

4. Proof of the elements of waiver may be express or implied from conduct or acts that lead a party to believe a right has been waived. *Raymond James Fin. Servs., Inc. v. Saldukas*, 896 So.2d 707, 711 (Fla. 2005); *LeNeve v. Via S. Fla., L.L.C.*, 908 So.2d 530, 535 (Fla. 4th DCA 2005).

416.31 AFFIRMATIVE DEFENSE – NOVATION

To establish the defense of novation, (defendant) **must prove that all parties agreed, by words or conduct, to cancel the original contract and to substitute a new contract in its place.**

NOTE ON USE FOR 416.31

If necessary, Instruction 416.3 (Contract Formation – Essential Factual Elements) should be read in whole or in part at this point to address the issue of formation of the new contract.

416.32 AFFIRMATIVE DEFENSE – STATUTE OF LIMITATIONS

On the defense of statute of limitations, the issue for you to decide is whether (claimant) **filed [his] [her] [its] claim** (describe claim as to which statute of limitations defense has been raised) **within the time set by law.**

To establish this defense, (defendant) **must prove that any breach of contract, if one in fact occurred, occurred before** (insert date four or five years before date of filing suit).

NOTE ON USE FOR 416.32

The delayed discovery doctrine has not been applied to breach of contract actions in Florida. *See Medical Jet, S.A. v. Signature Flight Support–Palm Beach, Inc.*, 941 So.2d 576, 578 (Fla. 4th DCA 2006) ("The supreme court rejected an expansion of the delayed discovery doctrine in *Davis v. Monahan*, 832 So.2d 708 (Fla. 2002).").

SOURCES AND AUTHORITIES FOR 416.32

1. Section 95.11(2)(b), Florida Statutes (2011), provides that "[a] legal or equitable action on a contract, obligation or liability *founded on a written instrument* [other than for the recovery of real property], except for an action to enforce a claim against a payment bond, which shall be governed by the applicable provisions of ss. 255.05(1) and 713.23(1)(e)" shall be commenced within *five* years. (emphasis added).

2. Section 95.11(3)(k), Florida Statutes (2011), provides that "[a] legal or equitable action on a contract, obligation or liability *not founded on a written instrument* [other than for the recovery of real property], including an action for the sale and delivery of goods, wares, and merchandise, and on store accounts" shall be commenced within *four* years. (emphasis added).

3. In a breach of contract action, "it is well-established that a statute of limitations runs from the time of the breach," *BDI Const. Co. v. Hartford Fire Ins. Co.*, 995 So.2d 576, 578 (Fla. 3d DCA 2008), "not from the time when consequential damages result or become ascertained," *Medical Jet, S.A. v. Signature Flight Support–Palm Beach, Inc.*, 941 So.2d 576, 578 (Fla. 4th DCA 2006).

416.33 AFFIRMATIVE DEFENSE – EQUITABLE ESTOPPEL

(Defendant) **has raised the defense of equitable estoppel. To establish this defense,** (defendant) **must prove all of the following:**

1. [(Claimant) **took action by** (describe material action)**]**
[(Claimant) **spoke about** (describe material fact)**]**
[(Claimant) **concealed or was silent about** (describe material fact) **at a time when [he] [she] [it] knew of [that fact] [those facts]];**

2. (Defendant) **relied in good faith upon** (claimant's) **[action] [words] [inaction] [silence]; and**

3. (Defendant's) **reliance on** (claimant's) **[action] [words] [inaction] [silence] caused** (defendant) **to change [his] [her] [its] position for the worse.**

NOTE ON USE FOR 416.33

The court should not give this instruction if it determines that the alleged action, words, inaction, or silence was not material.

SOURCES AND AUTHORITIES FOR 416.33

1. "The elements of equitable estoppel are (1) a representation as to a material fact that is contrary to a later-asserted position, (2) reliance on that representation, and (3) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon." *State v. Harris*, 881 So.2d 1079, 1084 (Fla. 2004).

2. "[I]n order to work an estoppel, silence must be under such circumstances that there are both a specific opportunity and a real apparent duty to speak." *Thomas v. Dickinson*, 30 So.2d 382, 384 (Fla. 1947).

3. "The 'representation' upon which an estoppel may be predicated may consist of words, conduct, or, if there is a duty to speak, silence." *Lloyds Underwriters at London v. Keystone Equipment Finance Corp.*, 25 So.3d 89, 93 (Fla. 4th DCA 2009) (citations omitted).

4. "The conduct ... such as to create an estoppel ... necessary to a waiver consists of willful or negligent words and admissions, or conduct, acts and acquiescence causing another to believe in a certain state of things by which such other person is or may be induced to act to his prejudice. The acts or conduct need not be positive, but can consist of failure to act or, more particularly, failure to speak when under some duty to speak." *Richards v. Dodge*, 150 So.2d 477, 481 (Fla. 2d DCA 1963) (internal citations omitted).

416.34 [RESERVED FOR FUTURE USE]

416.35 AFFIRMATIVE DEFENSE – JUDICIAL ESTOPPEL

The committee has not drafted an instruction for the affirmative defense of judicial estoppel because judicial estoppel is an equitable doctrine which a court is to determine. *See Blumberg v. USAA Cas. Ins. Co.*, 790 So.2d 1061, 1066 (Fla. 2001) ("Judicial estoppel is an equitable doctrine that is used to prevent litigants from taking totally inconsistent positions in separate judicial, including quasi-judicial, proceedings." (citation omitted).

416.36 AFFIRMATIVE DEFENSE – RATIFICATION

(Defendant) **has raised the defense of ratification. To establish this defense,** (defendant) **must prove all of the following:**

1. (Defendant) **performed [an act] [a transaction] which breached the contract;**

2. (Claimant) **knew of the [act] [transaction];**

3. (Claimant) **knew that [he] [she] [it] could reject the contract because of the [act] [transaction]; and**

4. (Claimant) **[accepted the [act] [transaction]] [expressed [his] [her] [its] intention to accept the [act] [transaction]].**

SOURCES AND AUTHORITIES FOR 416.36

1. "An agreement is deemed ratified where the principal has full knowledge of all material facts and circumstances relating to the unauthorized act or transaction at the time of the ratification. An affirmative showing of the principal's intent to ratify the act in question is required." *Frankenmuth Mut. Ins. Co. v. Magaha*, 769 So.2d 1012, 1022 (Fla. 2000) (citations omitted).

2. "[W]here a party seeking rescission has discovered grounds for rescinding an agreement and either remains silent when he should speak or in any manner recognizes the contract as binding upon him, ratifies or accepts the benefits thereof, he will be held to have waived his right to rescind." *AVVA-BC, LLC v. Amiel*, 25 So.3d 7, 11 (Fla. 3d DCA 2009) (citation and internal quotations omitted).

416.37 GOODS SOLD AND DELIVERED

(Claimant) **claims that** (defendant) **owes [him] [her] [it] money for goods which** (claimant) **sold and delivered to** (defendant)**. To establish this claim,** (claimant) **must prove all of the following:**

1. (Claimant) **sold and delivered goods to** (defendant)**;**

2. (Defendant) **failed to pay for such goods; and**

3. [The price agreed upon for] [The reasonable value of] the goods which (claimant) **sold and delivered to** (defendant)**.**

If the greater weight of the evidence does not support (claimant's) **claim on these issues, then your verdict should be for** (defendant)**. However, if the greater weight of the evidence supports** (claimant's) **claims on these issues, then your verdict should be for** (claimant) **in the total amount of [his] [her] [its] damages.**

SOURCES AND AUTHORITIES FOR 416.37

1. "[T]he plaintiff was bound to prove the sale and delivery and the price agreed upon for the [goods], or their value. The sale could be proved by the delivery, from which the sale is presumed or implied.".*Chase & Co. v. Miller*, 88 So. 312, 314 (Fla. 1921).

2. "[T]he plaintiff failed to prove that it delivered certain [goods] to defendant's [place of business] and as such, no prima facie case for goods sold and delivered was established." *Bosem v. A.R.A. Corp.*, 350 So. 2d 526, 527 (Fla. 3d DCA 1977).

3. "[A] claim on an open account requires proof of a sales contract between the creditor and debtor, and proof that the amount claimed by the creditor represents either the agreed upon sales price or the reasonable value of the goods actually delivered .... [I]t is clear that a claimant also must prove delivery of goods and show either an agreement upon sales price or that amounts claimed represent the reasonable value of the goods actually delivered." *Alderman Interior Sys., Inc. v. First National-Heller Factors, Inc.*, 376 So. 2d 22, 24 (Fla. 2d DCA 1979).

4. Fla. R. Civ. P. 1.935 (Form) ("Defendant owes plaintiff $(amount) that is due with interest since (date), for the following goods sold and delivered by plaintiff to defendant between (date) and (date): (list goods and prices).").

5. Fla. Sm. Cl. R. Form 7.331 ("There is now due, owing, and unpaid from defendant to plaintiff $(amount) with interest since (date), for the following goods sold and delivered by plaintiff to defendant between (date) and (date): (list goods and prices and any credits).").

416.38 OPEN ACCOUNT

(Claimant) **claims that** (defendant) **owes [him] [her] [it] money on an open account. An open account is an unsettled debt arising from [items of work and labor] [goods sold and delivered] where the parties have had [a transaction] [transactions] between them and expected to conduct further transactions. To establish this claim,** (claimant) **must prove all of the following:**

1. (Claimant) **and** (defendant) **had [a transaction] [transactions] between them;**

2. An account existed between (claimant) **and** (defendant) **in which the parties had a series of charges, payments, adjustments;**

3. (Claimant) **prepared an itemized statement of the account; and**

4. (Defendant) **owes money on the account.**

If the greater weight of the evidence does not support (claimant's) **claim on these issues, then your verdict should be for** (defendant). **However, if the greater weight of the evidence supports** (claimant's) **claim on these issues, [then your verdict should be for** (claimant) i**n the total amount of [his] [her] [its] damages] [then you shall consider the [defense] [defenses] raised by** (defendant)**].**

SOURCES AND AUTHORITIES FOR 416.38

1. "[A]n open account is an unsettled debt arising from items of work and labor, with the expectation of further transactions subject to future settlements and adjustment. In order to state a valid claim on an open account, the claimant must attach an itemized copy of the account." *Farley v. Chase Bank, U.S.A., N.A.*, 37 So.3d 936, 937 (Fla. 4th DCA 2010) (citations and quotations omitted).

2. "An account opened is an unsettled debt arising from items of work and labor, with the expectation of further transactions subject to future settlements and adjustment." *S. Motor Co. of Dade Cnty. v. Accountable Const. Co.*, 707 So.2d 909, 912 (Fla. 3d DCA 1998).

3. "An action to recover on an open account is essentially an action to collect on a debt created by a series of credit transactions. One party to the account agrees to sell goods or services on credit and the other assumes the obligation to make payment. These duties do not change merely because the parties have decided to engage in a course of trade on a cash basis." *Hawkins v. Barnes*, 661 So.2d 1271, 1273 (Fla. 5th DCA 1995) (citations omitted).

4. "An open account is one which is based upon a connected series of transactions, and which has no break or interruption …. [A]n open account has been defined as an unsettled debt arising from items of work and labor, goods sold and delivered with the expectation of further transactions subject to further settlement. Money advanced may form the basis of an

open account." *Central Ins. Underwriters, Inc. v. National Ins. Fin. Co.*, 599 So.2d 1371, 1373 (Fla. 3d DCA 1992) (citations and quotations omitted).

5. "An 'open account' is ... defined as an unsettled debt arising from items of work and labor, goods sold and delivered, with the expectation of further transactions subject to future settlement and adjustment." *Robert W. Gottfried, Inc. v. Cole*, 454 So.2d 695, 696 (Fla. 4th DCA 1984).

6. Fla. R. Civ. P. 1.932 (Form) ("A copy of the account showing items, time of accrual of each, and amount of each must be attached" to the Complaint).

7. *But see Evans v. Delro Industries, Inc.*, 509 So.2d 1262, 1263 (Fla. 1st DCA 1987) (purportedly an action for "open account," but requiring proof of sales contract, proof of sales price or reasonable value of goods delivered, and proof of actual delivery) (citing *Chase & Co. v. Miller*, 88 So. 312 (Fla. 1921) (an action involving common counts for goods bargained and sold and goods sold and delivered), and *Alderman Interior Systems, Inc. v. First National-Heller Factors, Inc.*, 376 So.2d 22 (Fla. 2d DCA 1979) (same)).

416.39 ACCOUNT STATED

(Claimant) **claims that** (defendant) **owes [him] [her] [it] money on an account stated. An account stated involves a transaction or series of transactions for which a specific amount of money is due. To establish this claim,** (claimant) **must prove all of the following:**

1. (Claimant) **and** (defendant**) had [a transaction] [transactions] between them;**

2. [(Claimant) **and** (defendant) **agreed upon the balance due] [or] [**(Claimant) **rendered a statement to** (defendant) **and** (defendant) **failed to object within a reasonable time to a statement of [his] [her] [its] account];**

3. (Defendant) **expressly or implicitly promised to pay** (claimant) **[this balance] [the amount set forth in the statement]; and**

4. (Defendant) **has not paid** (claimant) **[any] [all] of the amount owed under the account.**

If the greater weight of the evidence does not support (claimant's) **claim on these issues, then your verdict should be for** (defendant). **However, if the greater weight of the evidence supports** (claimant's) **claim on these issues, [then your verdict should be for** (claimant) **in the total amount of [his] [her] [its] damages] [then you shall consider the [defense] [defenses] raised by** (defendant)**].**

SOURCES AND AUTHORITIES FOR 416.39

1. There must be an agreement between the parties that a certain balance is correct and due and an express or implicit promise to pay this balance. *Merrill-Stevens Dry Dock Co. v. Corniche Exp.*, 400 So.2d 1286, 1286 (Fla. 3d DCA 1981).

2. The action for an account stated is an action for a sum certain, and where there is no such agreement between the parties, the plaintiff may not recover upon a theory of account stated. *Merrill-Stevens Dry Dock Co. v. Corniche Exp.*, 400 So.2d 1286, 1286-87 (Fla. 3d DCA 1981); *FDIC v. Brodie*, 602 So. 2d 1358, 1361 (Fla. 3d DCA 1992); *Carpenter Contractors of Am., Inc. v. Fastener Corp. of Am., Inc.*, 611 So.2d 564, 565 (Fla. 4th DCA 1992).

3. An account statement is not absolutely conclusive upon the parties as the presumption of the account's accuracy and correctness may be overcome by proof of fraud, mistake, or error. *Farley v. Chase Bank*, U.S.A., N.A., 37 So.3d 936, 937 (Fla. 4th DCA 2010).

4. An agreement to a resulting balance may be established by the failure to object to the account statement. *Myrick v. St. Catherine Laboure Manor, Inc.*, 529 So.2d 369, 371 (Fla. 1st DCA 1988).

5. An objection to an account must be made within a reasonable time. *Robert C. Malt & Co. v. Kelly Tractor Co.*, 518 So.2d 991, 992 (Fla. 4th DCA 1988).

6. Fla. R. Civ. P. 1.933 (Form) ("A copy of the account showing items, time of accrual of each, and amount of each must be attached" to the Complaint).

416.40 MONEY HAD AND RECEIVED

(Claimant) **claims that** (defendant) **has received money which [he] [she] [it] ought to refund to** (claimant)**. To establish this claim,** (claimant) **must prove all of the following:**

1. (Defendant) **received** (claimant's) **money;**

2. (Defendant) **received the money as the result of** (insert brief summary of basis of claim)**; and**

3. The circumstances are such that (defendant) **should, in all fairness, be required to return the money to** (claimant)**.**

SOURCES AND AUTHORITIES FOR 416.40

1. The common law action for money had and received derives from the common law action of assumpsit. The action is used to recover money which a defendant erroneously receives in circumstances where it would be unjust for the defendant to retain the money. While this is a legal action, it draws "upon the equitable principle that no one ought to be unjustly enriched at the expense of another." *Sharp v. Bowling*, 511 So.2d 363, 364-65 (Fla. 5th DCA 1987).

2. A claim for money had and received may be based upon a wide variety of grounds including: (1) upon consideration which has failed, *Deco Purchasing & Distributing Co. v. Panzirer*, 450 So.2d 1274, 1275 (Fla. 5th DCA 1984); (2) for money paid by mistake, *First State Bank of Fort Meade v. Singletary*, 169 So. 407 (Fla. 1936); (3) for money obtained through imposition, extortion, or coercion, *Cullen v. Seaboard Air Line R. Co.*, 58 So. 182, 184 (Fla. 1912); or (4) where defendant had taken undue advantage of claimant's situation, *Moss v. Condict*, 16 So.2d 921, 922 (Fla. 1944). The foregoing list is not exclusive, and a claim for money had and received may be based upon any set of facts "which show that an injustice would occur if money were not refunded." *Moore Handley, Inc. v. Major Realty Corp.*, 340 So.2d 1238, 1239 (Fla. 4th DCA 1976).

SECTION 500 – DAMAGES

NOTE ON USE

These instructions are numbered 504 to not conflict with the instructions already numbered 501 through 503 by the Florida Supreme Court Committee on Standard Jury Instructions in Civil Cases.

504.1 INTRODUCTION TO CONTRACT DAMAGES

If you find for (defendant)**, you will not consider the matter of damages. But, if you find for** (claimant)**, you should award** (claimant) **an amount of money that the greater weight of the evidence shows will fairly and adequately compensate** (claimant) **for [his] [her] [its] damages. You shall consider the following type(s) of damages:**

504.2 BREACH OF CONTRACT DAMAGES

a. ***Compensatory damages:***

Compensatory damages is that amount of money which will put (claimant) **in as good a position as [he] [she] [it] would have been if** (defendant) **had not breached the contract and which naturally result from the breach.**

SOURCES AND AUTHORITIES FOR 504.2a

1. *Capitol Environmental Svcs., Inc. v. Earth Tech, Inc.*, 25 So.3d 593, 596 (Fla. 1st DCA 2009) ("It is well-settled that the injured party in a breach of contract action is entitled to recover monetary damages that will put it in the same position it would have been had the other party not breached the contract.").

2. *Sharick v. Se. University of the Health Sciences, Inc.*, 780 So.2d 136, 139 (Fla. 3d DCA 2000) ("Damages recoverable by a party injured by a breach of contract are those which would naturally result from the breach and can reasonably be said to have been contemplated by the parties at the time the contract was made.").

b. ***Special damages:***

Special damages is that amount of money which will compensate (claimant) **for those damages which do not normally result from the breach of contract. To recover special damages,** (claimant) **must prove that when the parties made the contract,** (defendant) **knew or reasonably should have known of the special circumstances leading to such damages**.

SOURCES AND AUTHORITIES FOR 504.2b

1. *Land Title of Central Fla., LLC v. Jimenez*, 946 So.2d 90, 93 (Fla. 5th DCA 2006) ("Special damages are those that do not *necessarily* result from the wrong or breach of contract complained of, or which the law does not imply as a result of that injury, even though they might naturally and proximately result from the injury. More succinctly, special damages are damages that do not follow by implication of law merely upon proof of the breach.") (citations omitted).

2. *Hardwick Properties, Inc. v. Newbern*, 711 So.2d 35, 40 (Fla. 1st DCA 1998) ("[S]pecial damages are not likely to occur in the usual course of events, but may reasonably be supposed to have been in contemplation of the parties at the time they made the contract. Special damages consist of items of loss which are peculiar to the party against whom the breach was committed and would not be expected to occur regularly to others in similar circumstances.") (citation and internal quotations omitted).

3. *Hardwick*, 711 So.2d at 40 ("Similarly, consequential damages do not arise within the scope of the immediate buyer-seller transaction, but rather stem from losses incurred by the non-breaching party in its dealings, often with third parties, which were a proximate result of the breach, and which were reasonably foreseeable by the breaching party at the time of contracting.") (citation and internal quotations omitted).

4. *Lanzalotti v. Cohen*, 113 So.2d 727, 731 (Fla. 3d DCA 1959) ("Recovery may include special damages which are reasonably and necessarily incurred as a proximate result of the failure of the lessor or sublessor to perform his contract to make a lease or sublease, and such as should reasonably have been contemplated by the parties.").

5. *Fla. E. Coast Railway Co. v. Peters*, 83 So. 559, 563 (Fla. 1919) ("If the owner of the goods would charge the carrier with any special damages, he must have communicated to the carrier all the facts and circumstances of the case which do not ordinarily attend the carriage or the particular character and value of the property carried, for otherwise such peculiar circumstances cannot be contemplated by the carrier.") (citation omitted).

504.3 LOST PROFITS

To be entitled to recover lost profits, (claimant) **must prove both of the following:**

1. (Defendant's) **actions caused** (claimant) **to lose profits; and**

2. (Claimant) **can establish the amount of [his] [her] [its] lost profits with reasonable certainty.**

For (claimant) **to establish the amount of [his] [her] [its] lost profits with reasonable certainty, [he] [she] [it] must prove that a reasonable person would be satisfied that the amount of lost profits which [he] [she] [it] may be entitled to recover is not simply the result of speculation or guessing. Instead,** (claimant) **must prove that there is some standard by which the amount of lost profits may be established.** (Claimant) **does not have to be able to prove that the amount of lost profits can be calculated with mathematical precision as long as [he] [she] [it] has shown there is a reasonable basis for determining the amount of the loss.**

[Even though (claimant's) **business is not established or does not have a "track record," [he] [she] [it] still may be able to establish the amount of lost profits which [he] [she] [it] may be entitled to recover if [he] [she] [it] proves that there is some standard by which the amount of lost profits may be established.]**

NOTE ON USE FOR 504.3

Provide the bracketed language if the claimant's business is not established or does not have a "track record."

SOURCES AND AUTHORITIES FOR 504.3

1. *River Bridge Corp. v. Am. Somax Ventures ex rel. Am. Home Dev. Corp.*, 18 So.3d 648, 650 (Fla. 4th DCA 2009) ("When a party seeks lost future profits based upon a breach of contract or other wrong, the party must prove that the lost profits were a direct result of the defendant's actions and that the amount of the lost profits can be established with reasonable certainty.") (citation and internal quotations omitted).

2. *Levitt-ANSCA Towne Park P'ship v. Smith & Co.*, 873 So.2d 392, 396 (Fla. 4th DCA 2004) ("Lost profits must be proven with a reasonable degree of certainty before they are recoverable. The mind of a prudent impartial person should be satisfied that the damages are not the result of speculation or conjecture.") (citation and internal quotations omitted).

3. *Marshall Auto Painting & Collision, Inc. v. Westco Eng'g, Inc.*, 2003 WL 25668018 *7 (M.D. Fla. 2003) ("[T]he Florida Supreme Court has stated that a business can recover lost prospective profits [if] … there is *some standard* by which the amount of the damages may be adequately determined… . The requisite … allowance [for lost profits] is *some standard*, such

as regular market values, or other established data, by reference to which the amount may be satisfactorily established.") (citations and internal quotation marks omitted).

4. *W.W. Gay Mechanical Contractor, Inc. v. Wharfside Two, Ltd.*, 545 So.2d 1348, 1351 (Fla. 1989) ("A business can recover lost prospective profits regardless of whether it is established or has any 'track record.' The party must prove that 1) the defendant's action caused the damage and 2) there is some standard by which the amount of damages may be adequately determined.").

504.4 DAMAGES FOR COMPLETE DESTRUCTION OF BUSINESS

If (claimant) **proved that** (defendant) **completely destroyed** (claimant's) **business, then you must award** (claimant) **damages based upon the market value of** (claimant's) **business on the date** (claimant's) **business was destroyed.**

NOTE ON USE FOR 504.4

The court should give this instruction when the claimant seeks damages for the complete destruction of a business. If a business has not been completely destroyed, then damages based upon the market value of the business are not appropriate, and the court should not give this instruction. Instead, the court should give instruction 504.3 regarding lost profits.

SOURCES AND AUTHORITIES FOR 504.4

1. "If a business is completely destroyed, the proper total measure of damages is the market value of the business on the date of the loss. If the business is not completely destroyed, then it may recover lost profits. A business may not recover both lost profits and the market value of the business." *Montage Grp., Ltd. v. Athle-Tech Computer Systems, Inc.*, 889 So.2d 180, 193 (Fla. 2d DCA 2004) (citations omitted).

2. "Market value," as used in this instruction, is not meant to suggest a particular approach to determining market value. *See, e.g.*, *Fidelity Warranty Servs., Inc. v. Firstate Ins. Holdings, Inc.*, 74 So.3d 506, 514 n.5 (Fla. 4th DCA 2011) (discussing various approaches).

3. "Courts in other jurisdictions have generally rejected the notion that 'fair value' is synonymous with 'fair market value.'" *Boettcher v. IMC Mortg. Co.*, 871 So.2d 1047, 1052 (Fla. 2d DCA 2004). "The rationale underlying this language is the recognition that the events that trigger the valuation process may either disrupt or preclude the market for the shares, if in fact such a market ever existed – as in the case of a closely held corporation." *Id.* (citation omitted).

504.5 OWNER'S DAMAGES FOR BREACH OF CONTRACT TO CONSTRUCT IMPROVEMENTS ON REAL PROPERTY

The amount of damages recoverable for breach of a contract to construct improvements on real property is:

a. In cases where the defendant does not contend that the damages claimed by the claimant constitute unreasonable economic waste:

The reasonable cost to (claimant) **of completing the work in accordance with the contract less the balance due under the contract.**

b. In cases where the defendant contends that the damages claimed by the claimant constitute unreasonable economic waste:

If construction and completion in accordance with the contract would not involve unreasonable economic waste, the reasonable cost to (claimant) **of completing the work in accordance with the contract less the balance due under the contract;**
or
If construction and completion in accordance with the contract would involve unreasonable economic waste, the difference between the fair market value of (claimant's) **real property as improved and its fair market value if** (defendant) **had constructed the improvements in accordance with the contract, measured at the time of the breach.**

SOURCES AND AUTHORITIES FOR 504.5

1. In *Grossman Holdings Ltd. v. Hourihan*, 414 So.2d 1037, 1039 (Fla. 1982), the Florida Supreme Court adopted Section 346 of the Restatement (First) of Contracts (1932), which provides, in relevant part:

> For a breach by one who has contracted to construct a specified product, the other party can get judgment for compensatory damages for all unavoidable harm that the builder had reason to foresee when the contract was made, less such part of the contract price as has not been paid and is not still payable, determined as follows:
>
> (a) For defective or unfinished construction he can get judgment for either
>
> (i) the reasonable cost of construction and completion in accordance with the contract, if this is possible and does not involve unreasonable economic waste; or
> (ii) the difference between the value that the product contracted for would have had and the value of the performance that has been received by the plaintiff, if construction and completion in accordance with the contract would involve unreasonable economic waste.

2. *Heine v. Parent Construction, Inc.*, 4 So.3d 790, 792 (Fla. 4th DCA 2009) ("The [Florida] [S]upreme [C]ourt ... adopted section 346(1)(a) of the Restatement (First) of Contracts (1932), as the law for the measure of damages in a claim for breach of a construction contract.").

3. *Centex-Rooney Construction Co. v. Martin Cnty.*, 706 So.2d 20, 27 (Fla. 4th DCA 1997) ("In a case involving the breach of a construction contract, a recognized measure of damages is the reasonable cost of performing construction and repairs in conformance with the original contract's requirements.").

504.6 OBLIGATION TO PAY MONEY ONLY

To recover damages for the breach of a contract to pay money, (claimant) **must prove the amount due under the contract.**

SOURCE AND AUTHORITY FOR 504.6

See Murciano v. Garcia, 958 So.2d 423, 423 (Fla. 3d DCA 2007) ("[T]o prevail on a breach of contract action, [a plaintiff] must prove (1) a valid contract; (2) a material breach; and (3) damages.").

504.7 BUYER'S DAMAGES FOR BREACH OF CONTRACT FOR SALE OF REAL PROPERTY

To recover damages for the breach of a contract to sell real property, (claimant) **must prove that [he] [she] [it] was ready, willing, and able to perform the contract.**

If (claimant) **proves that [he] [she] [it] was ready, willing, and able to perform the contract, then** (claimant) **may recover:**

1. **The amount of any payment made by** (claimant) **toward the purchase price; and**
2. **The amount of any reasonable expenses for examining title.**

If (claimant) **also proves that** (defendant) **acted in bad faith in breaching the contract or that** (defendant) **sold the property to a third party after entering into the contract, then** (claimant) **also may recover the difference between the fair market value of the property on the date of the breach and the contract price.**

NOTE ON USE FOR 504.7

The court should give this instruction when a buyer is seeking damages as a remedy for the breach of a contract for the sale of real property. This instruction does not apply to claims for specific performance. *See Castigliano v. O'Connor*, 911 So.2d 145, 148 (Fla. 3d DCA 2005) (a decree of specific performance is an equitable remedy); *381651 Alberta, Ltd. v. 279298 Alberta, Ltd.*, 675 So.2d 1385, 1387 (Fla. 4th DCA 1996) (the right to a jury trial applies only to legal and not equitable causes of action).

SOURCES AND AUTHORITIES FOR 504.7

1. In *Gassner v. Lockett*, 101 So.2d 33, 34 (Fla. 1958), the Florida Supreme Court, quoting *Key v. Alexander*, 108 So. 883, 885 (Fla. 1926), stated (emphasis and internal quotations omitted):

> The law is well settled that in an action brought by the vendee against the vendor upon a valid contract for the sale of land when the vendor has breached such contract, the general rule as to the measure of damages is that the vendee is entitled to such purchase money as he paid, together with interest and expenses of investigating title. This rule, however, does not apply where there is want of good faith in the vendor, which may be shown by any acts inconsistent with the utmost good faith. In such cases, or in cases where the vendor had no title but acting on the supposition that he might acquire title, he is liable for the value of the land at the time of the breach with interest from that date … .
>
> The reason for the rule seems to be that where a vendor acts in good faith he should not be liable for more than the actual loss which might be suffered by the vendee. On the other hand, there is no reason why the vendor should be allowed to

> benefit from such mistake even though it was made in good faith. Every rule of logic and justice would seem to indicate that where a vendor is unable to perform a prior contract for the sale of lands because of a subsequent sale of the same land, he should be held, to the extent of any profit in the subsequent sale, to be a trustee for the prior vendee and accountable to such vendee for any profit.

2. *Hollywood Mall, Inc. v. Capozzi*, 545 So.2d 918, 921 (Fla. 4th DCA 1989) ("To obtain damages for anticipatory breach of contract, the purchaser must also show that he was ready, willing, and able to perform the contract.") (citing *Hosp. Mortg. Grp. v. First Prudential Dev. Corp.*, 411 So.2d 181 (Fla. 1982)).

3. *Coppola Enterprises, Inc. v. Alfone*, 531 So.2d 334, 335-36 (Fla. 1988) ("A seller will not be permitted to profit from his breach of a contract with a buyer, even absent proof of fraud or bad faith, when the breach is followed by a sale of the land to a subsequent purchaser.").

4. *Port Largo Club, Inc. v. Warren*, 476 So.2d 1330, 1333 (Fla. 3d DCA 1985) ("Where bad faith exists a purchaser may obtain, as a portion of his full compensatory damages, loss of bargain damages, *i.e.*, the difference between the contract price and the value of the property on the closing date.").

5. *Wolofsky v. Behrman*, 454 So.2d 614, 615 (Fla. 4th DCA 1984) ("Florida has long since aligned itself with the English rule announced in *Flureau v. Thornhill*, 2 W.Bl. 1078, 96 Eng.Rep. 635, to the effect that, except where a vendor has acted in bad faith, his liability for breach of a land sale contract is limited to the amount of the deposit paid by the purchaser, with interest and reimbursement for expenses in investigating title to the property. However, absent good faith, he is liable for full compensatory damages, including the loss of his bargain, which is the difference between the value of the property and the contract price.").

6. *Bosso v. Neuner*, 426 So.2d 1209, 1212 (Fla. 4th DCA 1983) ("However, where bad faith exists the purchaser may obtain loss of bargain damages which is the difference in value between the price the purchaser had agreed to pay and the value of the property on the contracted date for closing.").

7. *Horton v. O'Rourke*, 321 So.2d 612, 613 (Fla. 2d DCA 1975) ("[I]n the absence of bad faith the damages recoverable for breach by the vendor of an executory contract to convey title to real estate are the purchase money paid by the purchaser together with interest and expenses of investigating title.").

504.8 SELLER'S DAMAGES FOR BREACH OF CONTRACT TO PURCHASE REAL PROPERTY

To recover damages for the breach of a contract to buy real property, (claimant) **must prove that [he] [she] [it] performed, or had the ability to perform, all of [his] [her] [its] obligations necessary for closing.**

If (claimant) **proves that [he] [she] [it] performed, or had the ability to perform, all of [his] [her] [its] obligations necessary for closing, then** (claimant) **may recover:**

1. The difference between the contract sales price and the fair market value of the property on the date of the breach, less any amount which (defendant) **previously paid; and**

2. Any damages which the parties contemplated when the parties made the contract and which normally result from the breach of contract.

NOTES ON USE FOR 504.8

1. The court should give this instruction when a seller is seeking damages as a remedy for the breach of a contract for the purchase of real property. This instruction does not apply to claims for specific performance. *See Castigliano v. O'Connor*, 911 So.2d 145, 148 (Fla. 3d DCA 2005) (a decree of specific performance is an equitable remedy); *381651 Alberta, Ltd. v. 279298 Alberta, Ltd.*, 675 So.2d 1385, 1387 (Fla. 4th DCA 1996) (the right to a jury trial applies only to legal and not equitable causes of action).

2. The court should give this instruction where the contract does not contain a liquidated damages provision or where the liquidated damages provision has been determined to be unenforceable.

SOURCES AND AUTHORITIES FOR 504.8

1. *Pembroke v. Caudill*, 37 So.2d 538, 541 (Fla. 1948) (receded from on other grounds by *Hutchison v. Tompkins*, 259 So.2d 129, 130 (Fla. 1972)) ("[T]he measure of the sellers' damage ordinarily being in such cases [where the buyer breaches the contract] the difference between the agreed purchase price and the actual value of the property at the time of the breach of the contract of purchase, less the amount paid.").

2. *Buschman v. Clark*, 583 So.2d 799, 800 (Fla. 1st DCA 1991) ("[T]he measure of damages for breach of a real estate sales contract is the difference between the contract sales price and the fair market value of the property on the date of the breach. All additional damages must be alleged and proved to have been contemplated by the parties and must be a natural and proximate result of the breach.").

3. When the seller elects to sue for breach of contract, "the measure of damages is the difference between the price the buyer agreed to pay for the property and the fair market value of the property on the date of the breach." *Frank Silvestri, Inc. v. Hilltop Developers, Inc.*, 418 So.2d 1201, 1203 (Fla. 5th DCA 1982). "If a seller has suffered additional damage, he must allege and prove that those damages were contemplated by the parties and were a natural and proximate result of the breach." *Id.* at 1203 n.1.

4. *Cohen v. Champlain Towers N. Assocs.*, 452 So.2d 989, 991 (Fla. 3d DCA 1984) (seller must show ability to perform all conditions precedent to recover damages) (citing *Hosp. Mortg. Grp. v. First Prudential Dev. Corp.*, 411 So.2d 181 (Fla. 1982)).

5. *Redmond v. Prosper, Inc.*, 364 So.2d 812, 813 (Fla. 3d DCA 1978) (proper measure of damages for breach of real estate contract is "the excess of the contract sales price over the market value as of the time of the breach, less the amount previously paid").

6. *Popwell v. Abel*, 226 So.2d 418, 422 (Fla. 4th DCA 1969) ("In the ordinary case where a purchaser of land breaches his contract to buy, the difference between the value of the land on the date of breach as compared with the date of sale would restore the vendor, but the vendor may still allege and prove as proper elements of damage all those damages contemplated by the parties which are a natural and proximate result of the breach.").

504.9 MITIGATION OF DAMAGES

If (defendant) **breached the contract and the breach caused damages,** (claimant) **is not entitled to recover for those damages which** (defendant) **proves** (claimant) **could have avoided with reasonable efforts or expenditures. You should consider the reasonableness of** (claimant's) **efforts in light of the circumstances facing [him] [her] [it] at the time, including [his] [her] [its] ability to make the efforts or expenditures without undue [risk] [burden] [or] [humiliation].**

If (claimant) **made reasonable efforts to avoid the damages caused by the breach, then your award should include reasonable amounts that [he] [she] [it] spent for this purpose.**

NOTE ON USE FOR 504.9

This instruction is intended primarily for use in exclusive contract cases when the defense of mitigation of damages has been asserted, as non-exclusive contracts are generally considered an exception to the doctrine of avoidable consequences. *See Graphic Assocs., Inc. v. Riviana Rest. Corp.*, 461 So.2d 1011, 1014 (Fla. 4th DCA 1984); Calimari and Perillo, THE LAW OF CONTRACTS § 14-16. This instruction does not use the somewhat inaccurate term "duty to mitigate" damages because "[t]here is no actual 'duty to mitigate,' because the injured party is not compelled to undertake any ameliorative efforts." *Sys. Components Corp. v. Fla. Dep't of Transp.*, 14 So.3d 967, 982 (Fla. 2009).

SOURCES AND AUTHORITIES FOR 504.9

1. *Sys. Components Corp. v. Fla. Dep't of Transp.*, 14 So.3d 967, 982 (Fla. 2009) ("The doctrine of avoidable consequences … commonly applies in contract and tort actions. … The doctrine does not permit damage reduction based on what 'could have been avoided' through Herculean efforts. Rather, the injured party is only accountable for those hypothetical ameliorative actions that could have been accomplished through 'ordinary and reasonable care' without requiring undue effort or expense.") (internal citations omitted).

2. *Graphic Associates, Inc. v. Riviana Rest. Corp.*, 461 So.2d 1011, 1014 (Fla. 4th DCA 1984) ("The doctrine of avoidable consequences, commonly referred to as a duty to mitigate damages, prevents a party from recovering those damages inflicted by a wrongdoer which the injured party 'could have avoided without undue risk, burden, or humiliation.'") (citation omitted).

3. RESTATEMENT (SECOND) OF CONTRACTS § 350 (1981) ("(1) Except as stated in Subsection (2), damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation. (2) The injured party is not precluded from recovery by the rule stated in Subsection (1) to the extent that he has made reasonable but unsuccessful efforts to avoid loss.").

504.10 PRESENT CASH VALUE OF FUTURE DAMAGES

Any amount of damages which you award for future damages should be reduced to its present money value and only the present money value of these future damages should be included in your verdict.

The present money value of future damages is the sum of money needed now which, together with what that sum will earn in the future, will compensate (claimant) **for these damages as they are actually experienced in future years.**

SOURCES AND AUTHORITIES FOR 504.10

1. Designing a standard instruction for reduction of damages to present value is complicated by the fact that there are several different methods used by economists and courts to arrive at a present-value determination. *See*, *e.g.*, *Delta Air Lines, Inc. v. Ageloff*, 552 So.2d 1089 (Fla. 1989), and *Renuart Lumber Yards v. Levine*, 49 So.2d 97 (Fla. 1950) (using approach similar to calculation of cost of annuity); *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983), and *Loftin v. Wilson*, 67 So.2d 185 (Fla. 1953) (lost stream of income approach); *Beaulieu v. Elliott*, 434 P.2d 665 (Alaska 1967) (total offset method); *Culver v. Slater Boat Co.*, 688 F.2d 280 (5th Cir. 1982), and *Seaboard Coast Line R.R. v. Garrison*, 336 So.2d 423 (Fla. 2d DCA 1976) (discussing real interest rate discount method and inflation/market rate discount methods); and *Bould v. Touchette*, 349 So.2d 1181 (Fla. 1977) (even without evidence, juries may consider effects of inflation).

2. Until the Supreme Court or the legislature adopts one approach to the exclusion of other methods of calculating present money value, the committee assumes that the present value of future damages is a finding to be made by the jury on the evidence; or, if the parties offer no evidence to control that finding, that the jury properly resorts to its own common knowledge as guided by this instruction and by argument. *See Seaboard Coast Line R.R. v. Burdi*, 427 So.2d 1048 (Fla. 3d DCA 1983).

504.11 NOMINAL DAMAGES

If you decide that (defendant) **breached the contract but also that** (claimant) **did not prove any loss or damage, you may still award** (claimant) **nominal damages such as one dollar.**

SOURCES AND AUTHORITIES FOR 504.11

1. *AMC/Jeep of Vero Beach, Inc. v. Funston*, 403 So.2d 602, 605 (Fla. 4th DCA 1981) ("While there is a legal remedy for every legal wrong and, thus, a cause of action exists for every breach of contract, an aggrieved party who has suffered no damage is only entitled to a judgment for nominal damages.").

2. *Dep't of Transp. v. Weisenfeld*, 617 So.2d 1071, 1086 (Fla. 5th DCA 1993) ("Whenever the intentional invasion of a legal right occurs the law infers some damage to the party whose rights were violated and if no evidence is adduced as to any particular specific loss or damage, the law 'rights' or remedies the wrong by awarding nominal damages, usually in the amount of $1.00.").

SECTION 600 – SUBSTANTIVE INSTRUCTIONS – GENERAL

601.1 WEIGHING THE EVIDENCE

In deciding this case, it is your duty as jurors [to decide the issues, and only those issues, that I submit for your determination] [to answer certain questions I ask you to answer on a special form, called a verdict form]. You must come to an agreement about [your verdict] [what your answers will be. Your agreed-upon answers to my questions are called your jury verdict].

The evidence in this case consists of the sworn testimony of the witnesses, all exhibits received in evidence [and] all facts that were admitted or agreed to by the parties [, and any fact of which the court has taken judicial notice (explain as necessary)].

In reaching your verdict, you must think about and weigh the testimony and any documents, photographs, or other material that has been received in evidence. You may also consider any facts that were admitted or agreed to by the lawyers. Your job is to determine what the facts are. You may use reason and common sense to reach conclusions. You may draw reasonable inferences from the evidence. But you should not guess about things that were not covered here. And, you must always apply the law as I have explained it to you.

601.2 BELIEVABILITY OF WITNESSES

a. General considerations:

Let me speak briefly about witnesses. In evaluating the believability of any witness and the weight you will give the testimony of any witness, you may properly consider the demeanor of the witness while testifying; the frankness or lack of frankness of the witness; the intelligence of the witness; any interest the witness may have in the outcome of the case; the means and opportunity the witness had to know the facts about which the witness testified; the ability of the witness to remember the matters about which the witness testified; and the reasonableness of the testimony of the witness, considered in the light of all the evidence in the case and in the light of your own experience and common sense.

b. Expert witnesses:

[You have heard opinion testimony [on certain technical subjects] from [a person] [persons] referred to as [an] expert witness[es].] [Some of the testimony before you was in the form of opinions about certain technical subjects.]

You may accept such opinion testimony, reject it, or give it the weight you think it deserves, considering the knowledge, skill, experience, training, or education of the witness, the reasons given by the witness for the opinion expressed, and all the other evidence in the case.

NOTES ON USE FOR 601.2

1. *Expert witness*. See *F.S.* 90.702 (1985), and *Shaw v. Puleo*, 159 So.2d 641 (Fla. 1964). The court will select one or the other introductory sentence in keeping with the court's practice and preference in announcing before the jury, or acceding to counsel's characterization, that a tendered witness is an "expert."

2. *Common knowledge and everyday experience*. Except to the extent indicated in instruction 601.2, the committee recommends that the jury not be instructed that the jurors may bring to bear their "common knowledge and everyday experience."

3. *Failure to produce witness.* The committee recommends that no instruction be given. While it may be permissible in some circumstances to instruct the jury regarding inferences arising from a party's failure to produce a witness (compare *Weeks v. Atlantic Coast Line R.R. Co.*, 132 So.2d 315 (Fla. 1st DCA 1961), with *Georgia Southern & Florida Railway Co. v. Perry*, 326 F.2d 921 (5th Cir. 1964)), the committee believes that generally such inferences are more properly referred to in counsel's argument.

601.3 JURY TO BE GUIDED BY OFFICIAL ENGLISH TRANSLATION/INTERPRETATION

[A] [Some] witness[es] have testified in (language used) **which was interpreted into English.**

The evidence you are to consider is only that provided through the official court interpreters. Although some of you may know (language used)**, it is important that all jurors consider the same evidence. Therefore, you must base your decision on the evidence presented in the English interpretation. You must disregard any different meaning.**

If, during the testimony there was a question as to the accuracy of the English interpretation and steps were taken to resolve any discrepancies and despite these efforts a discrepancy remains, I emphasize that you must rely only upon the official English interpretation as provided by the court interpreter and disregard any other contrary interpretation.

NOTES ON USE FOR 601.3

1. See *United States v. Franco*, 136 F.3d 622, 626 (9th Cir. 1998); *United States v. Rrapi*, 175 F.3d 742, 748 (9th Cir. 1999); *United States v. Fuentes-Montijo*, 68 F.3d 352, 355–56 (9th Cir. 1995).

2. When instructing the jury at the beginning of the case, use instruction 202.5 instead of this instruction.

601.4 MULTIPLE CLAIMS, NUMEROUS PARTIES, CONSOLIDATED CASES

In your deliberations, you will consider and decide [several] [(state the number)**] distinct claims.** (Identify claims to be considered.) **Although these claims have been tried together, each is separate from the other[s], and each party is entitled to have you separately consider each claim as it affects that party. Therefore, in your deliberations, you should consider the evidence as it relates to each claim separately, as you would had each claim been tried before you separately.**

NOTE ON USE FOR 601.4

This instruction is applicable to two or more consolidated actions as well as to two or more claims in the same action by or against different persons or by or against the same person in different capacities. The committee recommends that this instruction not be given to distinguish between a primary claim and a derivative claim (*e.g.*, that of the injured party and that of his or her spouse) or between a claim against a party primarily liable and a claim against a party liable only vicariously (*e.g.*, claims against a party actively negligent and against his employer) or claims under *F.S.* 768.0415.

601.5 CONCLUDING INSTRUCTION (BEFORE FINAL ARGUMENT)

That is the law you must follow in deciding this case. The attorneys for the parties will now present their final arguments. When they are through, I will have a few final instructions about your deliberations.

NOTE ON USE FOR 601.5

Instruction 601.5 is for use when instructing the jury before final argument. If the court's instruction is to be given after final argument, skip to instruction 700 and omit the bracketed sentence in the first paragraph.

SECTION 700 – CLOSING INSTRUCTIONS

Members of the jury, you have now heard all the evidence, my instructions on the law that you must apply in reaching your verdict and the closing arguments of the attorneys. You will shortly retire to the jury room to decide this case. [Before you do so, I have a few last instructions for you.]

During deliberations, jurors must communicate about the case only with one another and only when all jurors are present in the jury room. You will have in the jury room all of the evidence that was received during the trial. In reaching your decision, do not do any research on your own or as a group. Do not use dictionaries, the Internet, or any other reference materials. Do not investigate the case or conduct any experiments. Do not visit or view the scene of any event involved in this case or look at maps or pictures on the Internet. If you happen to pass by the scene, do not stop or investigate. All jurors must see or hear the same evidence at the same time. Do not read, listen to, or watch any news accounts of this trial.

You are not to communicate with any person outside the jury about this case. Until you have reached a verdict, you must not talk about this case in person or through the telephone, writing, or electronic communication, such as a blog, twitter, e-mail, text message, or any other means. Do not contact anyone to assist you, such as a family accountant, doctor, or lawyer. These communications rules apply until I discharge you at the end of the case. If you become aware of any violation of these instructions or any other instruction I have given in this case, you must tell me by giving a note to the bailiff.

Any notes you have taken during the trial may be taken to the jury room for use during your discussions. Your notes are simply an aid to your own memory, and neither your notes nor those of any other juror are binding or conclusive. Your notes are not a substitute for your own memory or that of other jurors. Instead, your verdict must result from the collective memory and judgment of all jurors based on the evidence and testimony presented during the trial.

At the conclusion of the trial, the bailiff will collect all of your notes and immediately destroy them. No one will ever read your notes.

In reaching your verdict, do not let bias, sympathy, prejudice, public opinion, or any other sentiment for or against any party to influence your decision. Your verdict must be based on the evidence that has been received and the law on which I have instructed you.

Reaching a verdict is exclusively your job. I cannot participate in that decision in any way and you should not guess what I think your verdict should be from something I may have said or done. You should not think that I prefer one verdict over another. Therefore, in reaching your verdict, you should not consider anything that I have said or done, except for my specific instructions to you.

Pay careful attention to all the instructions that I gave you, for that is the law that you must follow. You will have a copy of my instructions with you when you go to the jury room to deliberate. All the instructions are important, and you must consider all of them together. There are no other laws that apply to this case, and even if you do not agree with these laws, you must use them in reaching your decision in this case.

After you have decided what the facts are, you may find that some instructions do not apply. In that case, follow the instructions that do apply and use them together with the facts to reach your verdict.

When you go to the jury room, the first thing you should do is choose a presiding juror to act as a foreperson during your deliberations. The foreperson should see to it that your discussions are orderly and that everyone has a fair chance to be heard.

It is your duty to talk with one another in the jury room and to consider the views of all the jurors. Each of you must decide the case for yourself, but only after you have considered the evidence with the other members of the jury. Feel free to change your mind if you are convinced that your position should be different. You should all try to agree. But do not give up your honest beliefs just because the others think differently. Keep an open mind so that you and your fellow jurors can easily share ideas about the case.

[**I will give you a verdict form with questions you must answer. I have already instructed you on the law that you are to use in answering these questions. You must follow my instructions and the form carefully. You must consider each question separately. Please answer the questions in the order they appear. After you answer a question, the form tells you what to do next. I will now read the form to you:** (read form of verdict)]

[**You will be given** (state number) **forms of verdict, which I shall now read to you:** (read form of verdict(s))]

[**If you find for** (claimant(s)), **your verdict will be in the following form:** (read form of verdict)]

[**If you find for** (defendant(s)), **your verdict will be in the following form:** (read form of verdict)]

Your verdict[s] must be unanimous, that is, your verdict must be agreed to by each of you. When you have [agreed on your verdict[s]] [finished filling out the form[s]], your foreperson must write the date and sign it at the bottom and return the verdict[s] to the bailiff.

If any of you need to communicate with me for any reason, write me a note and give it to the bailiff. In your note, do not disclose any vote or split or the reason for the communication.

You may now retire to decide your verdict[s].

NOTES ON USE FOR 700

1. When final instructions are read to the jury before the attorney's closing arguments, this instruction should not be given at that time. It should be given following closing arguments, just before the jury retires to deliberate. If, however, the entire instruction is given after final arguments, omit the bracketed sentence in the first paragraph.

2. The portion of this instruction dealing with communication with others and outside research may need to be modified to include other specific means of communication or research as technology develops.

3. Florida Rule of Judicial Administration 2.430(k) provides that at the conclusion of the trial, the court shall collect and immediately destroy all juror notes.

4. *Quotient verdict.* The committee recommends that no instruction generally be given to admonish the jury against returning a "quotient verdict."

5. When it is impracticable to take all of the evidence into the jury room, this instruction should be modified accordingly.

SECTION 800 – SUPPLEMENTAL MATTERS

801.1 JUROR QUESTIONS DURING DELIBERATIONS

Members of the jury, I have discussed your [note] [question] with the attorneys. You have [asked the following question] [made the following request]:

(read juror's note):

If I have not read your [note] [question] correctly, please raise your hand.

(clarify question as needed):

1. The answer is:

(respond to question):

OR

2. I am not able to [answer] [respond to] this [question] [request] because it [calls for information that is not in evidence] [is not proper to be considered in this case] [(other reason why question or request is improper)]**. Your decision must be based only on the evidence presented in the trial and the law that I have given you. [If you have any other specific questions, please send another note, and I will see if I can answer it.] [**(other appropriate response)**].**

NOTES ON USE FOR 801.1

1. The procedure contained in 801.1 assumes that a juror question or request will be in writing. Oral questions from jurors are discouraged.

2. In responding to a juror's question or request, the court should answer as specifically as possible. To avoid inadvertent error, it is a good practice to prepare a written answer with the assistance of the attorneys and then read this answer to the jury.

3. All written questions and answers should be preserved and placed in the court file.

801.2 READ-BACK OF TESTIMONY

a. Read-back granted as requested:

Members of the jury, you have asked that the following testimony be read back to you: *(describe testimony)*

The court reporter will now read the testimony, which you have requested.

OR

b. Read-back deferred:

Members of the jury, I have discussed with the attorneys your request to have certain testimony read back to you. It will take approximately (amount of time) **to have the court reporter prepare and read back the requested testimony.**

I now direct you to return to the jury room and discuss your request further. If you are not able to resolve your question about the requested testimony by relying on your collective memory, then you should write down a more specific description of the part of the witness(es)' testimony which you want to hear again. Make your request for reading back testimony as specific as possible.

c. Read-back denied:

Members of the jury, you have asked that the following testimony be read back to you: *(describe testimony)*

I am not able to grant your request because (give reason(s) for denying request)**.**

NOTE ON USE FOR 801.2

Any read-back of testimony should take place in open court. Transcripts or tapes of testimony should not be sent back to the jury room.

801.3 JURY DEADLOCKED

Members of the jury, we understand you are having difficulty reaching a verdict. This case is important to the parties, and we appreciate your efforts. But I am going to ask you to go back to try again to reach a verdict if you reasonably can.

Please carefully consider the views of all the jurors, including those you disagree with. Keep an open mind and feel free to change your view if you conclude it is wrong.

You should not, however, give up your own conscientiously held views simply to end the case or avoid further discussion. Each of you must decide the case for yourself and not merely go along with the conclusions of other jurors.

If you cannot agree on what a witness said, you may ask that the court reporter read back to you a portion of any witness's testimony. To avoid delay, your request should be as specific as possible.

You may now return to the jury room for further deliberations.

NOTES ON USE FOR 801.3

1. This instruction should not be given unless the jury indicates it is deadlocked. *Moore v. State*, 635 So.2d 998 (Fla. 4th DCA 1994); *Armstrong v. State*, 364 So.2d 1238 (Fla. 1st DCA 1978).

2. This instruction should be given only once. If after having received this instruction, the jury announces *again* that it is deadlocked, the jury cannot be sent back for further deliberations. *Tomlinson v. State*, 584 So.2d 43 (Fla. 4th DCA 1991).

801.4 INSTRUCTION UPON DISCHARGE OF JURY

Ladies and gentlemen, on behalf of the parties, lawyers and the people of the State of Florida, I wish to thank you for your time and consideration of this case.

I also wish to advise you of some very special privileges enjoyed by jurors.

No juror can be required to talk about the discussions that occurred in the jury room, except by court order. For many centuries, our society has relied upon juries for consideration of difficult cases. We have recognized for hundreds of years that a jury's deliberations, discussions and votes should remain their private affair as long as they wish it. Therefore, the law gives you a unique privilege not to speak about the jury's work.

The lawyers and their representatives are not permitted to initiate any communication with you about the trial. However, you may speak to the lawyers or anyone else about the trial. You also have the right to refuse to speak with anyone. A request may come from those who are simply curious, or from those who might seek to find fault with you. It will be up to you to decide whether to preserve your privacy as a juror.

(In discharging the jury, the court should advise them of their further responsibilities, if any.)

NOTE ON USE FOR 801.4

After this instruction, the jury should be discharged and no further discussion should be had between the judge and the jurors, or between the attorneys and jurors, except in accordance with applicable law. *See* Fla. R. Civ. P. 1.431(h); Rule Reg. Fla. Bar 4-3.5(d)(4).

APPENDIX B

July 1, 2011 Florida Bar News

Proposed Standard Jury Instructions — Contract and Business Cases

The Supreme Court Committee on Standard Jury Instructions — Contract and Business Cases invites all interested persons to comment on the proposed new instructions below. Comments must be received by the Committee on or before August 1, 2011. All comments received will be reviewed by the Committee at its next meeting. Revisions to the proposed instructions may be made based upon comments received. Upon final approval of the instructions, the Committee will make a recommendation to the Florida Supreme Court. E-mail your comments in the format of a Word document to Judge Thomas B. Smith, Committee Chair, at ctjuts1@ocnjcc.org, with a copy to the Committee liaison, Jodi Jennings, at jjenning@flabar.org.

300 Breach Of Contract — Introduction
301 Third-Party Beneficiary
302 Contract Formation — Essential Factual Elements
303 Breach Of Contract — Essential Factual Elements
304 Oral Or Written Contract Terms
305 Implied-In-Fact Contract
307 Contract Formation — Offer
308 Contract Formation — Revocation Of Offer
309 Contract Formation — Acceptance
310 Contract Formation — Acceptance By Silence Or Conduct
313 Modification
314 Interpretation — Disputed Term(s)
315 Interpretation — Meaning Of Ordinary Words
316 Interpretation — Meaning Of Disputed Technical Or Special Words
317 Interpretation — Construction Of Contract As A Whole
318 Interpretation — Construction By Conduct
319 Interpretation — Reasonable Time
320 Interpretation — Construction Against Drafter
321 Existence Of Conditions Precedent Disputed
322 Occurrence Of Agreed Condition Precedent

The proposed instructions, including the numbering scheme, are modeled on and, where consistent with Florida law, use the language contained in the Judicial Council Of California's Civil Jury Instructions ("CACI"). The Committee wishes to acknowledge its appreciation to the Judicial Council of California, which has graciously agreed to permit the use of its CACI instructions as a model for the drafting of these instructions.

The Committee adopts the conventions and approach taken by the Supreme Court Committee on Standard Jury Instructions in Civil Cases, as quoted below:

Boldface type, brackets, parentheses, and italics are used in standard instructions to give

certain directions as follows:

Boldface type identifies words that the trial judge should speak aloud to instruct the jury.

Brackets express variables or alternatives within the text that are to be spoken aloud to the jury.

Bracketed material always appears in boldface type because some or all of the enclosed words must be spoken aloud and provided as part of the instruction. The Notes on Use often provide guidance on the variables appropriate in a given circumstance.

Parentheses signify the need to insert a proper name, a specific item or element, or some other variable that must be supplied by the trial judge. For example, in the following sentence, the designations in parentheses should be replaced with the specific profession of the defendant.

Because the words within the parentheses are directional in nature and not spoken to the jury, they do not appear in boldface type. They merely serve as signals to insert names, titles, or other words that must be spoken aloud. In like manner, throughout the instructions the parties are referred to as "claimant" and "defendant," and these labels may appear in parentheses. The committee does not intend that these labels be used in the jury instructions given to the jury. The judge should name or refer to the parties in the most convenient and clear way.

Italics identify directions to the trial judge.

A Note on Use may appear immediately following an instruction to provide guidance in the use of an instruction. Where the committee determines that a charge on a particular subject does not materially assist the jury, or that the instruction is likely to be argumentative or negative, or is for other reasons inappropriate, the Note on Use will contain the committee's recommendation that no instruction be given. A Note on Use is also used by the committee to set out the committee's reasons for recommending particular treatment and to cite cases and other authorities. The committee uses only illustrative cases and avoids long lists of cases.

The Committee invites all interested persons to comment on the proposed new instructions, reproduced in full below. Comments must be received by the Committee in both hard copy and electronic format on or before July 15. All comments received will be reviewed by the Committee at its next meeting. Revisions to the proposed instructions may be made based upon comments received. Upon final approval of the instruction, the Committee will make a recommendation to the Florida Supreme Court. E-mail your comments in the format of a Word document to Manuel Farach, Committee Vice Chair, Richman Greer, P.A., at . In addition, mail a hard copy of your comments to Standard Jury Instructions Committee – Contract and Business Cases, Jodi Jennings, The Florida Bar, 651 East Jefferson Street, Tallahassee 32399-6584.

300 BREACH OF CONTRACT — INTRODUCTION

(Claimant) **claims that [he] [she] [it] and** (defendant) **entered into a contract for [insert brief summary of alleged contract].**

(Claimant) **claims that** (defendant) **breached this contract by [briefly state alleged breach], and that the breach resulted in damages to** (claimant).

(Defendant) **denies [insert denial of any of the above claims]**. (Defendant) **also claims [insert affirmative defense].**

NOTE ON USE FOR 300

This instruction is intended to introduce the jury to the issues involved in the case. It should be read before the instructions on the substantive law.

301 THIRD-PARTY BENEFICIARY

(Claimant) **is not a party to the contract. However,** (claimant) **may be entitled to damages for breach of the contract if [he] [she] [it] proves that [insert names of the contracting parties] intended that** (claimant) **benefit from their contract.**

It is not necessary for (claimant) **to have been named in the contract. In deciding what [insert names of the contracting parties] intended, you should consider the contract as a whole, the circumstances under which it was made, and the apparent purpose the parties were trying to accomplish.**

NOTE ON USE FOR 301

While the Supreme Court has not directly weighed in on its applicability (but note Justice Shaw's concurrence in *Metropolitan Life Ins. Co. v. McCarson*, 467 So.2d 277, 280-81 (Fla. 1985)), the district courts of appeal have cited to the Restatement (Second) of Contracts § 302 (1981):

"[A] beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and ... the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance."). *Civix Sunrise, GC, LLC v. Sunrise Road Maintenance Assn., Inc*., 997 So.2d 433 (Fla. 2d DCA 2008); *Technicable Video Systems, Inc. v. Americable of Greater Miami, Ltd*., 479 So.2d 810 (Fla. 3d DCA 1985); *Cigna Fire Underwriters Ins. Co. v. Leonard*, 645 So.2d 28 (Fla. 4th DCA 1994); *Warren v. Monahan Beaches Jewelry Center, Inc*., 548 So.2d 870 (Fla. 1st DCA 1989); *Publix Super Markets, Inc. v. Cheesbro Roofing, Inc*., 502 So.2d 484 (Fla. 5th DCA 1987). See also *A.R. Moyer, Inc. v. Graham*, 285 So.2d 397, 402 (Fla. 1973) and *Carvel v. Godley*, 939 So.2d 204, 207-208 (Fla. 4th DCA 2006) ("The question of whether a contract was intended for the benefit of a third person is generally regarded as one of construction of the contract. The intention of the parties in this respect is

determined by the terms of the contract as a whole, construed in the light of the circumstances under which it was made and the apparent purpose that the parties are trying to accomplish.").

302 CONTRACT FORMATION — ESSENTIAL FACTUAL ELEMENTS

(Claimant) **claims that the parties entered into a contract. To prove that a contract was created,** (claimant) **must prove all of the following:**

1. The essential contract terms were clear enough that the parties could understand what each was required to do;

2. The parties agreed to give each other something of value. [A promise to do something or not to do something may have value]; and

3. The parties agreed to the essential terms of the contract. When you examine whether the parties agreed to the essential terms of the contract, ask yourself if, under the circumstances, a reasonable person would conclude, from the words and conduct of each party, that there was an agreement. The making of a contract depends only on what the parties said or did. You may not consider the parties' thoughts or unspoken intentions.

Note: If neither offer nor acceptance is contested, then element #3 should not be given.

If (Claimant) **did not prove all of the above, then a contract was not created.**

NOTES ON USE FOR 302

1. This instruction should be given only when the existence of a contract is contested. If both parties agree that they had a contract, then the instructions relating to whether a contract was actually formed would not need to be given. At other times, the parties may be contesting only a limited number of contract formation issues. Also, some of these issues may be decided by the judge as a matter of law. Users should omit elements in this instruction that are not contested so that the jury can focus on the contested issues. Read bracketed language only if it is an issue in the case.

2. The general rule of contract formation was enunciated by the Florida Supreme Court in *St. Joe Corp. v. McIver*, 875 So.2d 375, 381 (Fla. 2004) ("An oral contract ... is subject to the basic requirements of contract law such as offer, acceptance, consideration and sufficient specification of essential terms.").

3. The first element of the instruction refers to the definiteness of essential terms of the contract. "The definition of 'essential term' varies widely according to the nature and complexity of each transaction and is evaluated on a case-by-case basis." *Lanza v. Damian Carpentry, Inc*., 6 So.3d 674, 676 (Fla. 1st DCA 2009). See also *Leesburg Community Cancer Center v. Leesburg Regional Medical Center*, 972 So.2d 203, 206 (Fla. 5th DCA 2007) ("We

start with the basic premise that no person or entity is bound by a contract absent the essential elements of offer and acceptance (its agreement to be bound to the contract terms), supported by consideration.").

4. The second element of the instruction requires giving something of value. In Florida, to constitute valid consideration there must be either a benefit to the promisor or a detriment to the promisee. *Mangus v. Present*, 135 So.2d 417, 418 (Fla. 1961). The detriment necessary for consideration need not be an actual loss to the promisee, but it is sufficient if he does something that he or she is not legally bound to do. *Id.*

5. The final element of this instruction requires an objective test. "An objective test is used to determine whether a contract is enforceable." *Robbie v. City of Miami*, 469 So.2d 1384, 1385 (Fla. 1985). The intention as expressed controls rather than the intention in the minds of the parties. "The making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs-not on the parties having meant the same thing but on their having said the same thing." *Gendzier v. Bielecki*, 97 So.2d 604, 608 (Fla. 1957).

303 BREACH OF CONTRACT — ESSENTIAL FACTUAL ELEMENTS

To recover damages from (defendant) **for breach of contract,** (claimant) **must prove all of the following:**

1. (Claimant) **and** (defendant) **entered into a contract;**

2. (Claimant) **did all, or substantially all, of the essential things which the contract required [him] [her] [it] to do [or that [he] [she] [it] was excused from doing those things];**

3. [All conditions required by the contract for (defendant's) **performance had occurred;]**

4. [(Defendant) **failed to do something essential which the contract required [him] [her] [it] to do] [That** (defendant) **did something which the contract prohibited [him] [her] [it] from doing and that prohibition was essential to the contract]; and**
Note: If the allegation is that the defendant breached the contract by doing something that the contract prohibited, use the second option

5. (Claimant) **was harmed by that failure.**

NOTES ON USE FOR 303

1. Read this instruction in conjunction with Instruction 300 Breach Of Contract — Introduction. In many cases, some of the above elements may not be contested. In those cases,

users should delete the elements that are not contested so that the jury can focus on the contested issues.

2. An adequately pled breach of contract action requires three elements: (1) a valid contract; (2) a material breach; and (3) damages. *Friedman v. New York Life Ins. Co.*, 985 So.2d 56, 58 (Fla. 4th DCA 2008). This general rule was enunciated by various Florida district courts of appeal. See *Murciano v. Garcia*, 958 So.2d 423, 423-24 (Fla. 3d DCA 2007); *Abbott Laboratories, Inc. v. General Elec. Capital*, 765 So.2d 737, 740 (Fla. 5th DCA 2000); *Mettler v. Ellen Tracy, Inc.*, 648 So.2d 253, 255 (Fla. 2d DCA 1994); *Knowles v. C.I.T. Corp.*, 346 So.2d 1042, 1043 (Fla. 1st DCA 1977).

3. To maintain an action for breach of contract, a claimant must first establish performance on the claimant's part of the contractual obligations imposed by the contract. *Marshall Construction, Ltd. v. Coastal Sheet Metal & Roofing, Inc.*, 569 So.2d 845, 848 (Fla. 1st DCA 1990). A claimant is excused from establishing performance if the defendant anticipatorily repudiated the contract. See *Hosp. Mortg. Grp. v. First Prudential Dev. Corp.*, 411 So.2d 181 (Fla. 1982). Repudiation constituting a prospective breach of contract may be evidenced by words or voluntary acts but refusal must be distinct, unequivocal and absolute. *Mori v. Matsushita Elec. Corp. of Am.*, 380 So.2d 461, 463 (Fla. 3d DCA 1980).

4. "Substantial performance is performance 'nearly equivalent to what was bargained for.'" *Strategic Resources Grp., Inc. v. Knight-Ridder, Inc.*, 870 So.2d 846, 848 (Fla. 3d DCA 2003). "Substantial performance is that performance of a contract which, while not full performance, is so nearly equivalent to what was bargained for that it would be unreasonable to deny the promisee the full contract price subject to the promisor's right to recover whatever damages may have been occasioned him by the promisee's failure to render full performance." *Ocean Ridge Dev. Corp. v. Quality Plastering, Inc.*, 247 So.2d 72, 75 (Fla. 4th DCA 1971).

5. The doctrine of substantial performance applies when the variance from the contract specifications is inadvertent or unintentional and unimportant so that the work actually performed is substantially what was called for in the contract. *Lockhart v. Worsham*, 508 So.2d 411, 412 (Fla. 1st DCA 1987). "In the context of contracts for construction, the doctrine of substantial performance is applicable only where the contractor has not willfully or materially breached the terms of his contract or has not intentionally failed to comply with the specifications." *National Constructors, Inc. v. Ellenberg*, 681 So.2d 791, 793 (Fla. 3d DCA 1996).

6. "There is almost always no such thing as 'substantial performance' of payment between commercial parties when the duty is simply the general one to pay." *Hufcor/Gulfstream, Inc. v. Homestead Concrete & Drainage, Inc.*, 831 So.2d 767, 769 (Fla. 4th DCA 2002).

304 ORAL OR WRITTEN CONTRACT TERMS

[Contracts may be written or oral.]

[Contracts may be partly written and partly oral.]

Oral contracts are just as valid as written contracts.

NOTES ON USE FOR 304

1. Give the bracketed alternative that is most applicable to the facts of the case. If the complete agreement is in writing, this instruction should not be given.

2. An "agreement, partly written and partly oral, must be regarded as an oral contract, the liability arising under which is not founded upon an instrument of writing." *Johnson v. Harrison Hardware Furniture Co.*, 160 So. 878, 879 (Fla. 1935).

3. An oral contract is subject to the basic requirements of contract law such as offer, acceptance, consideration, and sufficient specification of essential terms. *St. Joe Corp. v. McIver*, 875 So.2d 375 (Fla. 2004).

4. "The complaint alleged the execution of an oral contract, the obligation thereby assumed, and a breach. It therefore set forth sufficient facts which taken as true, would state a cause of action for breach of contract." *Industrial Medicine Publishing Co. v. Colonial Press of Miami, Inc.,* 181 So.2d 19 (Fla. 3d DCA 1965).

5. As long as an essential ingredient is not missing from an agreement, courts have been reluctant to hold contracts unenforceable on grounds of uncertainty, especially where one party has benefited from the other's reliance. *Gulf Solar, Inc. v. Westfall*, 447 So.2d 363 (Fla. 2d DCA 1984); *Community Design Corp. v. Antonell*, 459 So.2d 343 (Fla. 3d DCA 1984). When the existence of a contract is clear, the jury may properly determine the exact terms of an oral contract. *Perry v. Cosgrove*, 464 So.2d 664, 667 (Fla. 2d DCA 1975).

6. "In order to state a cause of action for breach of an oral contract, a plaintiff is required to allege facts that, if taken as true, demonstrate that the parties mutually assented to "a certain and definite proposition" and left no essential terms open. See *W.R. Townsend Contracting, Inc. v. Jensen Civil Construction, Inc.*, 728 So.2d 297 (Fla. 1st DCA 1999). Compare *Carole Korn Interiors, Inc. v. Goudie*, 573 So.2d 923 (Fla. 3d DCA 1990) (company that provided interior design services sufficiently alleged cause of action for breach of oral contract, when company alleged that it had entered into oral contract with defendants for interior design services; that company had provided agreed services; that defendants breached contract by refusing to remit payment; and that company suffered damages). "In this case, appellant sufficiently pled that Primedica, upon acquiring Shapiros' assets, which included their oral agreement with appellant, mutually assented to appellant's continued employment under the same terms and conditions as with Shapiro. Further, he alleged that he suffered damages as a result of his termination." *Rubenstein v. Primedica Healthcare, Inc.*, 755 So.2d 746, 748 (Fla. 4th DCA 2000).

305 IMPLIED-IN-FACT CONTRACT

Contracts can be created by the conduct of the parties, without spoken or written words. Contracts created by conduct are just as valid as contracts formed with words.

Conduct will create a contract if the conduct of both parties is intentional and each knows, or under the circumstances should know, that the other party will understand the conduct as creating a contract.

In deciding whether a contract was created, you should consider the conduct and relationship of the parties as well as all of the circumstances.

NOTES ON USE FOR 305

1. Use this instruction where there is no express contract, oral or written, between the parties, and the jury is being asked to infer the existence of a contract from the facts and circumstances of the case.

2. "[A]n implied contract is one in which some or all of the terms are inferred from the conduct of the parties and the circumstances of the case, though not expressed in words." 17A Am. Jur. 2d Contracts § 12 (2009). "In a contract implied in fact the assent of the parties is derived from other circumstances, including their course of dealing or usage of trade or course of performance." *Rabon v. Inn of Lake City, Inc.*, 693 So.2d 1126, 1131 (Fla. 1st DCA 1997); *McMillan v. Shively*, 23 So.3d 830, 831 (Fla. 1st DCA 2009).

3. "A contract implied in fact is one form of an enforceable contract; it is based on a tacit promise, one that is inferred in whole or in part from the parties' conduct, not solely from their words." 17 Am. Jur. 2d Contracts § 3 (1964); Corbin, Corbin on Contracts §§ 1.18-1.20 (Joseph M. Perillo ed. 1993). When an agreement is arrived at by words, oral or written, the contract is said to be "express." 17 Am. Jur. 2d Contracts § 3. A contract implied in fact is not put into promissory words with sufficient clarity, so a fact finder must examine and interpret the parties' conduct to give definition to their unspoken agreement. *Id.*; Corbin on Contracts § 562 (1960). It is to this process of defining an enforceable agreement that Florida courts have referred when they have indicated that contracts implied in fact "rest upon the assent of the parties." *Policastro v. Myers*, 420 So.2d 324, 326 (Fla. 4th DCA 1982); *Tipper v. Great Lakes Chemical Co.*, 281 So.2d 10, 13 (Fla. 1973). The supreme court described the mechanics of this process in *Bromer v. Florida Power & Light Co.*, 45 So.2d 658, 660 (Fla. 1950): "[A] [c]ourt should determine and give to the alleged implied contract 'the effect which the parties, as fair and reasonable men, presumably would have agreed upon if, having in mind the possibility of the situation which has arisen, they had contracted expressly thereto.'" 12 Am. Jur. 2d 766. See *Mecier v. Broadfoot*, 584 So.2d 159, 161 (Fla. 1st DCA 1991).

4. Common examples of contracts implied in fact are when a person performs services at another's request, or "where services are rendered by one person for another without his

expressed request, but with his knowledge, and under circumstances" fairly raising the presumption that the parties understood and intended that compensation was to be paid. *Lewis v. Meginniss*, 12 So. 19, 21 (Fla. 1892); *Tipper*, 281 So.2d at 13. In these circumstances, the law implies the promise to pay a reasonable amount for the services. *Lewis*, 12 So. at 21; *Lamoureux v. Lamoureux*, 59 So.2d 9, 12 (Fla. 1951); *A.J. v. State*, 677 So.2d 935, 937 (Fla. 4th DCA 1996); *Dean v. Blank*, 267 So.2d 670 (Fla. 4th DCA 1972); *Solutec Corp. v. Young & Lawrence Associates, Inc.*, 243 So.2d 605, 606 (Fla. 4th DCA 1971). "For example, a common form of contract implied in fact is where one party has performed services at the request of another without discussion of compensation. These circumstances justify the inference of a promise to pay a reasonable amount for the service. The enforceability of this obligation turns on the implied promise, not on whether the defendant has received something of value. A contract implied in fact can be enforced even where a defendant has received nothing of value." *Commerce Partnership 8098 Limited Partnership v. Equity Contracting Co.*, 695 So.2d 383, 387 (Fla. 4th DCA 1997).

307 CONTRACT FORMATION — OFFER

Both an offer and an acceptance are required to create a contract. (Defendant) **contends a contract was not created because there was never any offer. To establish that an offer was made,** (claimant) **must prove:**

1. (Claimant) **communicated to** (defendant) **that [he] [she] [it] was willing to enter into a contract with** (defendant)**;**

2. The communication[s] contained the essential terms of the offer; and

3. Based on the communication, (defendant) **could have reasonably concluded that a contract with these terms would result if [he] [she] [it] accepted the offer.**

If (claimant) **did not prove all of the above, then no offer was made and no contract was created.**

NOTES ON USE FOR 307

1. Do not give this instruction unless the defendant has testified or offered other evidence in support of his or her contention. This instruction assumes that the defendant is claiming the plaintiff never made an offer. Change the identities of the parties in the indented paragraphs if, under the facts of the case, the roles of the parties are switched (*e.g.*, if defendant was the alleged offeror). If the existence of an offer is not contested, then this instruction is unnecessary.

2. The court in *Lee County v. Pierpont*, 693 So.2d 994 (Fla. 2d DCA 1997), defined "offer" as follows: "A proposal to do a thing or pay an amount, usually accompanied by an expected acceptance, counter-offer, return promise or act. A manifestation of willingness to

enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." *Id*. at 996 (citation omitted).

3. "The rule that it is possible for parties to make an enforceable contract binding them to prepare and execute a subsequent agreement is well recognized. However, 'if the document or contract that the parties agree to make is to contain any material term that is not already agreed on, no contract has yet been made; and the so-called 'contract to make a contract' is not a contract at all." *John I. Moss, Inc. v. Cobbs Co*., 198 So.2d 872, 874 (Fla. 3d DCA 1967).

4. In *Soccarras v. Claughton Hotels, Inc*., 374 So.2d 1057, 1060 (Fla. 3d DCA 1979), the court found that a "handwritten note evidences only [the defendant's] willingness to negotiate a contract with potential purchasers who might be interested in the general terms that he outlined. The note did not incorporate all of the essential terms necessary to make an enforceable contract for the sale of the land. It reflected only the state of negotiations at that point, preliminary negotiations which never ripened into a formal agreement."

308 CONTRACT FORMATION — REVOCATION OF OFFER

Both an offer and an acceptance are required to create a contract. (Defendant) **contends that the offer was withdrawn before the offer was accepted. To establish that the offer was not withdrawn,** (claimant) **must prove one of the following:**

1. (Defendant) **did not withdraw the offer; or**

2. (Claimant) **accepted the offer before** (defendant) **withdrew it; or**

3. (Defendant's) **withdrawal of the offer was never communicated to** (claimant)**.**

If (claimant) **did not prove any of the above, then the offer was withdrawn and no contract was created.**

NOTES ON USE ON 308

1. Do not give this instruction unless the defendant has testified or offered other evidence to support this contention.

2. This instruction assumes that the defendant is claiming to have revoked the offer. Change the identities of the parties in the indented paragraphs if, under the facts of the case, the roles of the parties are switched (*e.g.*, if the defendant was the alleged offeree).

3. "A mere offer not assented to constitutes no contract, for there must be not only a proposal, but an acceptance thereof. So long as a proposal is not acceded to, it is binding upon neither party, and it may be retracted." *Gibson v. Courtois*, 539 So.2d 459, 460 (Fla. 1989).

4. “In the United States, the law is virtually uniform that a revocation requires communication and that an acceptance prior to a communicated revocation constitutes a binding contract.” *Lance v. Martinez-Arango*, 251 So.2d 707, 709 (Fla. 3d DCA 1971).

5. “Where an offer has not been accepted by the offeree, the offeror may revoke the offer provided the communication of such revocation is received prior to acceptance.” *Kendel v. Pontious*, 244 So.2d 543, 544 (Fla. 3d DCA 1971).

309 CONTRACT FORMATION — ACCEPTANCE

Both an offer and acceptance are required to create a contract. (Defendant) **contends that a contract was not created because the offer was never accepted. To establish acceptance of the offer,** (claimant) **must prove** (defendant) **communicated [his] [her] [its] agreement to the terms of the offer.**

[If (defendant) **agreed only to certain conditions, or if [he] [she] [it] introduced a new term into the bargain, then there was no acceptance.]**

NOTES ON USE FOR 309

1. Do not give this instruction unless the defendant has testified or offered other evidence in support of (his/her/its) contention.

2. This instruction assumes that the defendant has denied that he/she/it accepted claimant’s offer. Change the identities of the parties in the indented paragraphs if, under the facts of the case, the roles of the parties are switched (e.g., if defendant was the alleged offeror).

3. The general rule is that an acceptance is not valid, and thus is ineffective to form a contract, unless it is communicated to the offeror. *Kendel v. Pontious*, 261 So.2d 167, 169-70 (Fla. 1972). *See also Buell v. State*, 704 So.2d 552 (Fla. 4th DCA 1997) (recognizing that silence generally does not constitute acceptance).

310 CONTRACT FORMATION — ACCEPTANCE BY SILENCE OR CONDUCT

Ordinarily, if a party does not say or do anything in response to another party’s offer, then [he] [she] [it] has not accepted the offer. However, if (claimant) **proves that [both [he] [she] [it] and** (defendant) **understood silence or inaction to mean that the offer was accepted] [the benefits of the offer were accepted] [**(offeree) **had a legal duty to speak from a past relationship between** (claimant) **and** (defendant)**,** (claimant)**’s and** (defendant)**’s previous dealings, or** (identify other circumstances creating a legal duty to speak)**], then there was an acceptance.**

NOTES ON USE FOR 310

1. This instruction should be read in conjunction with and immediately after instruction 309, *Contract Formation–Acceptance* if acceptance by silence is an issue.

2. Pending further development of the law, the committee takes no position as to what "other circumstances" create a legal duty to speak. The committee does not consider the factors listed to be exclusive and, if the court determines that the jury may consider "other circumstances," the court should modify this instruction.

3. *Stevenson v. Stevenson*, 661 So.2d 367 (Fla. 4th DCA 1995) (citing RESTATEMENT (SECOND) OF CONTRACTS § 69 (2) and comment (e); *Scocozzo v. General Dev. Corp.*, 191 So.2d 572 (Fla. 1966).

4. Section 69 of the Restatement (Second) of Contracts states that if an offeree fails to reply to an offer, his or her silence and inaction operate as an acceptance in the following cases only:

(1) if an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation;

(2) if the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer; or

(3) if, because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he or she does not intend to accept.

5. An offeree's silent acceptance of benefits from the offeror constitutes acceptance. *Hendricks v. Stark*, 126 So. 293, 297 (Fla. 1930)("It has been repeatedly held that a person by the acceptance of benefits, may be estopped from questioning the validity and effect of a contract; and, where one has an election to ratify or disaffirm a conveyance, he can either claim under or against it, but he cannot do both, and having adopted one course with knowledge of the facts, he cannot afterwards pursue the other.").

313 MODIFICATION

(Claimant) **claims that the original contract was modified, or changed.** (Claimant) **must prove that the parties agreed to the modification.** (Defendant) **denies that the contract was modified.**

The parties to a contract may agree to modify its terms. You must decide whether a reasonable person would conclude from the words and conduct of (claimant) **and** (defendant) **that they agreed to modify the contract. You cannot consider the parties' hidden intentions.**

A contract in writing may be modified by a contract in writing, by a subsequent oral agreement between the parties, or by the parties' subsequent conduct [, if the modified agreement has been accepted and acted upon by the parties in such a manner as would work a fraud on either party to refuse to enforce it].

NOTES ON USE FOR 313

1. In *St. Joe Corporation v. McIver*, 875 So.2d 375, 381-382 (Fla. 2004) our supreme court said:

"It is well established that the parties to a contract can discharge or modify the contract, however made or evidenced, through a subsequent agreement."

"Whether the parties have validly modified a contract is usually a question of fact."

"A party cannot modify a contract unilaterally. All the parties whose rights or responsibilities the modification affects must consent."

The modification must be supported by proper consideration.

Under Florida law, the parties' subsequent conduct can modify the terms in a contract.

The parol evidence rule does not bar the introduction of evidence of a subsequent oral contract modifying a written agreement (citing *H.I. Resorts, Inc. v. Touchton*, 337 So.2d 854, 856 (Fla. 2d DCA 1976).

2. "A written contract or agreement may be altered or modified by an oral agreement if the latter has been accepted and acted upon by the parties in such a manner as would work a fraud on either party to refuse to enforce it ... . And oral modification under these circumstances is permissible even though there was in the written contract a provision prohibiting its alteration except in writing." *Professional Ins. Corp. v. Cahill*, 90 So.2d 916, 918 (Fla. 1956).

3. "[T]he actions of the parties may be considered as a means of determining the interpretation that they themselves have placed upon the contract." *Lalow v. Codomo*, 101 So.2d 390 (Fla. 1958).

4. "A written contract can be modified by subsequent oral agreement between the parties or by the parties' course of dealing ... Whether a written contract has been modified by subsequent oral agreement or by course of dealing is a question of fact for the jury." *Kiwanis Club of Little Havana, Inc. v. de Kalafe*, 723 So.2d 838, 841 (Fla. 3d DCA 1999).

314 INTERPRETATION — DISPUTED TERM(S)

(Claimant) **and** (defendant) **dispute the meaning of the following term(s) contained in their contract:** (*insert text of term(s)).*

(Claimant) **claims that the term(s) means:** (*insert claimant's interpretation of the term(s)*). (Defendant) **claims that the term(s) means:** (*insert defendant's interpretation of the term(s)*). (Claimant) **must prove that [his] [her] [its] interpretation of the term(s) is correct**.

In deciding what the term(s) of a contract mean, you must decide what the parties agreed to at the time the contract was created.

In order to determine what the parties agreed to, you should consider the plain and ordinary meaning of the language used in the contract as well as the circumstances surrounding the making of the contract. The agreement of the parties is determined only by what the parties said, wrote, or did. You may not consider the parties' thoughts or unspoken intentions.

Note: The following instruction should be given if the court is going to give additional instructions related to disputed term(s)).

[I will now instruct you on other methods that you should use in resolving the dispute over term(s) in the contract:]

NOTES ON USE FOR 314

1. *Use with Other Instructions.* Read any of the following instructions (as appropriate) on tools for interpretation (Nos. 315 through 320) after reading the last bracketed sentence. The instructions on interpretation (Nos. 315 through 320) are not exhaustive and the court may give any additional instruction on interpretation applicable to the facts and circumstances of the particular case provided it is supported by Florida law.

2. *When Instruction Should be Given.* The interpretation of a contract is normally a matter of law that is determined by the court. *Smith v. State Farm Mut. Auto. Ins. Co.*, 231 So.2d 193, 194 (Fla. 1970); *Strama v. Union Fidelity Life Ins. Co.*, 793 So.2d 1129, 1132 (Fla. 1st DCA 2001). Under certain circumstances, however, such as when the terms of a contract are ambiguous or susceptible to different interpretations, an issue of fact is presented which should be submitted to the jury. *First Nat'l Bank of Lake Park v. Gay*, 694 So.2d 784, 788 (Fla. 4th DCA 1997); *State Farm Fire & Cas. Co. v. De Londono*, 511 So.2d 604, 605 (Fla. 3d DCA 1987). "The initial determination of whether the contract term is ambiguous is a question of law for the court, and, if the facts of the case are not in dispute, the court will also be able to resolve the ambiguity as a matter of law." *Strama*, 793 So.2d at 1132; *Ellenwood v. Southern United Life Ins. Co.*, 373 So.2d 392, 394 (Fla. 1st DCA 1979).

3. *Agreement of the Parties.* In Florida, an objective test is used to determine the agreement of the parties. *Fivecoat v. Publix Super Markets, Inc*., 928 So.2d 402, 403 (Fla. 1st DCA 2006). The agreement of the parties "is ascertained from the language used in the instrument and the objects to be accomplished …." *Rylander v. Sears Roebuck & Co*., 302

So.2d 478, 479 (Fla. 3d DCA 1974); *Jones v. Treasure*, 984 So.2d 634, 638 (Fla. 4th DCA 2008). When determining the agreement of the parties, a court need not consider whether or not the parties reached a subjective meeting of the minds as to the terms of a contract. *Robbie v. City of Miami*, 469 So.2d 1384, 1385 (Fla. 1985). "The making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs – not on the parties having meant the same thing but on their having said the same thing." *Id*. (quoting *Gendzier v. Bielecki*, 97 So.2d 604, 608 (Fla. 1957)). Accordingly, the plain meaning of the language used by the parties controls as the best indication of the parties' agreement. *SPP Real Estate (Grand Bay), Inc. v. Portuondo, P.A.*, 756 So.2d 182, 184 (Fla. 3d DCA 2000). Thus, the terms in a contract should be interpreted in accordance with their plain and ordinary meaning. *Kel Homes, LLC, v. Burris*, 933 So.2d 699, 702 (Fla. 2d DCA 2006).

4. *Norms of Contractual Interpretation.* The norms of contractual interpretation may vary in certain areas of the law. For example, although the existence of an ambiguous contractual term typically creates an issue of fact as to the intent of the parties which should be resolved by the jury, this principle of law is not applicable to contracts between contractors and subcontractors with regard to risk-shifting provisions. *Dec Elec., Inc. v. Raphael Constr. Corp*., 558 So.2d 427, 428-29 (Fla. 1990). In such instances, the intention of the parties may be determined from the written contract as a matter of law because the nature of the transaction makes it appropriate for a court to resolve the apparent ambiguity. *Id.*"The reason is that the relationship between the parties is a common one and usually their intent will not differ from transaction to transaction, although it may be differently expressed." *Id*. at 429. The norms of contractual interpretation also do not apply to insurance contracts, as ambiguities are always to be construed against the insurer and in favor of coverage. *See, e.g.* Travelers Ins. Co. v. Smith, 328 So.2d 870 (Fla. 3d DCA 1976).

315 INTERPRETATION — MEANING OF ORDINARY WORDS

You should assume that the parties intended the disputed term(s) in their contract to have their plain and ordinary meaning, unless you decide that the parties intended the disputed term(s) to have another meaning.

NOTES ON USE FOR 315

1. This principle is well established under Florida law. *Hamilton Constr. Co. v. Bd. of Pub. Instruction of Dade Cnty.*, 65 So.2d 729 (Fla. 1953); *Langley v. Owens*, 42 So. 457 (Fla. 1906); *Winn-Dixie Stores, Inc. v. 99 Cent Stuff-Trial Plaza, LLC,* 811 So.2d 719 (Fla. 3d DCA 2002); *Institutional & Supermarket Equipment, Inc v. C&S Refrigeration, Inc*., 609 So.2d 66 (Fla. 4th DCA 1992); *Bingemann v. Bingemann*, 551 So.2d 1228 (Fla. 1st DCA 1989).

2. The term(s) "plain and ordinary" is used throughout the charge to describe the meaning of words. Plain and ordinary meaning is often described as the meaning of words as found in the dictionary. *See Beans v. Chohonis*, 740 So.2d 65 (Fla. 3d DCA 1999). Also, plain and ordinary meaning is the natural meaning that is most commonly understood in relation to the

subject matter and circumstances of the case. *See Sheldon v. Tiernan*, 147 So.2d 167 (Fla. 2d DCA 1962).

3. The Committee found no distinction between the phrases "usual and customary" and "plain and ordinary" as those phrases are used in case law. The Committee chooses to use the phrase "plain and ordinary" in the instruction because the phrase is more commonly used.

316 INTERPRETATION — MEANING OF DISPUTED TECHNICAL OR SPECIAL WORDS

Disputed term(s) in the contract should be given the meaning used by people in that trade, business, or technical field unless the parties agree that the disputed term(s) should have another meaning.

NOTES ON USE FOR 316

1. Contractual terms should be construed in accordance with their plain and ordinary meaning unless the parties intended the contractual terms to have a different or special meaning. *Madson v. Madson*, 636 So.2d 759, 760 (Fla. 2d DCA 1994).

2. Contracts may be written in light of established custom or trade usage in an industry, and contracts involving such transactions should be interpreted in light of such custom or trade usage. The responsibility for determining trade usage is customarily one for the jury. *Fred S. Conrad Construction Co. v. Exchange Bank of St. Augustine*, 178 So.2d 217 (Fla. 1st DCA 1965).

3. Extrinsic evidence may be admitted to explain technical terminology even if the contract is unambiguous. *NCP Lake Power, Inc. v. Florida Power Corp.*, 781 So.2d 531 (Fla. 5th DCA 2001).

4. A jury determines the meaning of words in contracts that are ambiguous, incomplete or use technical terms(s) of art. *Russel & Axon v. Handshoe*, 176 So.2d 909, 917 (Fla. 1st DCA 1965) (Sturgis, J., dissenting).

5. Evidence showing the meaning of technical terms is not an exception to the parol evidence rule because it does not vary or contradict the written instrument, but merely places the fact finder in the position of the parties when the contract was made. *Southeast Banks Trust Co., N.A. v. Higginbotham Chevrolet-Oldsmobile, Inc.*, 445 So.2d 347, 348-39 (Fla. 5th DCA 1984).

317 INTERPRETATION — CONSTRUCTION OF CONTRACT AS A WHOLE

In deciding what the disputed term(s) of the contract mean, you should consider the whole contract, not just isolated parts. You should use each part to help you interpret the others, so that all the parts make sense when taken together.

NOTES ON USE FOR 317

1. "In reviewing the contract in an attempt to determine its true meaning, the court must review the entire contract without fragmenting any segment or portion." *J.C. Penney Co., Inc. v. Koff*, 345 So.2d 732, 735 (Fla. 4th DCA 1977).

2. Every provision in a contract should be given meaning and effect and apparent inconsistencies reconciled if possible. *Excelsior Ins. Co. v. Pomana Park Bar & Package Store*, 369 So.2d 938, 941 (Fla. 1979); *Royal Am. Realty, Inc. v. Bank of Palm Beach & Trust Company*, 215 So.2d 336 (Fla. 4th DCA 1968); *Transport Rental Systems, Inc. v. Hertz Corp.*, 129 So.2d 454 (Fla. 3d DCA 1961).

3. "We rely upon the rule of construction requiring courts to read provisions of a contract harmoniously in order to give effect to all portions thereof." *Sugar Cane Growers Cooperative of Fla., Inc. v. Pinnock*, 735 So.2d 530, 535 (Fla. 4th DCA 1999) (holding contracts should be interpreted to give effect to all provisions); *Paddock v. Bay Concrete Indus., Inc.*, 154 So.2d 313, 315 (Fla. 2d DCA 1963) ("All the various provisions of a contract must be so construed, if it can reasonably be done, as to give effect to each."); *City of Homestead v. Johnson*, 760 So.2d 80, 84 (Fla. 2000).

318 INTERPRETATION — CONSTRUCTION BY CONDUCT

In deciding what the disputed term(s) of the contract mean, you should consider how the parties acted before and after the contract was created.

NOTE ON USE FOR 318

In the face of ambiguity on an issue, a jury is free to look at the subsequent conduct of the parties to determine the parties' intent and the contract's meaning: "Where an agreement is ambiguous, the meaning of the agreement may be ascertained by looking to the interpretation the parties have given the agreement and the parties' conduct throughout their course of dealings." *Rafael J. Roca, P.A. v. Lytal, Reiter, Clark, Roca, Fountain & Williams*, 856 So.2d 1, 5 (Fla. 4th DCA 2003). *See also Mayflower Corp. v. Davis*, 655 So.2d 1134, 1137 (Fla. 1st DCA 1994). The instruction's use of the word "should" as opposed to "may" arises out of the more mandatory language found in earlier authority upon which *Roca* relies. *See Blackhawk Heating and Plumbing, Inc. v. Data Lease Financial Corp.*, 302 So.2d 404, 407 (Fla. 1974).

319 INTERPRETATION — REASONABLE TIME

If a contract does not state a specific time within which a party is to perform a requirement of the contract, then the party must perform the requirement within a

reasonable time. What is a reasonable time depends on the facts of each case, including the subject matter and purpose of the contract and the expressed intent of the parties at the time they entered into the contract.

NOTES ON USE FOR 319

1. Whenever a contract fails to provide a specific time for performance, the law implies a reasonable time for performance. *Patrick v. Kirkland*, 43 So. 969, 971 (Fla. 1907); *De Cespedes v. Bolanos*, 711 So.2d 216, 218 (Fla. 3d DCA 1998); *Fleming v. Burbach Radio, Inc*., 377 So.2d 723, 724 (Fla. 4th DCA 1980).

2. The decision of what constitutes a reasonable time for performance is ordinarily a question of fact for the jury or fact-finder. *L.P. Sims v. Am. Hardware Mut. Ins. Co.*, 429 So.2d 21, 22 (Fla. 2d DCA 1982).

3. The determination of what constitutes a reasonable time for performance depends on the facts of each case, such as the subject matter of the contract, the situation of the parties, and the parties' agreement when they entered into the contract. *Sound City, Inc. v. Kessler*, 316 So.2d 315, 317 (Fla. 1st DCA 1975). *See also Cocoa Props., Inc. v. Commonwealth Land Title Ins. Co*., 590 So.2d 989, 991 (Fla. 2d DCA 1991); *Sharp v. Machry*, 488 So.2d 133, 137 (Fla. 2d DCA 1986).

320 INTERPRETATION — CONSTRUCTION AGAINST DRAFTER

You must first attempt to determine the meaning of the ambiguous term(s) in the contract from the evidence presented and the previous instructions. If you cannot do so, only then should you consider who drafted the disputed term(s) in the contract and then construe the language against the party who drafted the ambiguous term(s).

NOTES ON USE FOR 320

1. *Introduction*. The existence of this interpretation principle is well established. "An ambiguous term in a contract is to be construed against the drafter." *City of Homestead v. Johnson*, 760 So.2d 80, 84 (Fla. 2000). "Generally, ambiguities are construed against the drafter of the instrument." *Hurt v. Leatherby Ins. Co.*, 380 So.2d 432, 434 (Fla. 1980). "[A] provision in a contract will be construed most strongly against the party who drafted it …" *SOL Walker & Co. v. Seaboard Coast Line R.R. Co.*, 362 So.2d 45, 49 (Fla. 2d DCA 1978). Where the language of contract is ambiguous or doubtful, it should be construed against the party who drew the contract and chose the wording. *Vienneau v. Metropolitan Life Ins. Co.*, 548 So.2d 856 (Fla. 4th DCA 1989); *Am. Agronomics Corp. v. Ross*, 309 So.2d 582 (Fla. 3d DCA 1975). "To the extent any ambiguity exists in the interpretation of [a] contract, it will be strictly construed against the drafter." *Goodwin v. Blu Murray Ins. Agency, Inc.*, 939 So.2d 1098 (Fla. 5th DCA 2006); *Russell v. Gill*, 715 So.2d 1114 (Fla. 1st DCA 1998).

2. *Drafter*. If only one party drafted a contract, then the jury should consider that party to be the drafter in the context of this instruction. However, if more than one party contributed to drafting a contract, provision, or term, then the jury should consider the drafter to be the party that actually chose the wording at issue. *Finberg v. Herald Fire Ins. Co*., 455 So.2d 462 (Fla. 3d DCA 1984); *Bacon v. Karr*, 139 So.2d 166 (Fla. 2d DCA 1962). An additional tool the jury can utilize to determine who is the drafter is they can interpret the language at issue against the person who the language benefits. *Belen School, Inc. v. Higgins*, 462 So.2d 1151 (Fla. 4th DCA 1984); *Watson v. Poe*, 203 So.2d 14 (Fla. 4th DCA 1967).

3. *Secondary Rule of Interpretation*. This instruction endeavors to explain to the jury that this principle should be secondary to the consideration of other means of interpretation, principally the consideration of parol evidence that may explain the parties' intent at the time they entered into the contract. *See W. Yellow Pine Co. v. Sinclair*, 90 So. 828, 831 (Fla. 1922) (holding that the rule to construe against the drafter should not be used if other rules of construction reach the intent of the parties); *The School Bd. of Broward Cnty. v. The Great Am. Ins. Co.*, 807 So.2d 750 (Fla. 4th DCA 2002) (stating that the rule to construe against the drafter is a secondary rule of interpretation and should be used as a last resort when all ordinary interpretive guides have been exhausted); *DSL Internet Corp. v. Tigerdirect, Inc*., 907 So.2d 1203, 1205 (Fla. 3d DCA 2005) (holding that the against-the-drafter rule is a rule of last resort and is inapplicable if there is evidence of the parties' intent). There is a risk that the jury may place too much emphasis on this rule, to the exclusion of evidence and other approaches; therefore, this instruction should be given with caution.

4. *Contrary Contract Provision or Statute*. The Committee has been unable to find case law authority applying this principle when the contract contains language stating the contract will not be interpreted against the drafter. If the contract at issue or an applicable statute provides that the contract will not be construed against the drafter, the Committee would suggest that this be taken into consideration before this instruction is used, particularly given the secondary rule of interpretation principle expressed in the preceding paragraph and established Florida law that every provision in a contract should be given meaning and effect. *See Excelsior Ins. Co. v. Pomona Park Bar & Package Store*, 369 So.2d 938, 941 (Fla. 1979) (holding that every provision in a contract should be given meaning); *see also* section 542.335(1)(h), Florida Statutes (providing an example in the context of not construing a restrictive covenant against the drafter).

5. *Use of Verdict Form.* The Committee strongly recommends the use of this instruction in connection with a verdict form that clarifies, by special interrogatory, what the term or phrase is that the Court has declared to be ambiguous. *See First Nat'l Bank of Lake Park v. Gay*, 694 So.2d 784, 789 (Fla. 4th DCA 1997) (discussing that interrogatory verdict forms should track the same issues and defenses in the jury instructions).

321 EXISTENCE OF CONDITIONS PRECEDENT DISPUTED

(Defendant) **claims that the contract with** (claimant) **provides that [he] [she] [it] was not required to** (insert duty) **unless** (insert condition precedent).

(Defendant) **must prove that the parties agreed to this condition. If** (defendant) **proves this, then** (claimant) **must prove that** (insert condition precedent) **[was performed] [occurred] [was waived].**

If (claimant) **does not prove that** (insert condition precedent) **[was performed] [occurred] [was waived]**, **then** (defendant) **was not required to** (insert duty).

NOTES ON USE FOR 321

1. This instruction should be given only where both the existence and the occurrence of a condition precedent are contested. If only the occurrence of a condition precedent is contested, use Instruction 322 Occurrence of Agreed Condition Precedent.

2. "A condition precedent is an act or event, other than a lapse of time, that must occur before a binding contract will arise. … A condition may be either a condition precedent to the formation of a contract or a condition precedent to performance under an existing contract." *Mitchell v. DiMare*, 936 So.2d 1178, 1180 (Fla. 5th DCA 2006).

3. "Provisions of a contract will only be considered conditions precedent or subsequent where the *express* wording of the disputed provision conditions formation of a contract and or performance of the contract on the completion of the conditions." *Gunderson v. Sch. Dist. of Hillsborough Cnty.*, 937 So.2d 777, 779 (Fla. 1st DCA 2006); *see also Raban v. Federal Express*, 13 So.3d 140 (Fla. 1st DCA 2009).

4. In pleading, the performance or occurrence of a condition precedent may be alleged generally, but a denial of the performance or occurrence of a condition precedent *shall* be made specifically and with particularity. Rule 1.120(c), Fla. R. Civ. P. However, once

322 OCCURRENCE OF AGREED CONDITION PRECEDENT

The parties agreed in their contract that (defendant) **would not have to** (insert duty) **unless** (insert condition precedent)**.** (Defendant) **contends that this condition did not occur and that [he] [she] [it] did not have to** (insert duty)**. To overcome this contention,** (claimant) **must prove that** (insert condition precedent) **[was performed] [occurred] [was waived].**

If (claimant) **does not prove that** (insert condition precedent) **[was performed] [occurred] [was waived], then** (defendant) **was not required to** (insert duty)**.**

NOTES ON USE FOR 322

1. If both the existence and the occurrence of a condition precedent are contested, use instruction 321.

2. In pleading, the performance or occurrence of a condition precedent may be alleged generally, but a denial of the performance or occurrence of a condition precedent *shall* be made specifically and with particularity. Fla. R. Civ. P. 1.120(c). When a plaintiff alleges generally the occurrence of a condition precedent, and the defendant fails to deny the occurrence with particularity, then the defendant has no right to demand proof from the plaintiff of the occurrence of such condition. *See Cooke v. Ins. Co. of N. Am.*, 652 So.2d 1154 (Fla. 2d DCA 1995); *Scarborough Assocs. v. Financial Federal Savings & Loan Ass'n of Dade Cnty.*, 647 So.2d 1001 (Fla. 3d DCA 1994).

APPENDIX C

December 15, 2011 Florida Bar News

Proposed Standard Jury Instructions — Contract and Business Cases

The Supreme Court Committee on Standard Jury Instructions — Contract and Business Cases invites all interested persons to comment on the proposed new instructions below. Comments must be received by the Committee on or before January 15, 2011. All comments received will be reviewed by the Committee at its next meeting. Revisions to the proposed instructions may be made based upon comments received. Upon final approval of the instructions, the Committee will make a recommendation to the Florida Supreme Court. E-mail your comments in the format of a Word document to Judge Jonathan D. Gerber, Committee Chair, at gerberj@flcourts.org, with a copy to the Committee liaison, Jodi Jennings, at jjenning@flabar.org.

325 BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

In the contract in this case, there is an implied promise of good faith and fair dealing. This means that neither party will do anything to unfairly interfere with the right of any other party to the contract to receive the contract's benefits; however, the implied promise of good faith and fair dealing cannot create obligations that are inconsistent with the contract's terms. (Claimant) **contends that** (defendant) **violated the duty to act in good faith and fairly under [a] specific part[s] of the contract. To establish this claim,** (claimant) **must prove all of the following:**

1. (Claimant) **and** (defendant) **entered into a contract;**

2. (Claimant) **did all, or substantially all, of the significant things that the contract required [him] [her] [it] to do [or that [he] [she] [it] was excused from having to do those things];**

3. All conditions required for (defendant's) **performance had occurred;**

4. (Defendant's) **actions [or omissions] unfairly interfered with** (claimant's) **receipt of the contract's benefits;**

5. (Defendant's) **conduct did not comport with** (claimant's) **reasonable contractual expectations under [a] specific part(s) of the contract; and**

6. (Claimant) **was harmed by** (defendant's) **conduct.**

NOTES ON USE

1. The question of whether a particular contract is one in which an implied covenant of good faith and fair dealing applies is a question for the trial court to answer in the first instance.

2. The implied covenant of good faith and fair dealing exists in virtually all contractual relationships. *Sepe v. City of Safety Harbor*, 761 So.2d 1182 (Fla. 2d DCA 2000); *see also County of Brevard v. Miorelli Eng'g, Inc.*, 703 So.2d 1049 (Fla. 1997); RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).

3. The purpose of the implied covenant of good faith is "to protect the reasonable expectations of the contracting parties." *Cox v. CSX Intermodal, Inc.*, 732 So.2d 1092, 1097 (Fla. 1st DCA 1999); *Ins. Concepts & Design, Inc. v. Healthplan Services, Inc.*, 785 So.2d 1232, 1234-35 (Fla. 4th DCA 2001).

4. The implied covenant of good faith "is a gap filling default rule" which comes into play "when a question is not resolved by the terms of the contract or when one party has the power to make a discretionary decision without defined standards." *Speedway Superamerica, LLC v. Tropic Enterprises, Inc.*, 966 So.2d 1, 3, n.2 (Fla. 1st DCA 2007); *see also Cox*, 732 So.2d at 1097.

5. "[B]ecause the implied covenant is not a stated contractual term, to operate it attaches to the performance of a specific or express contractual provision." *Snow v. Ruden, McClosky, Smith, Schuster & Russell, P.A.*, 896 So.2d 787, 792 (Fla. 2d DCA 2005).

6. The implied covenant of good faith cannot override an express contractual provision. *Snow*, 896 So.2d at 791-92 ; *see also Ins. Concepts*, 785 So.2d at 1234.

7. "The implied obligation of good faith cannot be used to vary the terms of an express contract." *City of Riviera Beach v. John's Towing*, 691 So.2d 519, 521 (Fla. 4th DCA 1997); *see also Ins. Concepts*, 785 So.2d at 1234-35 ("Allowing a claim for breach of the implied covenant of good faith and fair dealing 'where no enforceable executory contractual obligation' remains would add an obligation to the contract that was not negotiated by the parties.") (citations omitted).

8. Good faith means honesty, in fact, in the conduct of contractual relations. *Burger King Corp. v. C.R. Weaver*, 169 F.3d 1310, 1315 (11th Cir. 1999), citing *Harrison Land Dev. Inc. v. R & H Holding Co.*, 518 So.2d 353, 355 (Fla. 4th DCA 1988); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981).

335(a) AFFIRMATIVE DEFENSE – FRAUD

To establish the defense of fraud, (defendant) **must prove all of the following:**

1. (Claimant) **represented that** (insert alleged fraudulent statement) **and that representation was material to the transaction;**

2. (Claimant) **knew that the representation was false;**

3. (Claimant) **made the representation to persuade** (defendant) **to agree to the contract;**

4. (Defendant) **relied on the representation; and**

5. (Defendant) **would not have agreed to the contract if [he] [she] [it] had known that the representation was false.**

On this defense, (Defendant) **may rely on a false statement, even though its falsity could have been discovered if** (defendant) **had made an investigation. However,** (defendant) **may not rely on a false statement if [he] [she] [it] knew it was false or its falsity was obvious to [him] [her] [it]. In making this determination, you should consider the totality of the circumstances surrounding the type of information transmitted, the nature of the communication between the parties, and the relative positions of the parties.**

NOTES ON USE

1. Fraud must be pled as an affirmative defense or it is waived. *Cocoves v. Campbell,* 819 So.2d 910 (Fla. 4th DCA 2002); *Peninsular Fla. Dist. Council of Assemblies of God v. Pan Am. Inv. & Dev. Corp*., 450 So.2d 1231, 1232 (Fla. 4th DCA 1984); *Ash Chem., Inc. v. Dep't of Envtl. Regulation,* 706 So.2d 362, 363 (Fla. 5th DCA 1998).

2. In order to raise an affirmative defense of fraud, the "pertinent facts and circumstances constituting fraud must be pled with specificity, and all the essential elements of fraudulent conduct must be stated." *Zikofsky v. Robby Vapor Systems, Inc*., 846 So.2d 684, 684 (Fla. 4th DCA 2003) (citation omitted).

3. The party seeking to use the defense of fraud must specifically identify misrepresentations or omissions of fact. *Cocoves v. Campbell,* 819 So.2d 910 (Fla. 4th DCA 2002).

4. Fraud must be pled with particularity. *Cocoves v. Campbell,* 819 So.2d 910 (Fla. 4th DCA 2002); *Thompson v. Bank of New York,* 862 So.2d 768 (Fla. 4th DCA 2003).

5. Mere statements of opinion are insufficient to constitute the defense of fraud. *Thompson v. Bank of New York,* 862 So.2d 768 (Fla. 4th DCA 2003); *Carefree Vills. Inc. v. Keating Props., Inc.*, 489 So.2d 99, 102 (Fla. 2d DCA 1986).

6. The elements of fraudulent misrepresentation are: "(1) a false statement concerning a material fact; (2) the representor's knowledge that the representation is false; (3) an intention that the representation induce another to act on it; and (4) consequent injury by the party acting in *reliance* on the representation." *Butler v. Yusem,* 44 So. 3d 102, 105 (Fla. 2010).

7. "Justifiable reliance is not a necessary element of fraudulent misrepresentation." *Butler v. Yusem*, 44 So. 3d 102, 105 (Fla. 2010).

335(b) AFFIRMATIVE DEFENSE – NEGLIGENT MISREPRESENTATION

The committee recognizes that some authority exists suggesting that negligent misrepresentation can be asserted as an affirmative defense to a breach of contract claim. *See Rocky Creek Retirement Properties, Inc. v. Estate of Fox ex rel. Bank of Am., N.A.*, 19 So.3d 1105 (Fla. 2d DCA 2009). However, the law supporting this defense has not been sufficiently developed to enable the committee to propose an instruction on this defense. Pending further development in the law, the committee takes no position on this issue.

336 AFFIRMATIVE DEFENSE – WAIVER

(Defendant) **claims that [he] [she] [it] did not have to** (insert description of performance) **because** (claimant) **gave up [his] [her] [its] right to have** (defendant) **perform [this] [these] obligation[s]. This is called a "waiver."**

To establish this defense, (defendant) **must prove all of the following:**

1. (Claimant's) **right to have** (defendant) (insert description of performance) **actually existed**;

2. (Claimant) **knew or should have known [he] [she] [it] had the right to have** (defendant) (insert description of performance); **and**

3. (Claimant) **freely and intentionally gave up [his] [her] [its] right to have** (defendant) (insert description of performance).

A waiver may be oral or written or may arise from conduct which shows that (claimant) **gave up that right.**

If (defendant) **proves that** (claimant) **gave up [his] [her] [its] right to have** (defendant) (insert description of performance), **then** (defendant) **was not required to perform [this] [these] obligation[s].**

NOTES ON USE

1. "Waiver" is the voluntary and intentional relinquishment of a known right. *Raymond James Fin. Servs., Inc. v. Saldukas*, 896 So.2d 707, 711 (Fla. 2005); *Bueno v. Workman*, 20 So.3d 993 (Fla. 4th DCA 2009); *Winans v. Weber*, 979 So.2d 269 (Fla. 2d DCA 2007).

2. The elements necessary to establish waiver are: the existence of a right, privilege, or advantage; the actual or constructive knowledge thereof; and an intention to relinquish that right, privilege, or advantage. *Bueno v. Workman*, 20 So.3d 993 (Fla. 4th DCA 2009); *Winans v. Weber*, 979 So.2d 269 (Fla. 2d DCA 2007).

3. There can be no waiver if the party against whom the waiver is invoked did not know all of the material facts, or was misled about the material facts. *Winans v. Weber*, 979 So.2d 269

(Fla. 2d DCA 2007); *L.R. v. Dep't of Children & Families*, 822 So.2d 527, 530 (Fla. 4th DCA 2002).

4. Proof of the elements of waiver may be express or implied from conduct or acts that lead a party to believe a right has been waived. *Raymond James Fin. Servs., Inc. v. Saldukas*, 896 So.2d 707, 711 (Fla. 2005); *LeNeve v. Via S. Fla., L.L.C.*, 908 So.2d 530, 535 (Fla. 4th DCA 2005).

337 AFFIRMATIVE DEFENSE – NOVATION

To establish the defense of novation, (defendant) must prove that all parties agreed, by words or conduct, to cancel the original contract and to substitute a new contract in its place.

NOTES ON USE

If necessary, Instruction 302 (Contract Formation – Essential Factual Elements) should be read in whole or in part at this point to address the issue of formation of the new contract.

350 INTRODUCTION TO CONTRACT DAMAGES

If you find for (defendant)**, you will not consider the matter of damages. But, if you find for** (claimant)**, you should award** (claimant) **an amount of money that the greater weight of the evidence shows will fairly and adequately compensate** (claimant) **for [his] [her] [its] damages. You shall consider the following type(s) of damages:**

351 BREACH OF CONTRACT DAMAGES

a. Compensatory damages:

Compensatory damages is that amount of money which will put (claimant) **in as good a position as [he] [she] [it] would have been if** (defendant) **had not breached the contract and which naturally result from the breach.**

NOTES ON USE

1. *Capitol Environmental Svcs., Inc. v. Earth Tech, Inc.*, 25 So.3d 593, 596 (Fla. 1st DCA 2009) ("It is well-settled that the injured party in a breach of contract action is entitled to recover monetary damages that will put it in the same position it would have been had the other party not breached the contract.").

2. *Sharick v. Se. University of the Health Sciences, Inc.*, 780 So.2d 136, 139 (Fla. 3d DCA 2000) ("Damages recoverable by a party injured by a breach of contract are those which would naturally result from the breach and can reasonably be said to have been contemplated by the parties at the time the contract was made.").

b. Special damages:

Special damages is that amount of money which will compensate (claimant) **for those damages which do not normally result from the breach of contract. To recover special damages,** (claimant) **must prove that when the parties made the contract,** (defendant) **knew or reasonably should have known of the special circumstances leading to such damages**.

NOTES ON USE

1. *Land Title of Central Fla., LLC v. Jimenez*, 946 So.2d 90, 93 (Fla. 5th DCA 2006) ("Special damages are those that do not *necessarily* result from the wrong or breach of contract complained of, or which the law does not imply as a result of that injury, even though they might naturally and proximately result from the injury. More succinctly, special damages are damages that do not follow by implication of law merely upon proof of the breach.") (citations omitted).

2. *Hardwick Properties, Inc. v. Newbern*, 711 So.2d 35, 40 (Fla. 1st DCA 1998) ("[S]pecial damages are not likely to occur in the usual course of events, but may reasonably be supposed to have been in contemplation of the parties at the time they made the contract. Special damages consist of items of loss which are peculiar to the party against whom the breach was committed and would not be expected to occur regularly to others in similar circumstances.") (citation and internal quotations omitted).

3. *Hardwick*, 711 So.2d at 40 ("Similarly, consequential damages do not arise within the scope of the immediate buyer-seller transaction, but rather stem from losses incurred by the non-breaching party in its dealings, often with third parties, which were a proximate result of the breach, and which were reasonably foreseeable by the breaching party at the time of contracting.") (citation and internal quotations omitted).

4. *Lanzalotti v. Cohen*, 113 So.2d 727, 731 (Fla. 3d DCA 1959) ("Recovery may include special damages which are reasonably and necessarily incurred as a proximate result of the failure of the lessor or sublessor to perform his contract to make a lease or sublease, and such as should reasonably have been contemplated by the parties.").

5. *Fla. E. Coast Railway Co. v. Peters*, 83 So. 559, 563 (Fla. 1919) ("If the owner of the goods would charge the carrier with any special damages, he must have communicated to the carrier all the facts and circumstances of the case which do not ordinarily attend the carriage or the particular character and value of the property carried, for otherwise such peculiar circumstances cannot be contemplated by the carrier.") (citation omitted).

352 LOST PROFITS

To be entitled to recover lost profits, (claimant) **must prove both of the following:**

1. (Defendant's) **actions caused** (claimant) **to lose profits; and**

2. (Claimant) **can establish the amount of [his] [her] [its] lost profits with reasonable certainty.**

For (claimant) **to establish the amount of [his] [her] [its] lost profits with reasonable certainty, [he] [she] [it] must prove that a reasonable person would be satisfied that the amount of lost profits which [he] [she] [it] may be entitled to recover is not simply the result of speculation or guessing. Instead,** (claimant) **must prove that there is some standard by which the amount of lost profits may be established.** (Claimant) **does not have to be able to prove that the amount of lost profits can be calculated with mathematical precision as long as [he] [she] [it] has shown there is a reasonable basis for determining the amount of the loss.**

[Even though (claimant's) **business is not established or does not have a "track record," [he] [she] [it] still may be able to establish the amount of lost profits which [he] [she] [it] may be entitled to recover if [he] [she] [it] proves that there is some standard by which the amount of lost profits may be established.]**

NOTE ON USE

Provide the bracketed language if the claimant's business is not established or does not have a "track record."

SOURCES AND AUTHORITY

1. *River Bridge Corp. v. Am. Somax Ventures ex rel. Am. Home Dev. Corp.*, 18 So.3d 648, 650 (Fla. 4th DCA 2009) ("When a party seeks lost future profits based upon a breach of contract or other wrong, the party must prove that the lost profits were a direct result of the defendant's actions and that the amount of the lost profits can be established with reasonable certainty.") (citation and internal quotations omitted).

2. *Levitt-ANSCA Towne Park P'ship v. Smith & Co.*, 873 So.2d 392, 396 (Fla. 4th DCA 2004) ("Lost profits must be proven with a reasonable degree of certainty before they are recoverable. The mind of a prudent impartial person should be satisfied that the damages are not the result of speculation or conjecture.") (citation and internal quotations omitted).

3. *Marshall Auto Painting & Collision, Inc. v. Westco Eng'g, Inc.*, 2003 WL 25668018 n.7 (M.D. Fla. 2003) ("[T]he Florida Supreme Court has stated that a business can recover lost prospective profits [if] … there is *some standard* by which the amount of the damages may be adequately determined… . The requisite … allowance [for lost profits] is *some standard*, such as regular market values, or other established data, by reference to which the amount may be satisfactorily established.") (citations and internal quotation marks omitted).

4. *W.W. Gay Mechanical Contractor, Inc. v. Wharfside Two, Ltd.*, 545 So.2d 1348, 1351 (Fla. 1989) ("A business can recover lost prospective profits regardless of whether it is established or has any 'track record.' The party must prove that 1) the defendant's action caused the damage and 2) there is some standard by which the amount of damages may be adequately determined.").

354 OWNER'S DAMAGES FOR BREACH OF CONTRACT TO CONSTRUCT IMPROVEMENTS ON REAL PROPERTY

The amount of damages recoverable for breach of a contract to construct improvements on real property is:

a. In cases where the defendant does not contend that the damages claimed by the claimant constitute unreasonable economic waste:

The reasonable cost to (claimant) **of completing the work in accordance with the contract less the balance due under the contract.**

b. In cases where the defendant contends that the damages claimed by the claimant constitute unreasonable economic waste:

If construction and completion in accordance with the contract would not involve unreasonable economic waste, the reasonable cost to (claimant) **of completing the work in accordance with the contract less the balance due under the contract;**

or

If construction and completion in accordance with the contract would involve unreasonable economic waste, the difference between the fair market value of (claimant's) **real property as improved and its fair market value if** (defendant) **had constructed the improvements in accordance with the contract, measured at the time of the breach.**

NOTES ON USE

1. In *Grossman Holdings Ltd. v. Hourihan*, 414 So.2d 1037, 1039 (Fla. 1982), the Florida Supreme Court adopted Section 346 of the Restatement (First) of Contracts (1932), which provides, in relevant part:

> For a breach by one who has contracted to construct a specified product, the other party can get judgment for compensatory damages for all unavoidable harm that the builder had reason to foresee when the contract was made, less such part of the contract price as has not been paid and is not still payable, determined as follows:
>
> (a) For defective or unfinished construction he can get judgment for either

(i) the reasonable cost of construction and completion in accordance with the contract, if this is possible and does not involve unreasonable economic waste; or

(ii) the difference between the value that the product contracted for would have had and the value of the performance that has been received by the plaintiff, if construction and completion in accordance with the contract would involve unreasonable economic waste.

2. *Heine v. Parent Construction, Inc.*, 4 So.3d 790, 792 (Fla. 4th DCA 2009) ("The [Florida] [S]upreme [C]ourt ... adopted section 346(1)(a) of the Restatement (First) of Contracts (1932) as the law for the measure of damages in a claim for breach of a construction contract.").

3. *Centex-Rooney Construction Co. v. Martin Cnty.*, 706 So.2d 20, 27 (Fla. 4th DCA 1997) ("In a case involving the breach of a construction contract, a recognized measure of damages is the reasonable cost of performing construction and repairs in conformance with the original contract's requirements.").

355 OBLIGATION TO PAY MONEY ONLY

To recover damages for the breach of a contract to pay money, (claimant) **must prove the amount due under the contract.**

NOTES ON USE

See Murciano v. Garcia, 958 So.2d 423, 423 (Fla. 3d DCA 2007) ("[T]o prevail on a breach of contract action, [a plaintiff] must prove (1) a valid contract; (2) a material breach; and (3) damages.").

356 BUYER'S DAMAGES FOR BREACH OF CONTRACT FOR SALE OF REAL PROPERTY

To recover damages for the breach of a contract to sell real property, (claimant) **must prove that [he] [she] [it] was ready, willing, and able to perform the contract.**

If (claimant) **proves that [he] [she] [it] was ready, willing, and able to perform the contract, then** (claimant) **may recover:**

1. The amount of any payment made by (claimant) **toward the purchase price; and**

2. The amount of any reasonable expenses for examining title.

If (claimant) **also proves that** (defendant) **acted in bad faith in breaching the contract or that** (defendant) **sold the property to a third-party after entering into the contract, then** (claimant) **also may recover the difference between the fair market value of the property on the date of the breach and the contract price.**

NOTES ON USE

1. In *Gassner v. Lockett*, 101 So.2d 33, 34 (Fla. 1958), the Florida Supreme Court, quoting *Key v. Alexander*, 108 So. 883, 885 (Fla. 1926), stated (emphasis and internal quotations omitted):

> The law is well settled that in an action brought by the vendee against the vendor upon a valid contract for the sale of land when the vendor has breached such contract, the general rule as to the measure of damages is that the vendee is entitled to such purchase money as he paid, together with interest and expenses of investigating title. This rule, however, does not apply where there is a want of good faith in the vendor, which may be shown by any acts inconsistent with the utmost good faith. In such cases, or in cases where the vendor had no title but acting on the supposition that he might acquire title, he is liable for the value of the land at the time of the breach with interest from that date ... .
>
> The reason for the rule seems to be that where a vendor acts in good faith he should not be liable for more than the actual loss which might be suffered by the vendee. On the other hand, there is no reason why the vendor should be allowed to benefit from such mistake even though it was made in good faith. Every rule of logic and justice would seem to indicate that where a vendor is unable to perform a prior contract for the sale of lands because of a subsequent sale of the same land, he should be held, to the extent of any profit in the subsequent sale, to be a trustee for the prior vendee and accountable to such vendee for any profit.

2. *Wolofsky v. Behrman*, 454 So.2d 614, 615 (Fla. 4th DCA 1984) ("Florida has long since aligned itself with the English rule announced in *Flureau v. Thornhill*, 2 W.Bl. 1078, 96 Eng.Rep. 635, to the effect that, except where a vendor has acted in bad faith, his liability for breach of a land sale contract is limited to the amount of the deposit paid by the purchaser, with interest and reimbursement for expenses in investigating title to the property. However, absent good faith, he is liable for full compensatory damages, including the loss of his bargain, which is the difference between the value of the property and the contract price.").

3. *Horton v. O'Rourke*, 321 So.2d 612, 613 (Fla. 2d DCA 1975) ("[I]n the absence of bad faith the damages recoverable for breach by the vendor of an executory contract to convey title to real estate are the purchase money paid by the purchaser together with interest and expenses of investigating title.").

4. *Port Largo Club, Inc. v. Warren*, 476 So.2d 1330, 1333 (Fla. 3d DCA 1985) ("Where bad faith exists a purchaser may obtain, as a portion of his full compensatory damages, loss of bargain damages, *i.e.*, the difference between the contract price and the value of the property on the closing date.").

5. *Bosso v. Neuner*, 426 So.2d 1209, 1212 (Fla. 4th DCA 1983) ("However, where bad faith

exists the purchaser may obtain loss of bargain damages which is the difference in value between the price the purchaser had agreed to pay and the value of the property on the contracted date for closing.").

6. *Coppola Enterprises, Inc. v. Alfone*, 531 So.2d 334, 335-36 (Fla. 1988) ("A seller will not be permitted to profit from his breach of a contract with a buyer, even absent proof of fraud or bad faith, when the breach is followed by a sale of the land to a subsequent purchaser.").

7. *Hollywood Mall, Inc. v. Capozzi*, 545 So.2d 918, 921 (Fla. 4th DCA 1989) ("To obtain damages for anticipatory breach of contract, the purchaser must also show that he was ready, willing, and able to perform the contract.") (citing *Hosp. Mortg. Grp. v. First Prudential Dev. Corp.*, 411 So.2d 181 (Fla. 1982)).

357 SELLER'S DAMAGES FOR BREACH OF CONTRACT TO PURCHASE REAL PROPERTY

To recover damages for the breach of a contract to buy real property, (claimant) **must prove that [he] [she] [it] performed, or had the ability to perform, all of [his] [her] [its] obligations necessary for closing.**

If (claimant) **proves that [he] [she] [it] performed, or had the ability to perform, all of [his] [her] [its] obligations necessary for closing, then** (claimant) **may recover:**

1. The difference between the contract sales price and the fair market value of the property on the date of the breach, less any amount which (defendant) **previously paid; and**

2. Any damages which the parties contemplated when the parties made the contract and which normally result from the breach of contract.

NOTES ON USE

This instruction is to be given where the contract does not contain a liquidated damages provision or where the liquidated damages provision has been determined to be unenforceable.

SOURCES OF AUTHORITY

1. *Pembroke v. Caudill*, 37 So.2d 538, 541 (Fla. 1948) (abrogated on other grounds by *Hutchison v. Tompkins*, 259 So.2d 129, 130 (Fla. 1972)) ("[T]he measure of the sellers' damage ordinarily being in such cases [where the buyer breaches the contract] the difference between the agreed purchase price and the actual value of the property at the time of the breach of the contract of purchase, less the amount paid.")

2. *Buschman v. Clark*, 583 So.2d 799, 800 (Fla. 1st DCA 1991) ("[T]he measure of damages

for breach of a real estate sales contract is the difference between the contract sales price and the fair market value of the property on the date of the breach. All additional damages must be alleged and proved to have been contemplated by the parties and must be a natural and proximate result of the breach.") (citing *Zipper v. Affordable Homes, Inc.*, 461 So.2d 988 (Fla. 1st DCA 1984)).

3. When the seller elects to sue for breach of contract, "the measure of damages is the difference between the price the buyer agreed to pay for the property and the fair market value of the property on the date of the breach." *Frank Silvestri, Inc. v. Hilltop Developers, Inc.*, 418 So.2d 1201, 1203 (Fla. 5th DCA 1982). "If a seller has suffered additional damage, he must allege and prove that those damages were contemplated by the parties and were a natural and proximate result of the breach." *Id.* at 1203 n.1.

4. *Redmond v. Prosper, Inc.*, 364 So.2d 812, 813 (Fla. 3d DCA 1978) (proper measure of damages for breach of real estate contract is "the excess of the contract sales price over the market value as of the time of the breach, less the amount previously paid").

5. *Popwell v. Abel*, 226 So.2d 418, 422 (Fla. 4th DCA 1969) ("In the ordinary case where a purchaser of land breaches his contract to buy, the difference between the value of the land on the date of breach as compared with the date of sale would restore the vendor, but the vendor may still allege and prove as proper elements of damage all those damages contemplated by the parties which are a natural and proximate result of the breach.").

6. *Cohen v. Champlain Towers N. Assocs.*, 452 So.2d 989, 991 (Fla. 3d DCA 1984) (seller must show ability to perform all conditions precedent to recover damages) (citing *Hosp. Mortg. Grp. v. First Prudential Dev. Corp.*, 411 So.2d 181 (Fla. 1982)).

358 MITIGATION OF DAMAGES

If (defendant) **breached the contract and the breach caused damages,** (claimant) **is not entitled to recover for those damages which** (defendant) **proves** (claimant) **could have avoided with reasonable efforts or expenditures. You should consider the reasonableness of** (claimant's) **efforts in light of the circumstances facing [him] [her] [it] at the time, including [his] [her] [its] ability to make the efforts or expenditures without undue [risk] [burden] [or] [humiliation].**

If (claimant) **made reasonable efforts to avoid the damages caused by the breach, then your award should include reasonable amounts that [he] [she] [it] spent for this purpose.**

NOTES ON USE

This instruction is intended primarily for use in exclusive contract cases when the defense of mitigation of damages has been asserted, as non-exclusive contracts are generally considered an exception to the doctrine of avoidable consequences. *See Graphic Assocs., Inc. v. Riviana Rest. Corp.*, 461 So.2d 1011, 1014 (Fla. 4th DCA 1984); Calimari and Perillo, The Law of

Contracts § 14-16. This instruction does not use the somewhat inaccurate term "duty to mitigate" damages because "[t]here is no actual 'duty to mitigate,' because the injured party is not compelled to undertake any ameliorative efforts." *Sys. Components Corp. v. Fla. Dep't of Transp.*, 14 So.3d 967, 982 (Fla. 2009).

SOURCES AND AUTHORITY

1. *Sys. Components Corp. v. Fla. Dep't of Transp.*, 14 So.3d 967, 982 (Fla. 2009) ("The doctrine of avoidable consequences … commonly applies in contract and tort actions. … The doctrine does not permit damage reduction based on what 'could have been avoided' through Herculean efforts. Rather, the injured party is only accountable for those hypothetical ameliorative actions that could have been accomplished through 'ordinary and reasonable care' without requiring undue effort or expense.") (internal citations omitted).

2. *Graphic Associates, Inc. v. Riviana Rest. Corp.*, 461 So.2d 1011, 1014 (Fla. 4th DCA 1984) ("The doctrine of avoidable consequences, commonly referred to as a duty to mitigate damages, prevents a party from recovering those damages inflicted by a wrongdoer which the injured party 'could have avoided without undue risk, burden, or humiliation.'") (citation omitted).

3. RESTATEMENT (SECOND) OF CONTRACTS § 350 (1981) ("(1) Except as stated in Subsection (2), damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation. (2) The injured party is not precluded from recovery by the rule stated in Subsection (1) to the extent that he has made reasonable but unsuccessful efforts to avoid loss.").

359 PRESENT CASH VALUE OF FUTURE DAMAGES

Any amount of damages which you award for future damages should be reduced to its present money value and only the present money value of these future damages should be included in your verdict.

The present money value of future damages is the sum of money needed now which, together with what that sum will earn in the future, will compensate (claimant) **for these damages as they are actually experienced in future years.**

NOTES ON USE

1. Designing a standard instruction for reduction of damages to present value is complicated by the fact that there are several different methods used by economists and courts to arrive at a present-value determination. *See, e.g., Delta Air Lines, Inc. v. Ageloff*, 552 So.2d 1089 (Fla. 1989), and *Renuart Lumber Yards v. Levine*, 49 So.2d 97 (Fla. 1950) (using approach similar to calculation of cost of annuity); *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983), and *Loftin v. Wilson*, 67 So.2d 185 (Fla. 1953) (lost stream of income approach); *Beaulieu v. Elliott*, 434 P.2d 665 (Alaska 1967) (total offset method); *Culver v. Slater Boat*

Co., 688 F.2d 280 (5th Cir. 1982), and *Seaboard Coast Line R.R. v. Garrison*, 336 So.2d 423 (Fla. 2d DCA 1976) (discussing real interest rate discount method and inflation/market rate discount methods); and *Bould v. Touchette*, 349 So.2d 1181 (Fla. 1977) (even without evidence, juries may consider effects of inflation).

2. Until the Supreme Court or the legislature adopts one approach to the exclusion of other methods of calculating present money value, the committee assumes that the present value of future damages is a finding to be made by the jury on the evidence; or, if the parties offer no evidence to control that finding, that the jury properly resorts to its own common knowledge as guided by this instruction and by argument. *See Seaboard Coast Line R.R. v. Burdi*, 427 So.2d 1048 (Fla. 3d DCA 1983).

360 NOMINAL DAMAGES

If you decide that (defendant) **breached the contract but also that** (claimant) **did not prove any loss or damage, you may still award** (claimant) **nominal damages such as one dollar.**

NOTES ON USE

1. *AMC/Jeep of Vero Beach, Inc. v. Funston*, 403 So.2d 602, 605 (Fla. 4th DCA 1981) ("While there is a legal remedy for every legal wrong and, thus, a cause of action exists for every breach of contract, an aggrieved party who has suffered no damage is only entitled to a judgment for nominal damages.").

2. *Dep't of Transp. v. Weisenfeld*, 617 So.2d 1071, 1086 (Fla. 5th DCA 1993) ("Whenever the intentional invasion of a legal right occurs the law infers some damage to the party whose rights were violated and if no evidence is adduced as to any particular specific loss or damage, the law 'rights' or remedies the wrong by awarding nominal damages, usually in the amount of $1.00.").

370 GOODS SOLD AND DELIVERED

(Claimant) **claims that** (defendant) **owes [him] [her] [it] money for goods which** (claimant) **sold and delivered to** (defendant)**. To establish this claim,** (claimant) **must prove all of the following:**

1. (Claimant) **sold and delivered goods to** (defendant)**;**

2. (Defendant) **failed to pay for such goods; and**

3. [The price agreed upon for] [The reasonable value of] the goods which (claimant) **sold and delivered to** (defendant)**.**

If the greater weight of the evidence does not support (claimant's) **claim on these issues, then your verdict should be for** (defendant)**. However, if the greater weight of the**

evidence supports (claimant's) **claims on these issues, then your verdict should be for** (claimant) **in the total amount of [his] [her] [its] damages.**

NOTES ON USE

See Chase & Co. v. Miller, 88 So. 312, 314 (Fla. 1921); *Bosem v. A.R.A. Corp.*, 350 So. 2d 526, 527 (Fla. 3d DCA 1977); *Alderman Interior Sys., Inc. v. First National-Heller Factors, Inc.*, 376 So. 2d 22, 24 (Fla. 2d DCA 1979); Florida Rule of Civil Procedure 1.935; Florida Small Claims Rule Form 7.331; *Amendments to the Florida Rules of Civil Procedure*, 773 So. 2d 1098 (Fla. 2000); Marc A. Wites, *Florida Causes of Action* § 4:110.1**.**

371 OPEN ACCOUNT

(Claimant) **claims that** (defendant) **owes [him] [her] [it] money on an open account. An open account is an unsettled debt arising from [items of work and labor] [goods sold and delivered] where the parties have had [a transaction] [transactions] between them and expected to conduct further transactions. To establish this claim,** (claimant) **must prove all of the following:**

1. (Claimant) **and** (defendant) **had [a transaction] [transactions] between them;**

2. An account existed between (claimant) **and** (defendant) **in which the parties had a series of charges, payments, adjustments;**

3. (Claimant) **prepared an itemized statement of the account; and**

4. (Defendant) **owes money on the account.**

If the greater weight of the evidence does not support (claimant's) **claim on these issues, then your verdict should be for** (defendant). **However, if the greater weight of the evidence supports** (claimant's) **claim on these issues, [then your verdict should be for** (claimant) i**n the total amount of [his] [her] [its] damages] [then you shall consider the [defense] [defenses] raised by** (defendant)**].**

NOTES ON USE

See Farley v. Chase Bank, U.S.A., N.A., 37 So. 3d 936, 937 (Fla. 4th DCA 2010); *S. Motor Co. of Dade Cnty. v. Accountable Const. Co.*, 707 So. 2d 909, 912 (Fla. 3d DCA 1998); *Central Ins. Underwriters, Inc. v. National Ins. Fin. Co.*, 599 So. 2d 1371, 1373 (Fla. 3d DCA 1992); *Robert W. Gottfried, Inc. v. Cole*, 454 So. 2d 695, 696 (Fla. 4th DCA 1984); *Hawkins v. Barnes*, 661 So. 2d 1271, 1273 (Fla. 5th DCA 1995); Fla. R. Civ. P. 1.932 (Form) ("A copy of the account showing items, time of accrual of each, and amount of each must be attached" to the Complaint); and *Myrick v. St. Catherine Laboure Manor, Inc.*, 529 So. 2d 369, 371 (Fla. 1st DCA 1988) (calling into question sufficiency of a complaint where copy of statement attached to the complaint fails to show the individual items making up the account and the

time of accrual and amount of each, as the cited form requires). *But see Evans v. Delro Industries, Inc.*, 509 So. 2d 1262, 1263 (Fla. 1st DCA 1987) (purportedly an action for "open account," but requiring proof of sales contract, proof of sales price or reasonable value of goods delivered, and proof of actual delivery) (citing *Chase & Co. v. Miller*, 88 So. 312 (Fla. 1921) (an action involving common counts for goods bargained and sold and goods sold and delivered) and *Alderman Interior Systems, Inc. v. First National-Heller Factors, Inc.*, 376 So. 2d 22 (Fla. 2d DCA 1979) (same)).

372 ACCOUNT STATED

(Claimant) **claims that** (defendant) **owes [him] [her] [it] money on an account stated. An account stated involves a transaction or series of transactions for which a specific amount of money is due. To establish this claim,** (claimant) **must prove all of the following:**

1. (Claimant) **and** (defendant**) had [a transaction] [transactions] between them;**

2. [(Claimant) **and** (defendant) **agreed upon the balance due] [or] [**(Claimant) **rendered a statement to** (defendant) **and** (defendant) **failed to object within a reasonable time to a statement of [his] [her] [its] account];**

3. (Defendant) **expressly or implicitly promised to pay** (claimant) **[this balance] [the amount set forth in the statement]; and**

4. (Defendant) **has not paid** (claimant) **[any] [all] of the amount owed under the account.**

If the greater weight of the evidence does not support (claimant's) **claim on these issues, then your verdict should be for** (defendant). **However, if the greater weight of the evidence supports** (claimant's) **claim on these issues, [then your verdict should be for** (claimant) **in the total amount of [his] [her] [its] damages] [then you shall consider the [defense] [defenses] raised by** (defendant)**].**

NOTES ON USE

1. There must be an agreement between the parties that a certain balance is correct and due and an express or implicit promise to pay this balance. *Merrill-Stevens Dry Dock Co. v. Corniche Exp.*, 400 So. 2d 1286 (Fla. 3dDCA 1981).

2. The action for an account stated is an action for a sum certain, and where there is no such agreement between the parties, the plaintiff may not recover upon a theory of account stated. *Id.*; *FDIC v. Brodie*, 602 So. 2d 1358, 1361 (Fla. 3d DCA 1992); *Carpenter Contractors of Am., Inc. v. Fastener Corp. of Am., Inc.*, 611 So. 2d 564, 565 (Fla. 4th DCA 1992).

3. An account statement is not absolutely conclusive upon the parties as the presumption of the account's accuracy and correctness may be overcome by proof of fraud, mistake, or error.

Farley v. Chase Bank, U.S.A., N.A., 37 So. 3d 936, 937 (Fla. 4th DCA 2010).

4. An agreement to a resulting balance may be established by the failure to object to the account statement. *See Myrick v. St. Catherine Laboure Manor, Inc.*, 529 So. 2d 369, 371 (Fla. 1st DCA 1988).

5. An objection to an account must be made within a reasonable time. *Robert C. Malt & Co. v. Kelly Tractor Co.*, 518 So. 2d 991, 992 (Fla. 4th DCA 1988).

6. Fla. R. Civ. P. 1.933 (Form) ("A copy of the account showing items, time of accrual of each, and amount of each must be attached" to the Complaint).

373 MONEY HAD AND RECEIVED

(Claimant) **claims that** (defendant) **has received money which [he] [she] [it] ought to refund to** (claimant)**. To establish this claim,** (claimant) **must prove all of the following:**

1. (Defendant) **received** (claimant's) **money;**

2. (Defendant) **received the money as the result of [insert brief summary of basis of claim]; and**

3. The circumstances are such that (defendant) **should, in all fairness, be required to return the money to** (claimant)**.**

NOTES ON USE

1. The common law action for money had and received derives from the common law action of assumpsit. The action is used to recover money which a defendant erroneously receives in circumstances where it would be unjust for the defendant to retain the money. While this is a legal action, it draws "upon the equitable principle that no one ought to be unjustly enriched at the expense of another." *Sharp v. Bowling*, 511 So. 2d 363, 364-65 (Fla. 5th DCA 1987).

2. A claim for money had and received may be based upon a wide variety of grounds including: (1) upon consideration which has failed, *Deco Purchasing & Distributing Co. v. Panzirer*, 450 So. 2d 1274, 1275 (Fla. 5th DCA 1984); (2) for money paid by mistake, *First State Bank of Fort Meade v. Singletary*, 169 So. 407 (Fla. 1936); (3) for money obtained through imposition, extortion, or coercion, *Cullen v. Seaboard Air Line R. Co.*, 58 So. 182, 184 (Fla. 1912); or (4) where defendant had taken undue advantage of claimant's situation, *Moss v. Condict*, 16 So. 2d 921, 922 (Fla. 1944). The foregoing list is not exclusive, and a claim for money had and received may be based upon any set of facts "which show that an injustice would occur if money were not refunded." *Moore Handley, Inc. v. Major Realty Corp.*, 340 So. 2d 1238, 1239 (Fla. 4th DCA 1976).

APPENDIX D

April 1, 2012 Florida Bar News

Proposed Standard Jury Instructions — Contract and Business Cases

The Supreme Court Committee on Standard Jury Instructions — Contract and Business Cases invites all interested persons to comment on the proposed new instructions below. Comments must be received by the Committee on or before May 1, 2012. All comments received will be reviewed by the Committee. Revisions to the proposed instructions may be made based upon comments received. Upon final approval of the instructions, the Committee will make a recommendation to the Florida Supreme Court. E-mail your comments in the format of a Word document to Judge Jonathan D. Gerber, Committee Chair, at gerberj@flcourts.org, with a copy to the Committee liaison, Jodi Jennings, at jjenning@flabar.org.

306 CONTRACT IMPLIED IN LAW

(Claimant) **claims that** (defendant) **owes [him] [her] [it] money for** (insert brief summary of allegations). **To establish this claim, (claimant) must prove all of the following:**

1. (Claimant) **gave a benefit to (defendant);**

2. (Defendant) **knew of the benefit;**

3. (Defendant) **accepted or retained the benefit; and**

4. The circumstances are such that (defendant) **should, in all fairness, be required to pay for the benefit.**

NOTES ON USE

1. "To describe the cause of action encompassed by a contract implied in law, Florida courts have synonymously used a number of different terms – quasi contract, unjust enrichment, restitution, constructive contract, and quantum meruit." *Commerce Partnership 8098 Limited Partnership v. Equity Contracting Co.*, 695 So.2d 383, 386 (Fla. 4th DCA 1997) (internal quotations and footnotes omitted). However, a contract implied in law "is not based upon the finding, by a process of implication from the facts, of an agreement between the parties. A contract implied in law is a legal fiction, an obligation created by the law without regard to the parties' expression of assent by their words or conduct. The fiction was adopted to provide a remedy where one party was unjustly enriched, where that party received a benefit under circumstances that made it unjust to retain it without giving compensation." *Id*. "The elements of a cause of action for a quasi contract are that: (1) the plaintiff has conferred a benefit on the defendant; (2) the defendant has knowledge of the benefit; (3) the defendant has accepted or retained the benefit conferred and (4) the circumstances are such that it would be inequitable for the defendant to retain the benefit without paying fair value for it. Because the basis for recovery does not turn on the finding of an enforceable agreement, there may be recovery under a contract implied in law even where the parties had no dealings at all with each other."

Id.

2. The committee has drafted this instruction because a claim to establish a contract implied in law may be a claim in equity for the court to decide or a claim at law for a jury to decide. *See Della Ratta v. Della Ratta*, 927 So.2d 1055, 1060 n.2 (Fla. 4th DCA 2006) ("In Florida, all implied contract actions, including unjust enrichment, were part of the action of assumpsit, which was an action at law under the common law. Although some Florida courts have described quasi contracts as being 'equitable in nature,' the term has been used in the sense of 'fairness,' to describe that quality which makes an enrichment unjust, and not as a reference to the equity side of the court.") (internal citations omitted).

312 SUBSTANTIAL PERFORMANCE

(Defendant) **claims that** (claimant) **did not perform all of the essential things which the contract required, and therefore** (defendant) **did not have to perform [his] [her] [its] obligations under the contract. To defeat this claim,** (claimant) **must prove both of the following:**

1. (Claimant) **performed in good faith; and**

2. (Claimant's) **performance was so nearly equivalent to what was bargained for that it would be unreasonable to deny [him] [her] [it] the full contract price less an appropriate reduction, if any, for** (claimant's) **failure to fully perform.**

SOURCES AND AUTHORITIES

"Substantial performance is that performance of a contract which, while not full performance, is so nearly equivalent to what was bargained for that it would be unreasonable to deny the promisee the full contract price subject to the promisor's right to recover whatever damages may have been occasioned him by the promisee's failure to render full performance." *Ocean Ridge Dev. Corp. v. Quality Plastering, Inc.*, 247 So.2d 72, 75 (Fla. 4th DCA 1971).

NOTES ON USE

1. "There is almost always no such thing as 'substantial performance' of payment between commercial parties when the duty is simply the general one to pay. Payment is either made in the amount and on the date due, or it is not." *Enriquillo Export & Import, Inc. v. M.B.R. Indus., Inc.*, 733 So.2d 1124, 1127 (Fla. 4th DCA 1999).

2. The measure of any reduction referred to in element 2 should be addressed in the damages instructions.

324 ANTICIPATORY BREACH

(Claimant) **claims that** (defendant) **anticipatorily breached the contract between the**

parties.

To establish this claim, (claimant) **must prove both of the following:**

1. (Defendant) **breached the contract by clearly and positively indicating, by words or conduct, or both, that [he] [she] [it] would not or could not perform the contract; and**

2. (Claimant) **was willing and able to perform the contract at the time** (defendant) **breached the contract.**

SOURCES AND AUTHORITIES

1. "Where performances are to be exchanged under an exchange of promises, one party's repudiation of a duty to render performance discharges the other party's remaining duties to render performance." *Hosp. Mortg. Grp. v. First Prudential Dev. Corp.*, 411 So.2d 181, 182 (Fla. 1982) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 253 (1979)).

2. "Repudiation may be evidenced by words or voluntary acts but the refusal must be distinct, unequivocal, and absolute." *Mori v. Matsushita Elec. Corp. of Am.*, 380 So.2d 461, 463 (Fla. 3d DCA 1980).

3. "[T]he non-breaching party is required to plead and prove compliance with all conditions precedent or the ability to comply if the performance has been excused by the repudiation." *Hosp. Mortg. Grp.*, 411 So.2d at 183. *But see Custer Med. Ctr. v. United Auto. Ins. Co.*, 62 So.3d 1086, 1096 (Fla. 2011) ("[A] defending party's assertion that a plaintiff has failed to satisfy conditions precedent necessary to trigger contractual duties under an existing agreement is generally viewed as *an affirmative defense,* for which the defensive pleader has the burden of pleading and persuasion."); Fla. R. Civ. P. 1.120(c) ("In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.").

330 AFFIRMATIVE DEFENSE – MUTUAL MISTAKE OF FACT

(Defendant) **claims that [he] [she] [it] should be able to set aside the contract because the parties were mistaken about** (insert description of mistake)**. To establish this defense,** (defendant) **must prove the following:**

1. The parties were mistaken about (insert description of mistake)**; and**

2. (Defendant) **did not bear the risk of mistake. A party bears the risk of a mistake when**

[the parties' agreement assigned the risk to [him] [her] [it]]*
[or]
[[he] [she] [it] was aware, at the time the contract was made, that [he] [she] [it] had only

limited knowledge about the facts relating to the mistake but decided to proceed with the contract].**

** The court should give the first option only if the court finds that the contract is ambiguous regarding whether the contract assigns the risk to the defendant.*

***The court should give the second option only if there is competent, substantial evidence that, at the time the contract was made, the defendant had only limited knowledge with respect to the facts relating to the mistake but treated the limited knowledge as sufficient.*

NOTES ON USE

1. The court should not give this instruction if it determines that the alleged mistake was not material.

2. The court should not give this instruction if it finds that the contract unambiguously assigns the risk to the defendant or if the court assigns the risk of mistake to the defendant on the ground that it is reasonable under the circumstances to do so.

SOURCES AND AUTHORITIES

1. "A party may avoid a contract by proving mutual mistake regarding a basic assumption underlying the contract. However,to prevail on this basis the party must also show he did not bear the risk of mistake." *Leff v. Ecker*, 972 So.2d 965, 966 (Fla. 3d DCA 2008) (citation omitted).

2. "A party bears the risk of a mistake when (a) the risk is allocated to him by agreement of the parties or (b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or (c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so." *Rawson v. UMLIC VP, L.L.C.*, 933 So.2d 1206, 1210 (Fla. 1st DCA 2006) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 154 (1979)).

331 AFFIRMATIVE DEFENSE – UNILATERAL MISTAKE OF FACT

(Defendant) **claims that [he] [she] [it] should be able to set aside the contract because [he] [she] [it] was mistaken about** (insert description of mistake)**. To establish this defense,** (defendant) **must prove all of the following:**

1. (Defendant) **was mistaken about** (insert description of mistake) **at the time the parties made the contract;**

2. [The effect of the mistake is such that enforcement of the contract would be unconscionable]

[or]

[(Claimant) **had reason to know of the mistake or [he] [she] [it] caused the mistake.]**

and

3. (Defendant) **did not bear the risk of mistake. A party bears the risk of a mistake when [the parties' agreement assigned the risk to [him] [her] [it]]***
[or]
[[he] [she] [it] was aware, at the time the contract was made, that [he] [she] [it] had only limited knowledge about the facts relating to the mistake but decided to proceed with the contract].**

** The court should give the first option only if the court finds that the contract is ambiguous regarding whether the contract assigns the risk to the defendant.*
***The court should give the second option only if there is competent, substantial evidence that, at the time the contract was made, the defendant had only limited knowledge with respect to the facts relating to the mistake but treated the limited knowledge as sufficient.*

NOTES ON USE

1. The court should not give this instruction if it determines that the alleged mistake was not material.

2. The court should not give this instruction if it finds that the contract unambiguously assigns the risk to the defendant or if the court assigns the risk of mistake to the defendant on the ground that it is reasonable under the circumstances to do so.

SOURCES AND AUTHORITIES

1. A contract may be "set aside on the basis of unilateral mistake unless (a) the mistake is the result of an inexcusable lack of due care or (b) the other party has so changed its position in reliance on the contract that rescission would be unconscionable." *BMW of N. Am. v. Krathen*, 471 So.2d 585, 588 (Fla. 4th DCA 1985) (citing *Maryland Cas. Co. v. Krasnek*, 174 So.2d 541 (Fla. 1965); *Orkin Exterminating Co. v. Palm Beach Hotel Condo. Ass'n, Inc.*, 454 So.2d 697 (Fla. 4th DCA 1984); *Pennsylvania Nat'l Mutual Cas. Ins. Co., v. Anderson*, 445 So.2d 612 (Fla. 3d DCA 1984)).

2. Sections 153 and 154 of the Restatement (Second) of Contracts (1979) provide:

> § 153. When Mistake of One Party Makes a Contract Voidable.
>
> Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in § 154, and
> (a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or

(b) the other party had reason to know of the mistake or his fault caused the mistake.

§ 154. When a Party Bears the Risk of a Mistake.

A party bears the risk of a mistake when
(a) the risk is allocated to him by agreement of the parties, or
(b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or
(c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.

334 AFFIRMATIVE DEFENSE – UNDUE INFLUENCE

(Defendant) **claims that [he] [she] [it] should be able to set aside the contract because** (claimant) **unfairly pressured [him] [her] [it] into agreeing to the contract. To establish this defense,** (defendant) **must prove both of the following:**

1. (Claimant) **used [a relationship of trust and confidence] [or] [**(defendant)**'s weakness of mind] [or] [**(defendant)**'s needs or distress] to control, persuade, or pressure** (defendant) **into agreeing to the contract; and**

2. (Defendant) **would not otherwise have voluntarily agreed to the contract.**

SOURCES AND AUTHORITIES

1. "Undue influence must amount to over-persuasion, duress, force, coercion, or artful or fraudulent contrivances to such a degree that there is a destruction of free agency and willpower." *Jordan v. Noll*, 423 So.2d 368, 370 (Fla. 1st DCA 1982).

1. "[M]ere weakness of mind, unaccompanied by any other inequitable incident, if the person has sufficient intelligence to understand the nature of the transaction and is left to act upon his own free will, is not a sufficient ground to set aside an agreement." *Donnelly v. Mann*, 68 So.2d 584, 586 (Fla. 1953) (citations omitted).

3. "To constitute 'undue influence' the mind ... must be so controlled or affected by persuasion or pressure, artful or fraudulent contrivances, or by the insidious influences of persons in close confidential relations with him, that he is not left to act intelligently, understandingly, and voluntarily, but ... subject to the will or purposes of another." *Peacock v. Du Bois*, 105 So. 321, 322 (Fla. 1925) (citation omitted).

338 AFFIRMATIVE DEFENSE – STATUTE OF LIMITATIONS

On the defense of statute of limitations, the issue for you to decide is whether (claimant)

filed [his] [her] [its] claim (describe claim as to which statute of limitations defense has been raised) **within the time set by law.**

To establish this defense, (defendant) **must prove that any breach of contract, if one in fact occurred, occurred before** (insert date four or five years before date of filing suit)**.**

SOURCES AND AUTHORITIES

1. Section 95.11(2)(b), Florida Statutes (2011), provides that "[a] legal or equitable action on a contract, obligation or liability *founded on a written instrument* [other than for the recovery of real property], except for an action to enforce a claim against a payment bond, which shall be governed by the applicable provisions of ss. 255.05(1) and 713.23(1)(e)" shall be commenced within *five* years. (emphasis added).

2. Section 95.11(3)(k), Florida Statutes (2011), provides that "[a] legal or equitable action on a contract, obligation or liability *not founded on a written instrument* [other than for the recovery of real property], including an action for the sale and delivery of goods, wares, and merchandise, and on store accounts" shall be commenced within *four* years. (emphasis added).

3. In a breach of contract action, "it is well established that a statute of limitations runs from the time of the breach," *BDI Const. Co. v. Hartford Fire Ins. Co.*, 995 So.2d 576, 578 (Fla. 3d DCA 2008), "not from the time when consequential damages result or become ascertained," *Medical Jet, S.A. v. Signature Flight Support–Palm Beach, Inc.*, 941 So.2d 576, 578 (Fla. 4th DCA 2006).

NOTES ON USE

The delayed discovery doctrine has not been applied to breach of contract actions in Florida. *See Medical Jet*, 941 So.2d at 578 ("The supreme court rejected an expansion of the delayed discovery doctrine in *Davis v. Monahan*, 832 So.2d 708 (Fla. 2002).").

339 AFFIRMATIVE DEFENSE – EQUITABLE ESTOPPEL

(Defendant) has raised the defense of equitable estoppel. To establish this defense, (defendant) must prove all of the following:

1. **[**(Claimant) **took action by (describe material action)]**
   [(Claimant) **spoke about (describe material fact)]**
   [(Claimant) **concealed or was silent about** (describe material fact) **at a time when [he] [she] [it] knew of [that fact] [those facts]];**

2. (Defendant) **relied in good faith upon** (claimant's) **[action] [words] [inaction] [silence]; and**

3. (Defendant's) **reliance on** (claimant's) **[action] [words] [inaction] [silence] caused** (defendant) **to change [his] [her] [its] position for the worse.**

NOTES ON USE

The court should not give this instruction if it determines that the alleged action, words, inaction, or silence was not material.

SOURCES AND AUTHORITIES

1. "The elements of equitable estoppel are (1) a representation as to a material fact that is contrary to a later-asserted position, (2) reliance on that representation, and (3) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon." *State v. Harris*, 881 So.2d 1079, 1084 (Fla. 2004).

2. "[I]n order to work an estoppel, silence must be under such circumstances that there are both a specific opportunity and a real apparent duty to speak." *Thomas v. Dickinson*, 30 So.2d 382, 384 (Fla. 1947).

3. "The 'representation' upon which an estoppel may be predicated may consist of words, conduct, or, if there is a duty to speak, silence." *Lloyds Underwriters at London v. Keystone Equipment Finance Corp.*, 25 So.3d 89, 93 (Fla. 4th DCA 2009) (citations omitted).

4. "The conduct ... such as to create an estoppel ... necessary to a waiver consists of willful or negligent words and admissions, or conduct, acts and acquiescence causing another to believe in a certain state of things by which such other person is or may be induced to act to his prejudice. The acts or conduct need not be positive, but can consist of failure to act or, more particularly, failure to speak when under some duty to speak." *Richards v. Dodge*, 150 So.2d 477, 481 (Fla. 2d DCA 1963) (internal citations omitted).

340 AFFIRMATIVE DEFENSE – JUDICIAL ESTOPPEL

The committee has not drafted an instruction for the affirmative defense of judicial estoppel because judicial estoppel is an equitable doctrine which a court is to determine. *See Blumberg v. USAA Cas. Ins. Co.*, 790 So.2d 1061, 1066 (Fla. 2001) ("Judicial estoppel is an equitable doctrine that is used to prevent litigants from taking totally inconsistent positions in separate judicial, including quasi-judicial, proceedings." (citation omitted).

341 AFFIRMATIVE DEFENSE – RATIFICATION

(Defendant) **has raised the defense of ratification. To establish this defense, (defendant) must prove all of the following:**

1. (Defendant) **performed [an act] [a transaction] that breached the contract;**

2. (Claimant) **knew of the [act] [transaction];**

3. (Claimant) **knew that [he] [she] [it] could reject the contract because of the [act] [transaction]; and**

4. (Claimant) **[accepted the [act] [transaction]] [expressed [his] [her] [its] intention to accept the [act] [transaction]].**

SOURCES AND AUTHORITIES

1. "An agreement is deemed ratified where the principal has full knowledge of all material facts and circumstances relating to the unauthorized act or transaction at the time of the ratification. An affirmative showing of the principal's intent to ratify the act in question is required." *Frankenmuth Mut. Ins. Co. v. Magaha*, 769 So.2d 1012, 1022 (Fla. 2000) (citations omitted).

2. "[W]here a party seeking rescission has discovered grounds for rescinding an agreement and either remains silent when he should speak or in any manner recognizes the contract as binding upon him, ratifies or accepts the benefits thereof, he will be held to have waived his right to rescind." *AVVA-BC, LLC v. Amiel*, 25 So.3d 7, 11 (Fla. 3d DCA 2009) (citation and internal quotations omitted).

342 AFFIRMATIVE DEFENSE – PROMISSORY ESTOPPEL

(Defendant) **has raised the defense of "promissory estoppel." To establish this defense,** (defendant) **must prove all of the following:**

1. (Claimant) **promised to** (describe material act to be performed or not performed) **in the future;**

2. (Claimant) **reasonably should have expected that** (defendant) **would rely upon the promise;**

3. (Defendant) **reasonably relied upon** (claimant's) **promise;**

4. (Claimant) **did not keep [his] [her] [its] promise; and**

5. (Defendant's) **reliance on** (claimant's) **promise caused harm to** (defendant)**.**

SOURCES AND AUTHORITIES

1. "The basic elements of promissory estoppel are set forth in Restatement (Second) of Contracts § 90 (1979), which states:

> (1) A promise which the promisor should reasonably expect to induce action or

> forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.
>
> The character of the reliance protected is explained as follows:
>
> The promisor is affected only by reliance which he does or should foresee, and enforcement must be necessary to avoid injustice. *Satisfaction of the latter requirement may depend on the reasonableness of the promisee's reliance, on its definite and substantial character in relation to the remedy sought, on the formality with which the promise is made, on the extent to which the evidentiary, cautionary, deterrent and channeling functions of form are met by the commercial setting* or otherwise, and on the extent to which such other policies as the enforcement of bargains and the prevention of unjust enrichment are relevant.

W.R. Grace & Co. v. Geodata Services, Inc., 547 So.2d 919, 924 (Fla. 1989).

2. Promissory estoppel is "a qualified form of equitable estoppel which applies to representations relating to a future act of the promisor rather than to an existing fact." *Crown Life Ins. Co. v. McBride*, 517 So.2d 660, 661-62 (Fla. 1987). Promissory estoppel "only applies where to refuse to enforce a promise, even though not supported by consideration, would be virtually to sanction the perpetration of fraud or would result in other injustice. Such injustice may be found where the promisor reasonably should have expected that his affirmative representations would induce the promisee into action or forbearance substantial in nature, and where the promisee shows that such reliance thereon was to his detriment. *Id*. at 662.

353 DAMAGES FOR COMPLETE DESTRUCTION OF BUSINESS

If (claimant) **proved that** (defendant) **completely destroyed** (claimant's) **business, then you must award** (claimant) **damages based upon the market value of** (claimant's) **business on the date** (claimant's) **business was destroyed.**

NOTES ON USE

1. The court should give this instruction when the claimant seeks damages for the complete destruction of a business. If a business has not been completely destroyed, then damages based upon the market value of the business are not appropriate, and the court should not give this instruction. Instead, the court should give instruction 352 regarding lost profits.

2. "Market value," as used in this instruction, is not meant to suggest a particular approach to determining market value. *See, e.g.*, *Fidelity Warranty Servs., Inc. v. Firstate Ins.*, 74 So.3d 506, 514 n.5 (Fla. 4th DCA 2011) (discussing various approaches).

SOURCES AND AUTHORITIES

1. “If a business is completely destroyed, the proper total measure of damages is the market value of the business on the date of the loss. If the business is not completely destroyed, then it may recover lost profits. A business may not recover both lost profits and the market value of the business.” *Montage Grp., Ltd. v. Athle-Tech Computer Systems, Inc.*, 889 So.2d 180, 193 (Fla. 2d DCA 2004) (citations omitted).

2. “Courts in other jurisdictions have generally rejected the notion that ‘fair value’ is synonymous with ‘fair market value.’” *Boettcher v. IMC Mortg. Co.*, 871 So.2d 1047, 1052 (Fla. 2d DCA 2004). “The rationale underlying this language is the recognition that the events that trigger the valuation process may either disrupt or preclude the market for the shares, if in fact such a market ever existed – as in the case of a closely held corporation.” *Id.* (citation omitted).

356 BUYER’S DAMAGES FOR BREACH OF CONTRACT FOR SALE OF REAL PROPERTY

To recover damages for the breach of a contract to sell real property, (claimant) **must prove that [he] [she] [it] was ready, willing, and able to perform the contract.**

If (claimant) **proves that [he] [she] [it] was ready, willing, and able to perform the contract, then** (claimant) **may recover:**

1. The amount of any payment made by (claimant) **toward the purchase price; and**

2. The amount of any reasonable expenses for examining title.

If (claimant) **also proves that** (defendant) **acted in bad faith in breaching the contract or that** (defendant) **sold the property to a third party after entering into the contract, then** (claimant) **also may recover the difference between the fair market value of the property on the date of the breach and the contract price.**

NOTES ON USE

The court should give this instruction when a buyer is seeking damages as a remedy for the breach of a contract for the sale of real property. This instruction does not apply to claims for specific performance. *See Castigliano v. O’Connor*, 911 So.2d 145, 148 (Fla. 3d DCA 2005) (a decree of specific performance is an equitable remedy); *381651 Alberta, Ltd. v. 279298 Alberta, Ltd.*, 675 So.2d 1385, 1387 (Fla. 4th DCA 1996) (the right to a jury trial applies only to legal and not equitable causes of action).

SOURCES AND AUTHORITIES

1. In *Gassner v. Lockett*, 101 So.2d 33, 34 (Fla. 1958), the Florida Supreme Court, quoting

Key v. Alexander, 108 So. 883, 885 (Fla. 1926), stated (emphasis and internal quotations omitted):

> The law is well settled that in an action brought by the vendee against the vendor upon a valid contract for the sale of land when the vendor has breached such contract, the general rule as to the measure of damages is that the vendee is entitled to such purchase money as he paid, together with interest and expenses of investigating title. This rule, however, does not apply where there is a want of good faith in the vendor, which may be shown by any acts inconsistent with the utmost good faith. In such cases, or in cases where the vendor had no title but acting on the supposition that he might acquire title, he is liable for the value of the land at the time of the breach with interest from that date ... .
>
> The reason for the rule seems to be that where a vendor acts in good faith he should not be liable for more than the actual loss which might be suffered by the vendee. On the other hand, there is no reason why the vendor should be allowed to benefit from such mistake even though it was made in good faith. Every rule of logic and justice would seem to indicate that where a vendor is unable to perform a prior contract for the sale of lands because of a subsequent sale of the same land, he should be held, to the extent of any profit in the subsequent sale, to be a trustee for the prior vendee and accountable to such vendee for any profit.

2. *Hollywood Mall, Inc. v. Capozzi*, 545 So.2d 918, 921 (Fla. 4th DCA 1989) ("To obtain damages for anticipatory breach of contract, the purchaser must also show that he was ready, willing, and able to perform the contract.") (citing *Hosp. Mortg. Grp. v. First Prudential Dev. Corp.*, 411 So.2d 181 (Fla. 1982)).

3. *Coppola Enterprises, Inc. v. Alfone*, 531 So.2d 334, 335-36 (Fla. 1988) ("A seller will not be permitted to profit from his breach of a contract with a buyer, even absent proof of fraud or bad faith, when the breach is followed by a sale of the land to a subsequent purchaser.").

4. *Port Largo Club, Inc. v. Warren*, 476 So.2d 1330, 1333 (Fla. 3d DCA 1985) ("Where bad faith exists a purchaser may obtain, as a portion of his full compensatory damages, loss of bargain damages, *i.e.*, the difference between the contract price and the value of the property on the closing date.").

5. *Wolofsky v. Behrman*, 454 So.2d 614, 615 (Fla. 4th DCA 1984) ("Florida has long since aligned itself with the English rule announced in *Flureau v. Thornhill*, 2 W.Bl. 1078, 96 Eng.Rep. 635, to the effect that, except where a vendor has acted in bad faith, his liability for breach of a land sale contract is limited to the amount of the deposit paid by the purchaser, with interest and reimbursement for expenses in investigating title to the property. However, absent good faith, he is liable for full compensatory damages, including the loss of his bargain, which is the difference between the value of the property and the contract price.").

6. *Bosso v. Neuner*, 426 So.2d 1209, 1212 (Fla. 4th DCA 1983) ("However, where bad faith

exists the purchaser may obtain loss of bargain damages which is the difference in value between the price the purchaser had agreed to pay and the value of the property on the contracted date for closing.").

7. *Horton v. O'Rourke*, 321 So.2d 612, 613 (Fla. 2d DCA 1975) ("[I]n the absence of bad faith the damages recoverable for breach by the vendor of an executory contract to convey title to real estate are the purchase money paid by the purchaser together with interest and expenses of investigating title.").

357 SELLER'S DAMAGES FOR BREACH OF CONTRACT TO PURCHASE REAL PROPERTY

To recover damages for the breach of a contract to buy real property, (claimant) **must prove that [he] [she] [it] performed, or had the ability to perform, all of [his] [her] [its] obligations necessary for closing.**

If (claimant) **proves that [he] [she] [it] performed, or had the ability to perform, all of [his] [her] [its] obligations necessary for closing, then** (claimant) **may recover:**

1. The difference between the contract sales price and the fair market value of the property on the date of the breach, less any amount which (defendant) **previously paid; and**

2. Any damages which the parties contemplated when the parties made the contract and which normally result from the breach of contract.

NOTES ON USE

1. The court should give this instruction when a seller is seeking damages as a remedy for the breach of a contract for the purchase of real property. This instruction does not apply to claims for specific performance. *See Castigliano v. O'Connor*, 911 So.2d 145, 148 (Fla. 3d DCA 2005) (a decree of specific performance is an equitable remedy); *381651 Alberta, Ltd. v. 279298 Alberta, Ltd.*, 675 So.2d 1385, 1387 (Fla. 4th DCA 1996) (the right to a jury trial applies only to legal and not equitable causes of action).

2. The court should give this instruction where the contract does not contain a liquidated damages provision or where the liquidated damages provision has been determined to be unenforceable.

SOURCES AND AUTHORITIES

1. *Pembroke v. Caudill*, 37 So.2d 538, 541 (Fla. 1948) (receded from on other grounds by *Hutchison v. Tompkins*, 259 So.2d 129, 130 (Fla. 1972)) ("[T]he measure of the sellers' damage ordinarily being in such cases [where the buyer breaches the contract] the difference between the agreed purchase price and the actual value of the property at the time of the

breach of the contract of purchase, less the amount paid.").

2. *Buschman v. Clark*, 583 So.2d 799, 800 (Fla. 1st DCA 1991) ("[T]he measure of damages for breach of a real estate sales contract is the difference between the contract sales price and the fair market value of the property on the date of the breach. All additional damages must be alleged and proved to have been contemplated by the parties and must be a natural and proximate result of the breach.").

3. When the seller elects to sue for breach of contract, "the measure of damages is the difference between the price the buyer agreed to pay for the property and the fair market value of the property on the date of the breach." *Frank Silvestri, Inc. v. Hilltop Developers, Inc.*, 418 So.2d 1201, 1203 (Fla. 5th DCA 1982). "If a seller has suffered additional damage, he must allege and prove that those damages were contemplated by the parties and were a natural and proximate result of the breach." *Id.* at 1203 n.1.

4. *Cohen v. Champlain Towers N. Assocs.*, 452 So.2d 989, 991 (Fla. 3d DCA 1984) (seller must show ability to perform all conditions precedent to recover damages) (citing *Hosp. Mortg. Grp. v. First Prudential Dev. Corp.*, 411 So.2d 181 (Fla. 1982)).

5. *Redmond v. Prosper, Inc.*, 364 So.2d 812, 813 (Fla. 3d DCA 1978) (proper measure of damages for breach of real estate contract is "the excess of the contract sales price over the market value as of the time of the breach, less the amount previously paid").

6. *Popwell v. Abel*, 226 So.2d 418, 422 (Fla. 4th DCA 1969) ("In the ordinary case where a purchaser of land breaches his contract to buy, the difference between the value of the land on the date of breach as compared with the date of sale would restore the vendor, but the vendor may still allege and prove as proper elements of damage all those damages contemplated by the parties which are a natural and proximate result of the breach.").

APPENDIX E

COMMENTS RECEIVED

From: Judge Fred A. Hazouri
Sent: Thursday, July 26, 2012 11:18 AM
To: Judge Jonathan Gerber
Cc: Judge Robert M. Gross
Subject: Proposed Jury Instructions in Contract and Business Cases

I can't add anything more than what Bob has said.

From: Judge Robert M. Gross
Sent: Wednesday, July 25, 2012 12:15 PM
To: Judge Jonathan Gerber
Cc: Judge Fred A. Hazouri
Subject: Proposed Jury Instructions in Contract and Business Cases

My concern about the proposed instruction is that I do not believe that promissory estoppel should be characterized as an affirmative defense; as set forth in section 90 of the restatement, it is a cause of action that will support a claim for damages. An affirmative defense admits a cause of action asserted by the complaint, but avoids liability, in whole or in part, by allegations that in some way negate the cause of action. Equitable estoppel as set forth in the proposed instructions is an affirmative defense.

Assume a case where the plaintiff sues on a contract. The defendant contends that the contract, or a provision in it, should not be enforced because of the defendant's good faith reliance on a representation of the plaintiff that caused the defendant to change his position for the worse. This is the affirmative defense of equitable estoppel that is covered in the proposed instruction.

Promissory estoppel is best characterized as a cause of action that will support a claim for damages. Paragraph 5 of the instruction talks about "harm" and it is this harm that is compensated by a damage award. Defensively, promissory estoppelshould be a counterclaim. Including it as an affirmative defense will foment confusion. I suspect that trial judges will give both estoppel instructions.

From: Judge Jonathan Gerber
Sent: Wednesday, July 25, 2012 9:12 AM
To: Judge Robert M. Gross
Cc: Judge Fred A. Hazouri
Subject: Proposed Jury Instructions in Contract and Business Cases

Bob – I am finalizing the petition for the Supreme Court's review of the proposed initial set of Jury Instructions in Contract and Business Cases. A few months ago, we had a discussion regarding your concern about the propriety of the proposed instruction "Affirmative Defense – Promissory Estoppel" re-printed below (as published for comment in the April 1, 2012 Florida Bar News). The Florida Bar's staff liaison to my committee has notified me that any comments we receive should be put in writing for inclusion with the petition. Would you mind taking a few minutes putting your thoughts down in writing? Thanks. I'm also re-printing below the proposed instruction "Affirmative Defense – Equitable Estoppel" (also as published for comment in the April 1, 2012 Florida Bar News) which I recall was part of our discussion.

Fred – I recall that you shared Bob's concern. After he sends me his comment in writing, would you mind also providing me your comment in writing? Thanks.

342 AFFIRMATIVE DEFENSE – PROMISSORY ESTOPPEL

(Defendant) **has raised the defense of "promissory estoppel." To establish this defense,** (defendant) **must prove all of the following:**

1. (Claimant) **promised to** (describe material act to be performed or not performed) **in the future;**

2. (Claimant) **reasonably should have expected that** (defendant) **would rely upon the promise;**

3. (Defendant) **reasonably relied upon** (claimant's) **promise;**

4. (Claimant) **did not keep [his] [her] [its] promise; and**

5. (Defendant's) **reliance on** (claimant's) **promise caused harm to** (defendant)**.**

SOURCES AND AUTHORITIES

1. "The basic elements of promissory estoppel are set forth in Restatement (Second) of Contracts § 90 (1979), which states:

> (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.
>
> The character of the reliance protected is explained as follows:
>
> The promisor is affected only by reliance which he does or should foresee, and enforcement must be necessary to avoid injustice. *Satisfaction of the latter requirement may depend on the reasonableness of the promisee's reliance, on its definite and substantial character in relation to the remedy sought, on the formality with which the promise is made, on the extent to which the evidentiary, cautionary, deterrent and channeling functions of form are met by the commercial setting* or otherwise, and on the extent to which such other policies as the enforcement of bargains and the prevention of unjust enrichment are relevant.

W.R. Grace & Co. v. Geodata Services, Inc., 547 So.2d 919, 924 (Fla. 1989).

2. Promissory estoppel is "a qualified form of equitable estoppel which applies to representations relating to a future act of the promisor rather than to an existing fact." *Crown Life Ins. Co. v. McBride*, 517 So.2d 660, 661-62 (Fla. 1987). Promissory estoppel "only applies where to refuse to enforce a promise, even though not supported by consideration, would be virtually to sanction the perpetration of fraud or would result in other injustice. Such injustice may be found where the promisor reasonably should have expected that his affirmative representations would induce the promisee into action or forbearance substantial in nature, and where the promisee shows that such reliance thereon was to his detriment. *Id*. at 662.

339 AFFIRMATIVE DEFENSE – EQUITABLE ESTOPPEL

(Defendant) has raised the defense of equitable estoppel. To establish this defense, (defendant) must prove all of the following:

6. [(Claimant) **took action by (describe material action)]**
[(Claimant) **spoke about (describe material fact)]**
[(Claimant) **concealed or was silent about** (describe material fact) **at a time when [he] [she] [it] knew of [that fact] [those facts]];**

2. (Defendant) **relied in good faith upon** (claimant's) **[action] [words] [inaction] [silence]; and**

3. (Defendant's) **reliance on** (claimant's) **[action] [words] [inaction] [silence] caused** (defendant) **to change [his] [her] [its] position for the worse.**

NOTE ON USE

The court should not give this instruction if it determines that the alleged action, words, inaction, or silence was not material.

SOURCES AND AUTHORITIES

1. "The elements of equitable estoppel are (1) a representation as to a material fact that is contrary to a later-asserted position, (2) reliance on that representation, and (3) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon." *State v. Harris*, 881 So.2d 1079, 1084 (Fla. 2004).

2. "[I]n order to work an estoppel, silence must be under such circumstances that there are both a specific opportunity and a real apparent duty to speak." *Thomas v. Dickinson*, 30 So.2d 382, 384 (Fla. 1947).

3. "The 'representation' upon which an estoppel may be predicated may consist of words, conduct, or, if there is a duty to speak, silence." *Lloyds Underwriters at London v. Keystone Equipment Finance Corp.*, 25 So.3d 89, 93 (Fla. 4th DCA 2009) (citations omitted).

4. "The conduct . . . such as to create an estoppel . . . necessary to a waiver consists of willful or negligent words and admissions, or conduct, acts and acquiescence causing another to believe in a certain state of things by which such other person is or may be induced to act to his prejudice. The acts or conduct need not be positive, but can consist of failure to act or, more particularly, failure to speak when under some duty to speak." *Richards v. Dodge*, 150 So.2d 477, 481 (Fla. 2d DCA 1963) (internal citations omitted).

APPENDIX F

Supreme Court Committee on Standard Jury Instructions - Contract and Business Cases
June 27, 2007
Orlando World Center Marriott

Minutes of Meeting

A meeting of the Supreme Court Committee on Standard Jury Instructions – Contract and Business Cases ("Committee") was held on June 27, 2007 at the Orlando World Center Marriott. Judge Thomas B. Smith, Chair of the Committee, called the meeting to order at 1:15 p.m., and requested a roll call. Those in attendance were:

Members Present
Hon. Thomas Smith - Chair
Hon. Bernard Nachman – Vice-Char
Hon. Jonathan Gerber
Hon. William Van Nortwick
Thomas Edwards, Esq.
Kacy Lake, Esq.
Michael Olin, Esq.
Brian Spector, Esq.
Manuel Farach, Esq.
Lee Barrett, Esq.
Barbara Green, Esq.
Robert Austin, Esq.
Don Conwell, Esq.
Maxine Long, Esq.

Members Absent
Hon. Brian Lambert
Hon. Charles Canady
Hon. Angel Cortinas
Mitchell W. Berger, Esq.
Michael Higer, Esq.
Benjamin H. Hill, III, Esq.
Jonathan Koch, Esq.
Tucker Ronzetti, Esq.

Also Present
Hon. Fred Lewis
Gerry Rose, Florida Bar Liaison

Notes on Attendance

Hon. Kenneth Bell, Florida Supreme Court Liaison to the Committee, was unable to attend the entire meeting due to other meeting commitments.

Justice Lewis welcomed the members of the Committee and thanked the members for their willingness to undertake a difficult and complex but much needed project. Justice Lewis asked the members to submit their proposed instructions to Mr. Rose, who would undertake the necessary additional steps at that point.

Mr. Spector requested the Committee discuss certain housekeeping matters. First, Mr. Spector suggested the Committee follow the same steps followed by the Committee on Standard Jury Instructions – Civil, i.e.,

1. Circulate drafts of instructions amongst the Committee,
2. Approve drafts of instructions,
3. Submit drafts to Mr. Rose for review and dissemination to the Bar and the public,
4. Solicit comments from the Bar and the public,
5. Consider comments received from the Bar the and public,
6. Submit "final draft" instructions to the Florida Supreme Court,
7. Attend Oral Argument on "final draft" instructions, and
8. Adoption of instructions by Florida Supreme Court.

The Committee unanimously agreed to adopt the procedure employed by the Supreme Court Committee on Standard Jury Instructions – Civil.

Second, Mr. Spector suggested the members introduce themselves. The members obliged.

Third, Mr. Spector requested the Committee consider whether it wished to have documentation for upcoming meetings in paper (notebook) or purely electronic forms. Mr. Rose informed the members he was willing to provide either.

Fourth, Mr. Spector requested the Committee discuss whether it wished to follow the traditionally used form of instructions or propose instructions using a "plain English" method of drafting instructions. The Committee unanimously agreed to use a "plain English" style of drafting instructions.

The discussion then turned to the efforts of the Committee on Standard Jury Instructions – Civil on drafting "plain English" instructions. Judge Smith informed the Committee that two members of the Committee, Mr. Robert Austin and Mr. Thomas Edwards, also serve on the Supreme Court Committee on Jury Instructions – Civil, and the two will act as liaisons between the two committees.

The Committee next discussed the issue of "plain English" instructions. Mr. Edwards and Mr. Austin advised the Committee that the Committee on Standard Jury Instructions – Civil had

undertaken a “plain English” program, but that such probably would not be complete for a period of time.

Mr. Olin next suggested that the Committee not adopt a different book than the one currently used by the Committee on Standard Jury Instructions – Civil, and the Committee agreed. The discussion then turned to the issue of how to go through the mechanics of discussing jury instructions, and the Committee agreed that Mr. Spector would operate the computers/screens necessary to discuss specific proposals for instructions and that Mr. Farach would take notes. The Committee also unanimously agreed the Hon. Nachman would serve as Vice-Chair. The extranet website for the work of the Committee is:

http://extranet.flcourts.org/committees/default.aspx

at which time the members of the Committee would have to insert the pre-fix [flaext] before their username and then enter the temporary password of P@$$w0rd. The members were urged to change their passwords upon entry into the extranet. Members should contact Mr. Spector through e-mail at bspector@kennynachwalter.com with any questions.

Mr. Austin requested agendas, proposals (with support) and comments prior to the meetings. The discussion then turned to whether the materials to be used at meetings were to be delivered via the extranet or in binders before meetings. The Committee did not reach a conclusion on which method to employ, and may try both methods to see which is more effective.

Mr. Austin also suggested that members “check their clients at the door” when discussing various proposals. Mr. Spector agreed and suggested the additional requirement of members disclosing any interests their clients may have in any pending proposals. The Committee agreed with both suggestions. The Committee further agreed that the standard to be used in drafting any proposed instructions was whether the instruction constituted “a fair and accurate statement of the law.” The Committee also agreed that uniformity in the law was desired, but would not seek to implement uniformity when it did not already exist. The Committee also recognized that jury instructions have several uses other than to instruct the jury, e.g., to be used for drafting or arguing pleadings or to offer guidance to practitioners, and that this thought should be kept in mind as instructions were drafted and proposed.

Mr. Spector also suggested that meetings of the Committee be held on dates other than Bar meeting dates so that there would be no scheduling conflicts, and at locations convenient to the majority of the members. After discussion, the Committee agreed to hold meetings on Fridays at the Orlando Airport (or other convenient Orlando location) at regularly scheduled dates other than Florida Bar meetings. Ms. Melissa Goodwin will coordinate the first series of meetings.

The Committee then turned to the issues of specific instructions. Mr. Olin offered the proposed F.D.U.P.T.A. instruction, but had two questions he reported his sub-committee had been struggling with:

1. Should reliance be an issue for the proposed instruction?
2. Should the proposed instruction flesh out the statutory language?

Discussion was held on these two topics, but no conclusion was reached and the Committee agreed to re-visit the topic in future meetings.

The discussion next turned to the issue of securities instruction. Ms. Lake advised that the Securities Sub-committee had discussed the issue of differences between the federal and Florida securities statutes, and whether the Committee should propose instructions closely similar to the federal securities instructions. Mr. Austin suggested a framework for all statutory instructions that follow the basic formula of documenting the duty, the breach of the duty, and damages arising from the breach. The Committee agreed the Securities Sub-Committee should study the similarities between the two series of instructions, follow the federal pattern as much as possible, and propose instructions that focus on the differences between the state and federal statutory schemes.

The Committee next analyzed the proposed Tortious Interference instructions. Mr. Berger was not able to attend, but sent proposed changes to the current Standard Jury Instructions – Civil MI 7.1 and 7.2 instructions. The Committee did not reach a decision on whether to adopt the proposed changes, but expressed concern over the spite/malice portion of the instruction.

The Committee next turned to the instruction regarding Trade Secrets. Mr. Barrett suggested a format similar to that used by a legal publisher. The Committee decided further inquiry would be appropriate, but also believed it would be appropriate to seek further inquiry from I.P. counsel as to the applicability of the "fair use" doctrine under these circumstances.

The Committee then discussed the various areas of possible real estate jury instructions, specifically, breach of contract, brokerage litigation, construction litigation, and Johnson v. Davis litigation. Mr. Farach was instructed to inquire which areas might be needed most, and propose instructions on these areas.

As a final matter, Mr. Rose invited all the members of the Committee to attend the July meeting of the Committee on Standard Jury Instructions – Civil scheduled for July 12th and 13th at the Breakers, Palm Beach. Many members offered to attend, schedules permitting.

There being no further business, the meeting was adjourned at 3:40 p.m.

Respectfully submitted,
Manuel Farach, Reporter

SUPREME COURT COMMITTEE
ON STANDARD JURY INSTRUCTIONS
CONTACT AND BUSINESS CASES

Minutes of January 22, 2010 Meeting

The Florida Supreme Court Committee On Standard Jury Instructions ("SJI") In Contract and Business Cases met on January 22, 2010, in Orlando, Florida, in connection with the Midyear Meeting Of The Florida Bar. The following were in attendance:

Committee Members
Honorable R. Fred Lewis
Manuel Farach, Vice Chair
Brian F. Spector, Vice Chair
Robert E. Austin, Jr.
Richard Lee Barrett
Mark A. Boyle, Sr.
Ronald M. Gache
Honorable Jonathan D. Gerber
Lee L. Haas
James M. Kaplan
Jane Kreusler-Walsh
Christine E. Lamia
Maxine M. Long
Robert M. Norway
Eduardo Palmer

Committee Members
Gera R. Peoples
Steven R. Reininger
Gary C. Rosen
Honorable Meenu Talwar Sasser
Mark M. Wall

Invited Guest
The Honorable James Manly Barton II
Vice Chair, Florida Supreme Court SJI
Committee (Civil)

Florida Bar Representatives
Krys Godwin
Jodi Jennings

1. Introduction: Manuel ("Manny") Farach explained that the Committee's Chair, the Honorable Thomas B. Smith, Circuit Judge of the Ninth Judicial Circuit, was ill, unable to attend the meeting, and extended his apologies to the Committee. In his place Vice Chair Farach chaired the meeting. Manny provided a historical overview of the Committee — its creation, charge, and focus. He then explained how the Committee decided to use California's instructions as a template and discussed the license agreement ultimately entered into between the Judicial Council of California, Administrative Office of the Courts, and the Supreme Court of Florida. Manny noted the breadth of the license agreement, as evidenced by one of the agreement's recitals, the language of which is set forth below:

> WHEREAS the Committee has Determined that Certain Portions of CACI relating to contracts and business torts (including instructions 300 through 374, as well as verdict forms VF-300 through VF-303, as they now exist or may be amended in the future) fraud and deceit (including instructions 1900 through 1925, as well as verdict forms VF-1900 through VF-1903, as they now exist or may be amended in the future), economic interference (including instructions 2200 through 2204, as well as verdict forms VF-200 through VF-2203, as they now exist or may be amended in the future), unfair practices (including instructions 3300 through 3335, as well as verdict forms VF-330 through VF-3307, as they now exist or may be amended in the future), damages (including instructions 3900 through 3964, as well as verdict forms VF-39 through VF-3907, as they now exist or may be amended in the future), trade secrets (including instruction 4400 through 4420, as they now exist or may be amended in the future), (the "California Instructions") may be useful in drafting corresponding jury instructions for use in the State of Florida.

2. Remarks from Florida Supreme Court Justice R. Fred Lewis: Justice Lewis explained his long standing concern over the absence of standard jury instructions for contract and business cases. In 2006 the Florida Supreme Court, under then Chief Justice Lewis, created the Committee through entry of Administrative Order AOSC07-54. By way of historical background, Justice Lewis explained that the Florida Supreme Court SJI (Civil) Committee previously had decided not to undertake the task of preparing a comprehensive set of standard instructions for contract and business cases other than those already in existence, e.g. MI 7 Tortious interference with business relationships, MI 8 Fraudulent misrepresentation; negligent misrepresentation, and MI 12.1 Breach of contract existence of contract admitted (terms unambiguous). Hence, this important task was entrusted to the newly created Committee. Justice Lewis recommended that our Committee present proposed instructions to the Court as each instruction is finalized rather than waiting for an entire body of law to be covered by a complete set of instructions.

3. Collaborative relationship with the Florida Supreme Court Committee on SJI (Civil): The Committee was pleased to have in attendance the Honorable James Manly Barton II, Circuit Judge of the Thirteenth Judicial Circuit and Vice Chair of the Florida Supreme Court SJI (Civil) Committee. Judge Barton reported on the status of the

SJI (Civil) Committee's "book reorganization" project. The materials for this project are found on the Florida Supreme Court's web site, specifically located at:

http://www.floridasupremecourt.org/clerk/comments/2009/09-284_Petition%20%28Volume%201%29.pdf

http://www.floridasupremcourt.org/clerk/comments/2099/09-284_021709_Petition%20%28Volume%202%29.pdf

http://www.floridasupremecourt.org/clerk/comments/2009/09-284_021709_Petition%20%28Volume%203%29.pdf

Justice Lewis advised that the Florida Supreme Court will be acting in the very near future on this project. After discussion, the consensus appeared to be that our Committee's work product would and should be included within the "new" book and work product of the SJI (Civil) Committee for ease of reference for trial judges and attorneys. It was noted that Committee member Robert E. Austin is also an *ex officio* member of the SJI (Civil) Committee. This will promote a collaborative working relationship with, and facilitate communication between, the two committees.

4. Initial focus of the Committee's efforts: The Committee agreed that the Committee's initial focus should be on contract instructions. Judge Gerber proposed, and the Committee approved, the following organizational structure for dividing responsibility among three to four-person working groups:

Group 1
300 Breach of Contract—Introduction
301 Third-Party Beneficiary
303 Breach of Contract—Essential Factual Elements
304 Oral or Written Contract Terms
305 Implied-in-Fact Contract
306 Unformalized Agreement
VF-300 Breach of Contract

Group 2
302 Contract Formation—Essential Factual Elements
307 Contract Formation —Offer
308 Contract Formation—Revocation of Offer
309 Contract Formation—Acceptance
310 Contract Format on—Acceptance by Silence
311 Contract Formation—Rejection of Offer
312 Substantial Performance
313 Modification
VF-303 Breach of Contract—Contract Formation at Issue

Group 3
314 Interpretation —Disputed Tern
315 Interpretation —Meaning of Ordinary Words
3161nlerpretation —Meaning of Technical Words
317 Interpretation —Construction of Contract as a

Whole
318 Interpretation —Construction by Conduct
319 Interpretation—Reasonable Time
320 Interpretation —Construction Against Drafts

Group 4
321 Existence of Condition Precedent Disputed
322 occurrence of Agreed Condition Precedent
323 Waiver of Condition Precedent
324 Anticipatory Breach
325 Breach of Covenant of Good Faith and Fair Dealing—Essential Factual Elements
326 Assignment Contested
327 Assignment Not Contested

Group 5
330 Affirmative Defense—Unilateral Mistake of Fact
331 Affirmative Defense—Bilateral Mistake
332 Affirmative Defense—Duress
333 Affirmative Defense—Economic Duress
334 Affirmative Defense—Undue Influence
335 Affirmative Defense—Fraud
336 Affirmative Defense—Waiver
337 Affirmative Defense—Novation
338 Affirmative Defense—Statute of Limitations
VF-301 Breach of Contract—Affirmative Defense—Unilateral Mistake of Fact
VF-302 Breach of Contract—Affirmative Defense—Duress

Group 6
350 Introduction to Contract Damages
351 Special Damages
352 Loss of Profits---No Profits Earned
353 Loss of Profits—Some Profits Earned
354 Owner's/Lessee's Damages for Breach of Contract to Construct Improvements on Real Property
355 Obligation to Pay Money Only
356 Buyer’s Damages for Breach of Contract for Sale of Real Property
357 Seller's Damages for Breach of Contract to Purchase Real Property
358 Mitigation of Damages
359 Present Cash Value of Future Damage
360 Nominal Damages
361 Plaintiff May Not Recover Duplicate Contract and Tort Damages

Group 7
370 Common Count: Money Had and Received
371 Common Count: Goods and Services Rendered
372 Common Count: Open Book Account
373 Common Count: Account Stated
374 Common Count: Mistaken Receipt

Within each three or four-person working group, one Committee member would be assigned the task of researching Florida law on the issue covered by one or more California instructions. Provided that there is clear, unambiguous Florida law covering the subject, the person with primary responsibility would draft a proposed instruction using the California CACI instruction as a template. Thereafter, a different member of that working group would be responsible for reading the applicable case law and offering comments and proposed changes/corrections to the draft instruction. The process to be followed is analogous to the editorial process on a law review, where someone other than the author performs a substantive and technical verification of the author's work product. After a draft instruction has undergone this initial review, all members of the working group would consider, discuss and, where appropriate, make further modifications to the instruction. Once that vetting process is complete, the draft instruction will be presented to the entire Committee for consideration and action. In recognition of the SJI (Civil) Committee's decision for the "book reorganization" project to use "notes on use," but abandon "comments" such as those presently found in the standard jury instruction notebook, our Committee decided to do likewise. Hence, proposed instructions will be accompanied by one of more "notes on use," with citation to applicable authority. There is no need to reference applicable West key numbers or second authorities. Moreover, when draft instructions are circulated— whether among the working group or to the entire Committee —PDF copies of the cited cases should be attached to the instruction. Ideas for Florida instructions (not identified in CACI instructions) may be suggested by the working groups as they proceed with their research, analysis and drafting, as it may not be possible to identify all contract instructions until that work begins

5. E-mails from Committee members no later than Monday, January 25, 2009: Each Committee member was asked to e-mail:

Judge Smith (ctjuts1@ocnjcc.org)
Judicial Assistant Melissa Goodwin (ctjamg1@ocnjcc.org)
Manny Farach (mfarach@richmangreer.com) and
Brian Spector (brian@bspector.com)

In these e-mails each Committee member should indicate his or her preference (first, second, and third choice) of the "Group" (identified above in paragraph 4) on which the Committee member would like work. Additionally, Committee members are encouraged to identify any additional contract instructions which should be considered. Judge Smith will e-mail all Committee members to identify working group members and chairs.

6. Future meetings: Much of the Committee's work will be performed at the working group (a/k/a subcommittee) level. However, final decisions on instructions being submitted to the Florida Supreme Court should be made at face to face meetings. The Committee tentative discussed meeting two, and perhaps three, times a year, e.g. February, June, and October. In all likelihood, such meetings would be held in Orlando or Tampa. In addition, the Committee hopes to use available technology to conduct conference calls in which all participants can see an instruction on their computer screen and watch while the draft is revised in "real time." No final decisions were reached, it being understood that the Chair will exercise his independent judgment and discretion in deciding how best to proceed.

Dated: February__, 2010
Miami, Florida

Respectfully submitted,

_____

Brian F. Spector

Supreme Court Committee on Standard Jury Instructions - Contract and Business Cases
August 26, 2010
Orange County Courthouse, Orlando

Minutes of Meeting

Meeting called to order at 1:10

Minutes were read and approved.

300: instruction was read and approved with discussion other than as to the use of "Claimant." The Committee decided to use the same descriptions as SJI Civil.

301: Barrett discussed whether a notation should be made of "incidental," Ronzetti stated it might lead to confusion to insert the word "incidental" beneficiaries into the Notes on Use. Palmer stated "incidental" should be included to clarify the distinction. Norway made recommendation to include a breakout of each contractual provision into the Notes on Use. The Committee voted in favor of including a statement on "incidental" third party beneficiaries. Ronzetti stated that the long list of authorities was due to listing a case from each district court of appeal in the instruction since there was no Florida Supreme Court case on the issue. A discussion was held whether the section of Notes on Use included Sources and Authorities or merely directions on how to use instructions. The decision of the Committee was to use the two different methods. The instruction was approved unanimously by the Committee.

302: Discussion was held on whether "agreement" should be switched to "contract" in the instruction, and the request. A Note on Use will be inserted as to when to read the bracketed paragraph of the instruction. Ronzetti suggested the word "essential" appear in paragraph three and in the bracketed language. Paragraph 7 of the Notes on Use will change to state "final element" as opposed to the "final instruction." The Committee discussed whether to further explain or give notation to the issue of "essential terms," but the Committee declined to define what "essential terms" are and instead decided to let the attorneys argue that definition in each specific case pursuant to Paragraph 5 of the Notes on Use.

303: Ronzetti stated he will change the "preponderance of the evidence" and change the use of the terms of "her, his and its." Ronzetti stated he will shorten the "substantial performance" language from the Ocean Ridge decision. Ronzetti and Gache' discussed whether to define the word "material," and Ronzette agreed to further research the use of the word "material" in place of "material."

304: The Committee decided to eliminate the second and third sentences of Note on Use 1 and use instead the following for the second sentence: "If the complete agreement is in writing, this instruction should not be given." The instruction passed unanimously with the change.

305: unanimous with the change to end of first paragraph of

306: after discussion, the Committee decided to not work on 306 for the moment.

307: The Committee decided to change “claimant” to “Plaintiff.” The Committee changed the last sentence to include the language that “if Plaintiff did not prove all of the above, then no offer was made and no contract was created.”

308: “If Claimant failed to prove any of the above, then the offer was withdrawn and no contract was created.” With the changes, the instruction was adopted as modified.

309: The admonition to not use this instruction unless there is evidence to support it (similar to 307 and 308) has been inserted back into the instruction. The Committee also agreed to remove Note No. 3.

310: The Committee decided to take out the last three paragraphs of the instruction and references to Sec. 69(1) of the Restatement. Rosen and Chris will combine their two proposal.

311: The Committee decided to use “manner” instead of “mode” and the sentence will read “in the manner, at the place and within the time . . .”

08/27: Meeting was reconvened at 8:45 a.m.

311: discussion continued on whether to keep working on this instruction. The Committee voted to not proceed forward with this instruction at this time.

312: Olin stated it really was into. The Committee decided to delete Instruction 312, and move the sources and authorities of 312 into 303. The Committee decided to wait until the conclusion of the meetings on whether and how to collapse some of the Group 2 instructions into 303.

313: skipped by the Committee.

314: Ronzetti suggested removal of Note 5 requiring the use of a verdict form, and the Committee agreed. The Committee also discussed whether the instruction should contain language regarding the objective test, and the Group 3 Subcommittee was tasked with incorporating the objective test language into the instruction itself.

315: Olin suggested the instruction read “You should assume the parties intended the disputed terms in their contract to have their plain and ordinary meaning, unless the parties agreed the disputed term(s) should have another meaning,” and the Committee voted unanimously in favor of the change. The word “chose” should have been used instead of “choose.”

316: The Committee decided to change a portion of the instruction to: ". . . unless the parties agreed the disputed term(s) should have another meaning."

317: The Committee voted to use the CACI instruction with the three word redaction and remove "to the parties." The Committee also decided to remove the portion of Note 1 up to "In reviewing the contract in an attempt to determine its true meaning, . . . " In deciding what disputed terms of a contract mean,"

318: The Committee agreed to use the suggestion of Judge Gerber: "In deciding what the disputed term(s) of a contract mean, you should consider how the parties acted after the contract was created." The suggestion passed unanimously.

319: Hass suggested "within" instead of "in" in the first line, and also the parties at the time they entered into the contract."

The Committee instructed Group 3 to draft an objective analysis of contract instruction.

320: Wall explained the importance of the instruction and its potential impact, and discussion was held on when the instruction should be given and what level of modification and impact on a term constitutes a "drafter" of an instrument. The Committee instructed Group 3 to further research the following issues:

1. Further clarification as to whether the issue is as to "primary" drafter or contract as a whole,
2. Further clarification as to what constitutes the "drafter" of the agreement, and
3. Examine research to see if questions 1 and 2 were considered in a jury trial context.

Next meeting: the Committee discussed meeting for an entire day on a Friday; Judge Smith will send out suggestions for a Friday meeting.

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS FOR BUSINESS AND CONTRACT CASES

Minutes for 10/21/10 Meeting

Members Present: Honorable Thomas B. Smith (Chair); Manuel Farach; Brian Spector; Lee Hass; Mark Wall; Eduardo Palmer; Jane Kreusler-Walsh; Honorable Meenu Sasser; Tucker Ronzetti; Maxine Long; Steve Reininger; Robert Norway; Kurt Eugene Lee; Gera Peoples; Ronald Gache; Christine Lamia; Richard Barrett; Honorable Jonathan Gerber.

Members Absent: Robert Austin; James Kaplan; Eric Allan Lee; Justice Fred Lewis; Bernard Nachman; Gary Rosen; Paul Silverberg; Michael Olin; Mark Andrew Boyle.

Administrative Matters:

- **Approval of Minutes:**
  - Judge Smith asked that the Committee take a few moments to review the minutes from the last meeting.
  - Long pointed out the blank at the end of 305
  - Ronzetti pointed out the use of word essential in 303
  - 312: "Olin stated it was really into"→ Unclear as to what this was meant to say.
  - (Non-substantive discussion regarding typos in documents)
  - Smith: What we will do is if you have comments, please send them to Judge Smith and we will approve the minutes at a later date.
- **Committee Meetings in Tampa:**
  - Judge Smith broached the issue of having meetings in the Tampa Airport Marriott. No need to take a cab etc..
  - Spector stated that the main concerns are cost and convenience so we need to be mindful of that. The venues need to NOT require a fee.
  - Walsh broached the issue of rotating locations of the meetings to ensure the same people are not always traveling.
  - Palmer suggested that we stay in Orlando because Tampa adds an hour to those coming from South Florida.
  - Judge Smith will take an informal poll via email re: location of meetings.
- **Website:**
  - Spector broached the idea of keeping all Committee materials on the website to prevent losing attachments etc.. In the "old days" there was a heavy notebook, which was helpful because you could trace the genealogy of the changes. Spector will work on the website to start from date current to show drafts from this day forward.

- **Committee's Product:**
  - Smith: We are going through the instructions for the first time. Do we want to roll them all out at one time or each instruction individually?
  - Spector: The process is that we publish whole thing in Fla. Bar J. for comments, when we get comments, we respond and say thanks, we will consider. If the comment is substantive, the comment will be circulated to the person that is writing that instruction. The committee member will write back. If we change our instruction per the comment, we need to republish the instruction and take comments again. All of the instructions are A LOT to deal with at one time. We could do blocks of instructions and publish in chunks. There may be instructions where there are no substantive comments and no rewrite is needed.
  - Ronzetti: Sections sounds fine, but we need to make sure we have good section breaks to ensure that the published segments give the whole picture.
  - Smith: Let's go through one time, and then talk about grouping them.
  - Walsh: If we want to send it to publication in chunks, wouldn't it make sense to finalize the parts that we have already done.
  - Consensus to start back up at 300 and finalize those sections.
  - Judge Gerber is making real time changes so that we can see what is being changed.

Substantive Discussion:

- **Deferred last time: 306, 314 and 320**

- **300**
  - No revisions needed.

- **301**
  - Spector: Do we concern ourselves with the form of the Notes on Use to be like SJ Civil?
  - Spector: Has it been decided as to whether these instructions will be included in the SJ Civil Book or be a separate book? (Discussion that it had not been decided yet).
  - Spector: What about string cites with no parentheticals?
  - Ronzetti: Didn't we say that last time these should be removed?
  - Spector: Should the string cites be used to show that ALL DCAs have followed or just the most recent? If a court has ruled, are any secondary authorities needed?
  - Walsh: If we use secondary sources, there is an inference that the courts have not ruled if we leave the secondary sources.
  - Palmer: This is the draft to vet the Notes on Use. There is value of reflecting the legal authority from which the instruction comes from.
  - Smith: Notes on Use are NOT considered authority.

- Hass: We could leave in the cases and in the event the Court finds that such authorities are not needed (i.e. the RST) the Court may remove them. Also, leaving out the underlying secondary authorities may misconstrue the decisions.
- Palmer: We should put all sources under Notes on Use.
- Ronzetti: I believe we discussed last time that we would keep the Sources and Authorities for Committee use only.
- Long: Instructions will become the authority once approved. Keep Notes on Use but NOT Sources and Authorities when we publish.
- Walsh: The Notes on Use are NOT meant to reflect our authorities. They are meant to be helpful and may not be needed in all situations.
- Smith: Hearing no opposition to 301, 301 is approved.

❖ **302**

- Hass: The brackets are needed because it may not arise in every situation, but is a valid instruction if needed.
- Walsh: Are the CA instructions bracketed in the same way? Yes.
- Spector: The instructions say that brackets are to be used as an option that may be read orally. Parentheses are used to signify a blank that must be filled in.
- Walsh: Should we use a Note on Use to explain the use of the bracketed language?
- Spector: The brackets signify an alternative. Bracketed language is in bold because some of the language MUST BE USED.
- Gerber: The bracketed language in three seems to apply always—and perhaps the brackets can be removed. But the language "You may not consider the parties' hidden intentions" may not apply in every case.
- Reininger: Does CA provide any insight on how they read bracketed language?
- Spector: Read bracketed language only if facts of case involve consideration based on forbearance or other "unusual" form of consideration.
- Ronzetti: CA's Note on Use is helpful on when to use the bracket in 3. (Gerber later mentions that the Committee has already adopted this Note on Use).
- Walsh: But the Note on Use does not tell us how to use the bracket in 2.
- Hass: The Committee's Notes on Use are the same as CA, but add sources of authority.
- Walsh: I think what Jodi is saying that is the two sets of brackets are meant to be read as an option between the two.
- Consensus to remove "then the elements should each be bracketed…" from Note on Use 1.
- Spector: SJ Civil has a special Note on Use imbedded in the text of the instruction by using italics.
- Long: So CA's Note on Use would be broken up and imbedded in the text of the instruction.

- Smith: Do we really think that we need to tell the Judge that the bracketed language would need to be read in certain circumstances?
- Consensus that Committee should make this point clear in the instruction and not assume understanding.
- Hass: Last sentence of Note on Use #1 can be changed to say "read bracketed language only if it is an issue in the case."
- Smith: I like the CA instructions.
- Bar Liason: Take out "the bracketed language" to make it apply generally.
- Palmer: Why not remove brackets from [When you examine…] and move up to number 3. Then take out "You may not consider the parties' hidden intentions."
- Farach: In drafting another instruction, I relied on the fact that this sentence was going to be here. 302 may not be the proper place, but we do need to say something regarding hidden intentions.
- Informal correction of period and semi-colon in #2.
- Palmer: Can we please look at the new language added to the end of Note on Use #1 "Read bracketed language only if…"
- Long: The last three Notes on Use are really Sources and Authority. I think we should consider them Sources, which would be omitted when published.
- Spector: The current version does cite cases and statutes—so the Sources and Authorities are important as part of the approval process. The current version DOES SHOW authority.
- Long: We can incorporate some of it in the Notes on Use.
- (Take the language "That the parties were legally capable of entering into a contract…" from Note 2 and move up to #2 of instruction to see how it looks).
- Farach: The formation of any contract has 30 variables. If we try to include all of the variables, this would be cumbersome.
- Smith: Do we want to take Note on Use #2 out completely and do a separate instruction on legal capacity?
  - Anyone opposed? No.
  - Affirmative Defense group to make a note to include a Note regarding legal capacity (perhaps mirroring Note 2).
- Walsh: I am trying to think of a question where legal capacity would NOT be a question of law for the court? (Committee—question of fact as to age).
- (Committee looking at CA Note #3)
- Long: Clarification is not needed here because the instructions already say don't read instructions that don't apply.
- Farach: Note #3 is needed for the situation where offer and acceptance are not at issue. In that instance, we would not read that part of the instruction.
- Barrett: If there is this much doubt about Note #2, perhaps we should take it out.

- Gache: Judges are going to read instruction #3 no matter what unless we tell them NOT to read it where offer and acceptance are not at issue. Note #2 is more explanatory.
- Spector: If Note on Use #3 is intended to deal with element three –that the parties agree to the essential terms of the K—what if we took Note #3, and moved it to 3 of the instruction to flag it in the text with the word "Note." This is what SJ Civil does. No need to bury it further down and this prevents the judges from missing it.
- Walsh: This is more user friendly.
  - (Committee: SJI Civil will drop the in-text Note down to the next line and indent a bit to really show it off. NOTE: Judge Gerber instituted this formatting on the spot).
- Gerber: Change "this element" to "element #3 should not be given."
- Smith: Oral vote. No opposition. Approved move of Note #2 in text.
- Palmer: What about Note #5 ("The final element of this instruction requires an objective test…")
- Spector: Back to element #3. The Note re: "if offer or acceptance is not contested" should immediately follow the first sentence of element three. Done.
- Spector: For the first published draft, let's "show all our work" and leave in the authorities and call it all a Note on Use. There will be nothing called Source on Authority.
- Gerber and Hass: We should leave the Note re: "if offer or acceptance is not contested" below the entire element three because said Note also modifies "When you examine whether the parties agreed…"
- Spector: Agreed. The Note should modify the whole third element.
- Walsh: I agree that we should publish en toto the first time, could we also publish a "disclaimer" as to why we are doing it this way.
- (Formatting discussion is tabled for now)
- Farach: I am still concerned that element three is not clear enough for a lay person. This is "the" instruction to discuss objective factors.
- Gache: The case law is important re: its not what the parties THOUGHT, it is what the contract SAYS. This is a hot point for trial lawyers. I would have loved to see this thought be discussed in the instruction itself.
- Walsh: When you look at the contract interpretation instructions at 314, we may have dealt with that there.
- Ronzetti: I like the language of this objective test—it is very easy ("the making of a contract depends not on…")
- (To see how it looks we moved the cited language from *Gendzier v. Bielecki* up to element three).
- Gache: The *Gendzier* language should be the starting point to massage the language to be more basic.

- Palmer: This is addressed in 314 also. Are we trying to explain the whole theory of the law to the jury, or merely to point them toward the objective factors? I am concerned that there is no language that says DON'T put value on the subjective factors.
- Ronzetti: What was the problem with "don't consider the parties' hidden intentions"
- (As a place holder, Gerber added "You may not consider the parties' unspoken thoughts or intentions" to the end of element three).
- Walsh: We should state the sentence in the affirmative.
- Palmer: We should have two sentences—one re: objective and the other re: subjective—this will keep the thoughts separate.
- (Consensus on having element three reading: That the parties agreed to the essential terms of the contract. When you examine whether the parties agreed to the essential terms of the contract ask yourself if, under the circumstances, a reasonable person would conclude, from the words and conduct of each party, that there was an agreement. The making of a contract depends on ~~the parties having said or done the same thing~~ what the parties said or did, not what the parties meant ~~the parties having meant the same thing~~. You may not consider the parties' thoughts or unspoken intentions.").
- Wall: We should include language re: parties' actions in the last sentence.
- Palmer: The last sentence accurately captures the law—if there is an action, we would consider it because it is manifest and apparent.
- Hass: "What the parties said or did"—that is better language and is the essence of the objective test (see above modifications).
- (Discussion that CACI instructions are the final product and that we want to be mindful that we want to IMPROVE those concepts)
- Vote: Lee votes nay; Spector abstain.
- Lee: I have issue with the "not what they meant" language.
- Gache: Let's remove "not what the parties meant" (because the next sentence reiterates). Add only—contract depends on *only* what the parties said or did.
- Approved.

(BREAK)

❖ **<u>303</u>**

- Resume at 11:09 a.m.
- Gerber: Jodi's comments put a flag on element 3 to include brackets because not every contract has conditions precedent. All agreed.
- (Brought up on overhead screen Ronzetti's notes and modifications that were circulated 10/20/10)
- Ronzetti: CA's version used term "material"; Ronzetti suggested the use of "essential" instead because it may be easier for a lay person to understand.

- (Group suggestion/question regarding whether to insert Note on Use #3 in text after element 4 and provide two language sentences in alternative form).
- Spector: Would the trial lawyers like to have language regarding substantial performance when it is an issue in their case? Substantially is not defined—perhaps add "performed so close to what was bargained for."
- Ronzetti: Substantiality is defined in a later Note. There was debate on whether to include this.
- Norway: (Regarding substantiality) Reading from minutes from last meeting: Committee decided to delete 312, and add the Notes to 303.
- Spector: If there is something less than full performance, the judge is going to give the substantial performance instruction.
- Farach: (Broaches discussion regarding whether NOT using "substantial performance" term will be problematic down the line).
- Spector: I would prefer to keep out phrases beginning with "or"—the disjunctive is confusing.
- Ronzetti: Because CA hashed this out, unless we have a case law objection, we should use the CA language as a base.
- Hass: We should remove Note 3 because it has been essentially moved up to element 4. Additionally, should Note 2 come out, or get moved?
- Smith: Note 2 doesn't really do anything because similar language is already in the body.
- Any objections to taking Note 2 out? No.
- Long: Should we just put slashes between he/she/it rather than successive brackets?
- Gerber: I think Jodi changed this to be uniform with SJ Civil. (Several agree).
- Ronzetti's suggestion: To add language in the beginning "must prove all of the following" (Several agree).
- Ronzetti's suggestion: In element #4 to modify to read "that (defendant) failed to do something <u>essential</u> that the contract required [him][her][it] to do."
- Gerber: We use essential and significant apparently interchangeably—All agree to change number 2 to essential.
- (Consensus to change "that" to "which" in a few places in this instruction to instill proper grammar).
- Long: Element 4 part option 1 has essential, but option 2 did not. I could do without BOTH "essentials."
- Spector: I think the language should be parallel.
- Bar Liason: How can you do something "essential" that the contract prohibited?
- Walsh: Is the jury going to understand our wordy option 2 for element 4?
- Spector: When we get to the "substantial performance" instruction, it merely states that Defendant did not do all of the things. Are we going to need to add "essential"

verbiage there too? Is that concept of materiality going to be used across the board? Is this modifier unnecessary?

- Farach: We will have to include this essential language because that is the law—the law of material aka essential breach.
- All in favor of 303 as modified. Approved.
- Gerber: There may be discussion on the order of the authorities, but that can be done later.

❖ **304**

- Smith: Does anyone think we need Note 3?
- Walsh: It appears to be the authority for what is already said rather than a Note on Use. (Several agree).
- Smith: Note on Use #1—should it be complete or completed. Complete.
- Numbering on Notes on Use removed.
- Revisions approved.

❖ **305**

- Committee notes that CACI Instructions have no Notes on Use.
- Walsh: The only change from the CACI Instruction is that the end of paragraph 3 was revised to say "interpret the conduct as creating a contract."
- Spector: Only potential Note on Use is to clarify Implied in Law v. Implied in Fact and to clarify the status of quasi-contracts.
- Spector proposes and group clarifies a Note on Use: "Use this instruction when there is no express agreement, oral or written, between the parties, and the jury is being asked to imply the existence of an agreement from the facts and circumstances of the case."
- Ronzetti: Delete oral or written.
- Palmer: Change agreement to contract. Long agrees to make it uniform throughout.
- Spector: Propose changing each word agreement to contract for uniformity.
- No dissent.
- Farach: I don't like having an instruction at all. How does the Note give the trier of fact and/or lay person any help? Perhaps we need to give more guideposts.
- Long: There is nothing in particular that must be done, it is fact specific.
- Spector: CACI says "the heart of this agreement is an intent to promise."
- Farach: Plaintiff delivered goods or services to Defendant and Defendant had reasonable knowledge that it would be required to pay for said services.
- Spector: I am concerned with Manny's question regarding does this help or not.
- Farach: The way it is now incentivizes volunteers to seek payment for their services. Farach reads definitions of implied in law and implied in fact.

- Ronzetti: The current language says "has reason to know"—Ronzetti thinks this is broader.
- Spector: Spector thinks "should have known" is broader.
- Long: Perhaps we can use some of the verbiage from *Lewis v. Meginniss*.
- Spector: That case is too old (1892).
- Barrett: Change the word interpret to understand. Agreed.
- Any disagreement with paragraph 2? No.
- Barrett: Where does the word "intentional" in paragraph 2 come from?
- Spector: I believe it is there to prevent an accidental acceptance by conduct.
- Farach: Some language implying an intentional element is necessary or else we will misstate the law.
- Hass: What if I'm at an auction and scratch my ear? That not implied in fact. It needs to be intentional.
- Spector: Look at the paragraph "in deciding whether a contact was created, you should consider the conduct and relationship of the parties as well as all of the circumstances between the parties."
- Palmer: Circumstances are necessary to keep it in context.
- Consensus to drop the last "circumstances between the parties." It is repetitive.
- Spector: Whoever is going to do the drafting edit can pull out the authorities.
- Vote. Gerber nay to clarify the flag placed by Jodi re: the proper citation for *Commerce Partnership 8098*.
- Norway: Clarifies that the citation should be to page 387 only.

❖ **306**

- Walsh: Suggests using "Defendant contends that no contract was created" rather than "parties did not enter into a contract" in paragraph 1.
- Spector: Note on Use #2 could be moved to Sources or merely put a cite with no parenthetical.
- Lee: Since there is not really much supportive authority, and because the other instructions seem adequate on this issue, why not just remove this instruction? Isn't 304 enough (that oral contracts are just as valid as written contract)?
- Farach: I didn't think 304 went far enough to avoid the jury having questions on this. 306 takes us a step further than 304.
- Hass: Isn't 304 more of an introduction? It explains that a contract could be written or oral. But if there is an oral contract, the 306 instruction would be given.
- Spector: Example—we had an oral agreement, but it wasn't to be a contract until we put it in writing. 306 would help to close that gap—the oral agreement was to have a written contract.
- Gerber: If judge says contract can be oral per 304, the first sentence of 306 makes the Defendant look like a fool because the judge just said contracts could be oral. We

could fix this by adding an instruction to 304 that if there is an oral contract, that you must use 306. Also, we should change the first sentence of 306.

- Ronzetti: This situation arises often in settlement. For example, the parties agrees orally and said they would draft written settlement. BUT, the oral agreement is still a binding agreement.
- Gerber: We can add a sentence to the beginning of 306 to the effect that Plaintiff contends that the parties agreed to terms without a written contract.
- Hass: If you look at 302, and 304, what is new about 306?
- Walsh: The addition in 306 is that Defendant contends there is no contract ***until*** there is a writing.
- Spector: If Defendant brings this up as a "defense," the Plaintiff still has the burden of proof—to prove that there was an enforceable oral agreement.
- Farach: I'm not comfortable with this—this would require the Plaintiff to anticipate an affirmative defense. I haven't seen Florida law on this point. I am aware of cases that say the parties can agree that the "agreement" is only binding WHEN the parties sign. This is a condition subsequent issue.
- Ronzetti: How can it be an affirmative defense if we are in contract formation?
- Lee: This goes to 302 then—one of the essential elements is missing.
- Ronzetti: But 306 is for the subset of cases where the Defendant claims there was no "agreement" until the contract was physically signed.
- Wall: This is too small of a scenario to warrant its own instruction. It will be harder for Plaintiff to prove up his oral agreement when Defendant says there was no agreement until the writing is signed, that is not different enough to warrant a new instruction.
- Ronzetti: I don't think this situation is rare.
- Farach: I think this is an affirmative defense that destroys formation—i.e., duress, incapacity, failure of consideration etc..
- Ronzetti: Still finds this is a formation issue.
- Smith: At trial, the Defendant's claim that there was no contract until a writing was signed will be treated like an affirmative defense.
- Spector: Reviewed *Citizens Bank of Perry* case. He argues that the Plaintiff still has the burden because it is a formation issue.
- Ronzetti: Even so, Judge Smith is right, it will be ***treated*** like an affirmative defense.
- Gerber: Perhaps start the instruction with something like: Defendant contends that the parties did not enter into a contract because the agreement was never written… To overcome this contention, Claimant must prove that the parties agreed to be bound without a written agreement [or before a written agreement was prepared].
- Farach: I worry that this puts the burden on the wrong party.
- Smith: Perhaps we remedy by including another Note on 302, to clarify that if this situation arises, use 302.

- Hass: Affirmative defenses are a "yes, but." However, a defense can be simply a denial. Defendant is adding another element (i.e. that there needs to have been a writing). Plaintiff would then have to disprove that additional element? If Defendant wants to add that element, why isn't that his burden to prove and persuade?
- Ronzetti: Because Plaintiff has the obligation of proving that a contract was formed.
- Gerber: Affirmative defense would be yes, I made a contract but …. Here, the Defendant denies that a contract was ever formed. That is not an affirmative defense. As an observation, this is a defense-friendly instruction.
- Barrett: This instruction could be abused where there was an oral agreement with no discussion of a writing and if Defendant asserts there is a writing, Plaintiff has to then disprove that there was a writing.
- (Revise: Defendant contends that the parties agreed not to be bound without a written contract. To overcome this contention, claimant must prove that no such agreement existed).
- Smith: Plaintiff has to prove a negative here.
- Spector: Question for judges—Defendant says we understood that until there was a writing, there was no contract. How would you instruct the jury?
- Farach: Because this group has been wrestling with this for quite a while, I believe the judges would similarly struggle with it. This should be an affirmative defense—the failure of consideration is an affirmative defense even though it goes to formation, so why isn't this? Minority is also an affirmative defense that must be plead and proved.
- Gerber: Capacity is not an element of a contract—offer, acceptance, consideration.
- Smith: The more I listen to this, the more I feel we should delete this and rely on 302.
- Committee agrees to omit 306.

❖ **<u>307</u>**

- Norway: There should be a semi-colon after paragraph numbered 1.
- Move to remove language from *Webster Lumber* in from the Sources and Authority.
- Clarification that the cite to Restatement § 24 is part of the *Lee County v. Pierpont* case. Committee agrees to remove citation to Restatement for clarity.
- Move for adoption. Approved.

❖ **<u>308</u>**

- Hass: We need to insert the word "not" in the third line—"To establish that the offer was <u>not</u> withdrawn."
- Discussion over whether term "withdraw" should be replaced with a simpler synonym.
- Walsh: Should we go back to CACI language in the beginning?
- Hass: We changed CACI version to get rid of the "contention" language.

- Gerber: Proposed different language to get rid of passive voice in the second sentence of the first paragraph → "Defendant contends that [he][she][it] withdrew the offer before it was accepted."
- Change contends to says? No because you don't know how the evidence will come in—Jurors may think "says" means by testimony only.
- Remove repetitive use of it—it is confusing if dealing with an entity (Defendant contends that [it] withdrew the offer before it was accepted").
- "Claimant must prove any of the following"→ add "any one of the following"
  - Used this to mirror prior instructions that say prove "all"
  - Farach: By saying "prove any one of the following" looks to favor defense.
  - Revise again "must prove one of the following"
- Any objections to text of instruction? No.
- Notes on Use—change "in support of" to "to support."
- Spector: Should we get rid of THE Plaintiff, THE Defendant? Consensus—no, because it is legalese to just say Defendant.
- **Later** Change language back to passive voice.

❖ **<u>309</u>**

- Suggestion to change to language to the active voice—Can't be done gracefully because then it makes it sounds like the Defendant must be the offeree, which may not be the case.
- Gerber: Do we need to go back and change 308's active voice? Does it create the same issue? (Consensus is that a similar issue is creative and the Committee went back to the passive voice).
- Spector: The second paragraph should read "the (defendant) communicated [his][her][its] agreement to be bound by the terms of the offer."
- Hass: We should have a separate paragraph to address the counteroffer situation.
  - Both an offer and acceptance are required to create a contract. (Defendant) contends that a contract was not created because the offer was never accepted. The establish acceptance of the offer, (claimant) must prove the (defendant) communicated [his][her][its] agreement to the terms of the offer.
    - Remove "to be bound" language—wordy
- Farach: Are we concerned that this is getting too wordy for jurors?
- Discussion on the mirror image rule—that materiality is not important and that the rule strictly requires exact performance.
- Norway: Found *Montgomery v. English* case.
- Farach: By removing the middle step (i.e. combining the thoughts—defendant agreed and communicated rather having them as separate thoughts), the instruction becomes harder to understand.
- Hass: Looking back at CACI Instructions, the sources are very weak.

- Walsh: We should get some additional authority for this section.
- Fix typo in first sentence of Sources and Authority.
- There was Florida law cited, but Committee cannot recall why the *case law* was deleted rather than the secondary sources. Perhaps the wrong authorities were removed.
  - Judge Gerber inserted the original authorities and removed secondary sources.
- Vote—ayes to keep as on screen; Walsh and Farach vote to keep the language of the combined paragraph separate.

❖ **310**

- Begin discussion with revised version sent by Christine Lamia on 10/20/10.
- Ronzetti: Is there another instruction regarding acceptance of the benefits?
- Hass: Keep out last phrase of instruction because address in other instructions.
- Spector: If you keep paragraph as is, we will need to change the title because the instruction explains not only acceptance by silence, but by action.
- Insert [he][she][it] with proper formatting.
- Spector: Is there any question as to the validity of the law? No.
- Walsh: We should make two separate instructions (acceptance by silence and action).
- Lee: Why not just change the title to acceptance by silence or conduct—that way both can be addressed in the same instruction.
- Palmer: Should these two ideas be shown as options with brackets? To represent that one or the other instruction would be selected.
- Smith: I like the way it is (one paragraph with no brackets).
- Spector: We should make some notation to signify that the Judge does not need to read the whole thing.
- Farach: As a matter of law, to have acceptance by silence, there must be a duty to speak (*Henderson* case). I'm not sure that this instruction reflects this aspect of the law.
- Have two optional phrases: Ordinarily, if a party does not say or do anything in response to another party's offer, then [he][she][it] has not accepted the offer. However,
  - If (claimant) proves that both [he][she][it] and (defendant) understood silence or inaction to mean that (defendant) had accepted (claimant's) offer
  - If (claimant proves that (defendant) had a duty to speak from a part relationship between (claimant) and (defendant), (claimant's) and (defendant)'s previous dealings, or other circumstances
  - Then there was an acceptance.
- Wall: The duty to speak arises from past relationships or other "circumstances."
- There is some question what the "other circumstances" are under Florida law.

- Walsh: The case law says "or other circumstances"—so we have to keep this language in the instruction.
- Spector: It is misleading to leave "or other circumstances"
- Barrett: Why not leave a blank as to where the obligation arises from—let the judge fill it in. As it reads now, the language regarding the duty to speak arising from prior relationships would not apply in all circumstances.
- Smith: To leave a blank for the judge to fill in the "facts of the case" is problematic because then you have the judge making factual findings and telling them to the jury.
- Spector: What if have list of circumstances (i.e. past relationships, previous dealings etc.), and have a parenthesis (or such other circumstance determined by the court giving rise to a duty to speak, which shall be specified). Judge would then need to add something.
- Ronzetti: Isn't there more case law that is more specific than "or other circumstances"?
- Spector: "Or other circumstances" cannot just be read to the jury.
- Farach: What about if I want to say someone had a moral obligation to speak?
- Palmer: Then the judge will ask for authority to add moral. We then we would need to add a Note on Use that instructs the judge that he/she needs legal authority to expand "or other circumstances."
- Then isn't that creating law? Is there authority for the judge to create more times where the duty can arise?
- Ronzetti: How do you prevent the judge from punting the issue to jury and say that what constitutes "other circumstances" is an issue of fact?
- Spector: What if we write it the best we can and wait for comments post-publication?
- Hass: Suggests that the Committee to go back to 308, as he thinks there is a similar issue there. Like 308, the parties are off. We are assuming that the offeree is the defendant.
  - **GO UP TO 308**
- Hass: We need to convert everything to passive voice to prevent the aforementioned offeree/defendant assumption.
- Gerber: Putting the last paragraph in the passive voice is tough because the offeree had the duty to speak.
- Regarding the additional Note on Use to address the language regarding "or other circumstances" → Gerber proposes first draft:
  - Pending further development of the law, the Committee takes no position as to what "other circumstances" create a legal duty to speak. The Committee does not consider the factors listed to be exclusive and, if the court determines that the jury may consider "other circumstances," the court should modify this instruction.
  - We use offeree/offeror, but this a placeholder for the judge to fill in the names.
- Committee approved the revisions.

- **Administrative**
  - Smith: Is this a good stopping point or should we go on?
  - We skipped 313 last time (regarding modification).

- **<u>312</u>**
  - Lee: Didn't we already agree to delete this?
  - Hass: Yes and we did and we moved the sources and authority to 303.
  - Farach: Didn't we have a discussion this morning that "substantial/substantial performance" is not defined. Perhaps just add the definition to 303 and delete 312.
  - CACI has a good faith requirement (discussion regarding whether this is a requirement under Florida law).
    - Can we glean anything from the disjunctive use of willfully or materially breached the terms of the contract. *National Constructors, Inc. v. Ellenberg*?
  - Lee: Per notes from last meeting, we fully vetted whether good faith was an element of substantial performance in Florida, and we said that it was NOT an element.
  - Discussion of implied covenant of good faith and fair dealing.
  - Spector: Example: A contractor installs 90% correct colored tiles and 10% wrong tiles on purpose. Hass referred Committee to *Grossman Holdings* case. In spite of objections, contractor builds home in the mirror image of the way homeowner requested. The Court didn't say that the contractor did not have to pay any damages. Thus, the Court had to have concluded that this was substantial performance. The only damages would be for diminution in value. If good faith WAS a requirement, wouldn't contractor have been required to pay for the whole value of the house? This case did not require the contractor to pay for the full value.
  - Smith: I like having it as a separate instruction. It is important enough.
  - Hass: Our thinking was that all the same Notes on Use and Sources were already in 303.
  - ::: Debate over holding in *Grossman Holdings* case:::
    - Ronzetti: There would be <u>*no*</u> damages at all if there was substantial performance.
  - Hass: *Viking* case and *Ocean Ridge* case (247 So. 2d 72)—These cases show that the court ties <u>*some*</u> good faith element to substantial performance. But, Committee seems to not be persuaded that the use of the phrase "good faith" was exactly what we are discussing here and is not persuaded by the authority.
  - Committee finds that it is going to do a separate instruction for 312 (thinking is that it is too important to just lump into another one).
  - Judge Smith was drafter of 312—He has volunteered to go back and redraft.

- **<u>313</u>**
  - Pick up with 313 next time.

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS
FOR BUSINESS AND CONTRACT CASES

Minutes for 4/15/11 Meeting

Members Present: Honorable Thomas B. Smith (Chair); Manuel Farach; Brian Spector; Christine Lamia; Maxine Long; Steve Reininger; Kurt Lee; Robert Norway; Lee Hass; Richard Barrett; Michael Olin; Tucker Ronzetti (Saturday); Ronald Gache; Honorable Jonathan Gerber (Friday); Honorable Meenu Sasser (Friday); Mark Wall; Gary Rosen; Eric Lee; Roy Fitzgerald (Friday by telephone).

Administrative Matters:

- Chair's introduction:
  - We have a new applicant, Joshua Spector.
  - Justice Lewis suggested that the Business and Contract Instructions be in a separate book. He also suggested that we send small groups of instructions up to the Supreme Court to start the vetting process. That is Judge Smith's recommendation as well.
    - If sending the instructions in groups is the goal, we can send up study groups 1 and 2. If we have done two passes over groups 1 and 2, this should be in a good form to send up, so that should be our goal now.
    - The next step is to publish in the Florida Bar News. We will then get comments, and the Committee will converse with the person who submitted comments on the proposed instructions. If changes are made based on the comments, then republication is necessary.
    - If we are going to have a separate book, we may need another working group to write the introduction, style, "how to use these instructions" etc.. The Bar has some responsibility for this, but the Committee will need to draft introductory materials.
- **Approval of Minutes:**
  - Discussion of format of the minutes.
  - Motion to approve the 10/22 minutes. Approved.

312:

- In our last meeting we discussed whether good faith was an element of substantial performance. This instruction was redrafted in accord with the definition of substantial performance from *Ocean Ridge Corp. v. Quality Plastering, Inc.*, 247 So.2d 72 (Fla. 4th DCA 1971).

- The Committee was concerned about whether there is a separate instruction regarding material breach, and how the doctrines of material breach and substantial performance relate. The closest current instruction is 303 which discusses the "failure to do something essential to the contract." However, 303 doesn't really address (1) damages and (2) whether the breach is material such that the performing party is relieved. The Committee briefly reviewed the Construction Jury Instruction regarding substantial performance. Discussion that that instruction should be consulted and synthesized.
- Two issues that the Committee needs to address regarding 312: (1) Do we want the second note on use? (2) How does Material v. Non-material breach doctrine relate? Should it be added in 312?
- The cases that address substantial performance don't seem to address material or non-material breach. Committee discussed adding a Note on Use clarifying the relationship between the two doctrines. Also, the Committee suggested adding case law that provides the substantial performance doctrine does not apply to the payment of money.
- Why are non-material breach and substantial performance doctrines separate? If we look at the *Ocean Ridge* decision, and all of the CACI instructions, Committee found that there does not appear to be an instruction that clarifies the relationship between the two doctrines.
  - Apparent distinctions: Material breach is whether the other party can treat the contract as terminated, whereas substantial performance is a damage measure. Also, a material breach can occur at the very beginning of performance, whereas substantial performance is really reserved when performance is almost complete.
  - As currently worded, this instruction makes substantial performance sound like it is a material breach—"and therefore defendant did not have to perform his obligations under the contract."
  - Argument that substantial performance instruction is necessary: Materiality does not fully encompass substantial performance. Materiality is very important in commercial litigation—leases and contracts. Substantiality however is very important in construction and ongoing service contracts.
  - Committee discussed various format options—two separate instructions for the two doctrines, include a note on use clarifying the relationship, or include 312 (a) and (b) (to address material breach and substantial performance separately).
    - Only 3 Florida cases discuss material breach and substantial performance together--there is not a whole lot out there that discusses the interplay. Committee determined that this is a delicate area and that more research is needed here to fully vet the interplay.

- Recall that originally 312 was deleted because the Committee felt 303 was sufficient. Then, in our last meeting the Committee felt 312 was important enough to have its own instruction, and it was redrafted.
- Discussion of Williston, which clearly connects these two doctrines.

➢ Committee decided to have the drafters of 303 and 312 (including Judge Smith and Gary Rosen) parse through these issues and harmonize these two instructions. Also, the Committee agreed that 312(a) and (b) may be necessary to streamline the materiality/substantial performance issues.

313:

❖ Committee discussed the language of the second bracketed sentence: "[A contract in writing may be modified by an oral agreement to the extent the oral agreement is carried out by the parties.]"

➢ This language was meant to address the line of cases that hold there can be a successful oral modification even where the contract says modifications are to be in writing—this is a partial performance/estoppel rationale.

➢ There is a case pending before the Florida Supreme Court that may assist us here—*DK Arena, Inc. and Don King v. EB Acquisitions I, LLC*. The Fourth DCA held that because the parties acted upon the unwritten amendment, it would work a fraud upon the purchaser to refuse to enforce it. The parties in the DK Arena case also argued that the oral agreement violated the statute of frauds, and thus was unenforceable. Committee agrees to monitor this case to determine the Florida Supreme Court's application of the statute of frauds to modifications of contracts.

❖ Committee notes that assuming there is new consideration for the modification, it must be determined whether (a) the terms of the contract barred oral modifications and (2) if there is a statute of frauds implication (real estate)—the law is that in either of these two instances, absent conduct in reliance on the modification, the party seeking to enforce the oral modification is out of luck.

❖ So how does this case law analysis affect our instruction?

➢ Committee agrees the 2nd bracketed language is a correct statement of the law: [A contract in writing may be modified by an oral agreement to the extent the oral agreement is carried out by the parties.]

➢ Issue with the 3rd bracketed language: [A contract in writing may be modified by an oral agreement if the parties agree to give each other something of value]→ As written, there is no performance element here. Committee agrees that the 3rd instruction should mirror the 2nd.

- ❖ Committee discusses how to address the fact that the modification must have new consideration. Currently, the Sources and Authority section has a sentence that the modification must be supported by proper consideration.
    - Instruction 304 addresses concept that contracts may be partly written and partly oral. Committee discussed whether to add a Note on Use to send the reader to 304 regarding oral contracts.
    - Committee discussed *Coral Reef Drive v. Duke Realty Limited Partnership*, 45 So.3d 897 (Fla. 3d DCA 2010), which holds that oral modifications are permitted despite contractual language to the contrary where there is additional consideration. However, this case does not require subsequent conduct in reliance on the modification. However, the Florida Supreme Court in *Cahill* stated the parties have acted upon the modification in such a fashion that to ignore it would be a fraud.
  - ➢ Committee discusses various options to rewrite the instruction:
    - Suggestion to drop the 2nd and 3rd bracketed language and provide them in an option form for the judge to read as applicable: A contract in writing may be modified by [a contract in writing][an oral agreement][by the parties conduct and performance]
      - However, it is not enough to just have an oral agreement—the later must be accepted by the parties AND acted upon. It is not enough to have performance alone.
    - Suggestion to use the language from *Moses v. Woodward*: a contract in writing may be modified if accepted and acted upon by the parties.
    - Suggestion to change 2nd and 3rd bracketed sentences to one long sentence: "A contract in writing may be modified by a contract in writing, by subsequent oral agreement between the parties, or by the parties' course of dealing"→ Problem is that this would include instructions that might not apply.
      - Committee discusses use of "subsequent oral agreement" (this instruction is about modifications, subsequent is implied). Also, whether to rephrase "course of dealing" to "subsequent conduct."
  - ➢ Issue: Can we confirm that the case law does not say that an oral agreement, without any action in reliance, is enough where the contract says no oral modification? This issue does not appear to have been resolved by the Committee.
  - ➢ What about the fraud language from *Professional Ins. Co. v. Cahill*—"as would work a fraud on either party to refuse the modification." This "fraud" language appears to be a higher standard than that the parties did "some act." Committee discussed

whether the "fraud" language was dicta or essential to decision, and also whether cases reiterating this point blindly recite this language or apply the fraud element.

- If we add the fraud language to this instruction, it appears to apply to all instances where a contract is orally modified. However, the fraud language should only be used where the contract provides for no oral modifications. Committee discusses other cases that use the "fraud" language and do not specifically state that the contract at issue provides that it may be modified only in writing. Thus, there is arguably an implication that the standard "as would work a fraud on either party to refuse the modification" applies in every case.
- Suggestion to put the fraud language in a bracket—that it is broached, but left as optional to be argued by the parties. However, brackets are usually for an option—this is not a "this" or "that" situation.
- There is a later Supreme Court case addressing this fraud exception, *Harris v. Air Conditioning Corp.*, 76 So.2d 877—essentially, a contract can be orally modified where the actions of the parties are consistent with the modification and inconsistent with the original contract.

▪ Motion to delete 2nd and 3rd brackets. Change first "bracketed" language to be a textual sentence. Add bracket regarding fraud to flag that further discussion is needed. Approved. ALL Committee members are asked to look at the *Cahill* case, and other case law, to determine whether bracketed language is necessary.

- Last part of instruction now reads: A contract in writing may be modified by a contract in writing, by subsequent oral agreement between the parties, or by the parties' subsequent conduct [if the modified agreement has been accepted and acted upon by the parties in such a manner as would work a fraud on either party to refuse to enforce it].

314:

❖ Note on Use 4: "Norms of Contractual Interpretation"→ Committee agrees that this note should include a reference after the sentence "this principal of law is not applicable to contracts between contractors and subcontractors with regard to risk-shifting provisions" that the same principal applies to insurance contracts.

❖ Suggested additional language: "The norms of contractual interpretation also do not apply to insurance contracts, as ambiguities in coverage are always to be construed against the insurer and in favor of coverage. *See* _____."

❖ Committee approved this instruction with the insertion of language regarding insurance contracts.

315:

- Suggested redraft from drafter in preparation of today's meeting does not have brackets.
- This instruction previously read: "You should assume that the parties intended the disputed term(s) in their contract to have their plain and ordinary meaning[, unless you decide that the parties intended the disputed term(s) to have another meaning.]"
  - If one party argues that the parties intended the meaning to be a certain way, then you would read the option.
- CACI instructions, without brackets, have a different implication→ "You should assume that the parties intended the words in their contract to have their usual and ordinary meaning unless you decide that the parties intended the words to have a special meaning."
  - The reason the Committee took out "special meaning" was because it wanted this phrase to be reserved for "technical term" type issues which will be discussed in future instructions. The Committee wanted to avoid juror confusion that a "special" meaning needs to be a technical type term.
- Committee discussed that if 315 contains brackets, and the bracketed option is not read, 315 does not say anything different than 314.
- Committee voted to remove the brackets so as to keep 314 and 315 distinct. "You should assume that the parties intended the disputed term(s) in their contract to have their plain and ordinary meaning, unless you decide that the parties intended the disputed term(s) to have another meaning."

316:

- Committee discussed whether this instruction should have brackets. Initial suggestion was to remove the brackets to keep 316 a distinct instruction. 315 and 316 amplify and explain 314—thus, there should be no brackets in either 315 or 316.
- Committee agrees to remove brackets.

317:

- Starting with: "In deciding what the disputed term(s) of the contract mean, you should consider the whole contract, not just isolated parts. You should use each part to help you interpret the others, so that all the parts make sense when taken together."
- 2nd Note on Use revised to remove period after first case, and to use a semi-colon instead.
- 3rd Note on Use revised to remove signal "See," as the cited case provided a direct quote.
- Move to approve 317 with bluebook edits. Approved.
- Discussion regarding whether the instruction needs to specifically say don't interpret in a way that makes a provision meaningless—Committee concluded that this proposition is embodied in the current form.

318:

- Starting with: "In deciding what the disputed term(s) of the contract mean, you should consider how the parties acted after the contract was created."
- CACI→ "In deciding what the words in a contract meant to the parties, you may consider how the parties acted after the contract was created by before any disagreement between the parties arose."
  - *Blackhawk*, a Florida Supreme Court case, used the word "should" consider how the parties acted; the other cited cases say "may"→ The drafter utilized the Supreme Court decision's language.
- Committee discussed whether to add "but before any disagreement between the parties arose." Idea is that conduct after a party hired a lawyer may be worthless.
- What about pre-contract conduct? So long as there is a written contract, this would be barred by the parol evidence rule. However, once a court finds a contract is ambiguous, couldn't pre or post contract conduct be instructive? The *Roca* case here says to look at the parties' course of dealings—this may encompass pre contract conduct.
- Suggestion to approve as is, and insert a note that SJI Business and Contract takes no position as to whether, in the absence of Florida law, the pre-contract formation conduct of the parties may be admissible.
- Alternative suggestion: use *Roca* language "throughout their course of dealing" and let the lawyers argue about how far a specific course of dealing should go. However, in *Roca*, it appears as though only post-contract conduct was considered, despite the broader language.
- Proposed change—instead of "how the parties acted after the contract was created" say "how the parties acted throughout their course of dealing." Looking at the facts of *Blackhawk*, it appears as though the Court did consider pre-formation negotiations.
- Committee approved the following instruction: "In deciding what the disputed term(s) of the contract mean, you should consider how the parties acted before and after the contract was created."

319:

- Revised by drafter to read as follows: If a contract does not state a specific time within which a party is to perform a requirement of the contract, then the party must perform the requirement within a reasonable time. What is a reasonable time depends on the facts of each case, including the subject matter of the contract, the reasons each party entered into the contract, and the agreement of the parties at the time they entered the contract.
- This revision changed "the intentions of the parties at the time they entered the contract" to "the agreement of the parties."

- ❖ Committee discussed the precise language of the cited case law, which appears to use the word "intentions." There is an argument that "the agreement of the parties" presumes that there is a contract.
- ❖ Discussion as to whether instruction, as written, addresses concept that what constitutes a reasonable time depends on the subject matter of the contract. Committee finds this is adequately addressed.
- ❖ Suggestion to track the language of the case cited in Note 3 (*Sound City, Inc. v. Kessler,* 316 So. 2d 315)→ "the situation of the parties, their intention and what they contemplated at the time the contract was made." Discussion regarding use of "situation of the parties" v. "reasons of the parties."
- ❖ Based on *Sound City* and *Patrick v. Kirkland*, suggested redraft: "What is a reasonable time depends on the facts of each case, including the subject matter and purpose of the contract, the expressed intent of the parties at the time they entered into the contract, and the agreement of the parties at the time they entered the contract.
    - "the subject matter of the contract" could be modified with "the purpose of the contract"; Take out "the reasons each party entered into the contract"—none of the cases use this test. Committee discussed case law language regarding the "circumstances in attending to performance" and it was not utilized as it is confusing.
  - ➢ Expressed intent does capture spoken words and actions—the Committee agrees that this is the most appropriate.
  - ➢ Committee approves this instruction.

320:

- ❖ Committee discussed the powerful nature of this instruction—California suggests only to give this instruction when there is a deadlocked jury. Florida law does not appear to be as wary of this principal. However, there are some Florida cases which provide that this instruction should be used as a secondary tool of interpretation because of its strength, hence drafter's decision to state "if you cannot determine the meaning of the ambiguous term…" Much research was done, and there are cases that gave caution to utilizing this principal, but DO NOT go so far as to say this instruction is ONLY to be used when the jury is deadlocked. Committee's consensus is that this should not only be used in the case of deadlock. *See The School Bd. of Broward Cnty. v. The Great Am. Ins. Co*., 807 So.2d 750 (Fla. 4th DCA 2002).
- ❖ Discussion regarding how to determine who the drafter is. Some cases imply the drafter is the drafter of the questioned term. Often contract language specifically states "do not construe against any one party—both considered drafter." Committee found support in Florida case law that contracts are to be interpreted so as to provide meaning to each

provision, which supports the proposition that language providing each party is a drafter should be upheld.

- ❖ Committee found volume of case law listed in Notes on Use section is necessary because of the import of this instruction.
- ❖ To more directly address that this is a secondary rule of interpretation, Committee discussed the following suggested language: "You must first attempt to determine the meaning of the ambiguous term(s) in the contract from the evidence presented and the previous instructions. If, after careful deliberation, you are unable to do so only then should you consider who drafted the disputed term(s) in the contract. You then should construe the language against the party who drafted the ambiguous term."
  - ➢ Committee does take some issue with "if after careful deliberation"
  - ➢ Committee analyzed whether the last sentence assumes it is obvious who the drafter is. If there is a dispute regarding who is the drafter, then perhaps even additional language is needed. Additionally, Committee discussed contracts of adhesion—i.e. bank loan documents. These often have "both parties are the drafter" language even though that is not the case.
- ❖ FINAL: "You must first attempt to determine the meaning of the ambiguous term(s) in the contract from the evidence presented and the previous instructions. If you cannot do so, only then should you consider who drafted the disputed term(s) in the contract and then construe the language against the party who drafted the ambiguous term."

OVERALL DISCUSSION REGARDING FORMAT OF BOOKS:

- ❖ Committee discussed whether introductory materials should be added before the "contract interpretation" section to advise the juries as to what the next section is about. Consensus that a segway is needed, but that it is premature to draft such materials now. Perhaps the introductory materials could be utilized by the court as an opening instruction.

321:

(Defendant) claims that the contract with (claimant) provides that [he][she][it] was not required to (insert duty) unless (insert condition precedent).

(Defendant) must prove that the parties agreed to this condition. If (defendant) proves this, then (claimant) must prove that (insert condition precedent).

If (claimant) does not prove that (insert condition precedent), then (defendant) was not required to (insert duty).

- ❖ Last case in Notes on Use is missing the 1st DCA citation. Inserted.
- ❖ The second sentence of the instruction currently reads: "(Defendant) must prove that the parties agreed to this condition. If (defendant) proves this, then (claimant) must

prove that (insert condition precedent)." Consensus that "[was performed], [occurred], or [waived]" needs to be inserted at the end of sentence. Same language should be inserted in the third sentence of this instruction.

- ❖ Committee discussed whether "was performed, occurred or waived" should be in brackets to reflect their reading to the jury is optional based on the facts of the given case. Committee found brackets are best to avoid reading unnecessary instructions.
- ❖ Committee approves this instruction.
- ❖ Committee also agreed to add the following language at the end of the Notes on Use: "The court should define waiver as set forth in Instruction 336 Affirmative Defense—Waiver."

322:

- ❖ Committee approved this instruction as written. Committee agreed to add the following language at the end of the Notes on Use: "The court should define waiver as set forth in Instruction 336 Affirmative Defense—Waiver."

323:

- ❖ This instruction was intended to bring in the concept of waiver of a condition precedent. Pursuant to today's changes to 321 and 322, we have inserted waiver of a condition precedent as excusing performance of the condition. Committee discussed whether this instruction should define waiver. However, Committee found the better approach would be to insert language in the Notes on Use for 321 and 322 to provide that if this charge is given, Court must give instruction defining waiver (336). Then, instruction 323 can be removed. Committee approved insertion of reference to 336 in 321 and 322 and deletion of 323.

324:

- ❖ Consensus that the concept that a breach can occur before performance is required needs to be explained to the jury and this instruction is important.
- ❖ Committee discussed whether this instruction should go a step further and provide that so long as one party breaches (here it is anticipatorily), the result is that the other party is relieved of their obligation to perform. Committee agrees that this is discussed in other sections in connection with a "normal" breach.
- ❖ Committee discussed whether terms "clearly and positively indicating" were both needed or are duplicative. This appears to be an attempt to capture the language of the *Mori* case "distinct, unequivocal, and absolute."
- ❖ Committee discussed *Hospital Mortgage Group* and *Alvarez* cases, which are cited in Notes on Use. These are condition precedent cases, and not really accurately anticipatory repudiation cases. Committee discussed whether the supportive authority should be reviewed in detail.

- Committee discussed whether there is Florida case law support for the instruction's language that "If claimant proves that he would have been able to fulfill the terms of the contract and that (defendant) clearly…." The language of *Alvarez* is supportive here. If you are the non-breaching party, you must still have been able to perform—"willingness and ability to perform if there had been no repudiation." Some members would prefer to use the language of the cases rather than "able to fulfill the contract."
- Committee corrected the syntax in Note on Use 5.
- Suggestion to revise second sentence of instruction to read: "If (claimant) proves that [he][she][it] would have been willing and able to perform the terms of the contract…"
- Committee approved this revision.
- Revisited on Saturday:
  - Committee analyzed this instruction in light of a scenario where the defendant clearly repudiated and plaintiff sues. Can the defendant then require the plaintiff to produce their cash flow statements, loan commitment letters etc. to prove up that plaintiff was "willing and able to perform"? Committee notes this appears to shift the burden of proof. Although "willing and able to perform" is from the case law, if the breach was 6 months in advance of the scheduled performance, why would the plaintiff have to be willing and able at that time? Committee notes that it is not "unapproving" this instruction, but notes that additional research on this issue is required to determine the meaning of willing and able. *See Porper*, 335 So. 2d 387. Olin has agreed to research this area a bit more.

325:

- Committee had initial discussion as to whether it is proper to have a separate count in a complaint for the breach of the implied covenant of good faith and fair dealing? Consensus is that it is not proper, as good faith is implied in connection with and in performance of other covenants. Committee notes that this instruction is valuable as it broadens the scope of factual evidence that can be elicited from witnesses etc..
- Committee discussed whether and how it should outline the elements of a cause of action for the breach of the covenant of good faith and fair dealing. Additional support is required for this instruction, specifically authority that outlines the elements of a breach of good faith cause of action.
- Committee members present have been unable to find a case that sets forth the elements of the implied covenant of good faith.
- Motion to table this instruction on the grounds that the drafter is not present and additional education is needed. 325 tabled.

326:

- Committee discussed the fact that the UCC is going to cover assignments of negotiable instruments, and thus those scenarios should be exempted from the Committee's discussion of this instruction.
- Discussion regarding the following language of the instruction: "Claimant must prove that assignor intended to transfer his contract rights to claimant." Committee noted that this is burdensome. Should the Claimant be permitted to enter the assignment into evidence as proof of intent to assign?
- Committee discussed whether this instruction is essential. Although assignment is a business concept and it does come up, since the UCC covers most instances, this instruction would only be used in the minority of cases.
- Committee voted to delete this instruction.

- **Committed decided to pass on 330, 331, 334, 336**

332 & 333:

- Committee discussed whether and how to define "wrongful act" or "wrongful threat of pressure"—how forceful must this duress be? *Cooper v. Cooper*, 69 So.2d 881 (Fla. 1954) found that pinching a woman's leg was not duress to sign the deed because there was no threat of what would happen if she did not sign the document.
- If there are cases that EXCLUDE certain types of conduct from "duress" then Committee agrees that the types of conduct that are excluded should be listed as a Note on Use. The fact that economic duress is not the type of duress discussed here should be a separate Note on Use.
- However, 333 is an instruction on economic duress. That instruction and the accompanying Notes on Use, as currently written, provide support for the proposition that economic duress IS a recognized affirmative defense. *Riedel v. NCNB Nat'l Bank of Fla., Inc.*, 591 So. 2d 1038 (Fla. 1st DCA 1991).
- Committee found that should make clear that the conduct that constitutes duress does NOT need to be, for example, a tort.
- Committee discussed option that the general duress instruction should contain a Note on Use that Florida law is unsettled as to whether economic duress can be an affirmative defense. There is one case that says it is—*Riedel*. This point could be made in a Note on Use to the effect of "Florida law appears to disfavor economic duress. *Compare __ and __*. Some cases say you can have duress if there is "business compulsion"—but this concept has not been defined, applied, or found.
- Motion to delete 333 and to add Note on Use in 332. Also, rephrase the last Note on Use for 332 to provide "Proof of duress renders contract void, not voidable."

- *Kapila* case is a bit problematic. Under this standard, a typical mortgage foreclosure case wherein the bank says pay what you owe, or we will foreclose, would constitute duress.
- Discussion regarding whether to delete 332 and 333. Committee decided to delete both instructions.

335:

- Committee discussed whether a defendant must "reasonably rely" on a representation where that representation was intentional (fraud).
- The Florida Supreme Court in *Butler v. Yusem*, 44 So.3d 102 (Fla. 2010) found "Justifiable reliance is not a necessary element of fraudulent misrepresentation. As we have stated, there are four elements of fraudulent misrepresentation: "(1) a false statement concerning a material fact; (2) the representor's knowledge that the representation is false; (3) an intention that the representation induce another to act on it; and (4) consequent injury by the party acting in *reliance* on the representation." This instruction needs to be revised in accordance with *Butler*.
- Committee discussed option of having 335 (a) and (b) for fraud and negligent misrepresentation, respectively. Alternatively, renumber fraud as 334 and have a negligent misrepresentation instruction as 335.
  - Drafter of 335 should review *Gilchrist Timber Co. v. ITT Rayonier, Inc*., 696 So.2d 334 (Fla. 1997).
- When revisited on Saturday:
  - When dealing with fraud, whether a claim or defense, they are the same species and the defendant's reliance on a misrepresentation can be unreasonable. If the plaintiff made a negligent misrepresentation, you need to be reasonably relying on this.
  - Drafter should additionally review *Besett v. Basnett*, 389 So.2d 995 (Fla. 1980) and *M/I Schottenstein Homes, Inc. v. Azam*, 813 So.2d 91, 93 (Fla. 2002)("[t]he recipient of a fraudulent misrepresentation of fact is justified in relying upon its truth, although he might have ascertained the falsity of the representation had he made an investigation… is the text of comment a to section 540 (of the Restatement), which contains an important exception. It provides, 'On the other hand, if a mere cursory glance would have disclosed the falsity of the representation, its falsity is regarded as obvious under the rule stated in section 541.'")

336:

- Drafter is going to rework for next meeting.

337:

- This instruction mirrors CACI a lot—only changes "valid" contract in the second sentence of the instruction to be in line with Florida law.
- Committee discussed whether the addition of this word requires an additional instruction regarding the addition of a "new" enforceable contract.

- CACI uses the word "original" contract—Discussion regarding whether this is cumbersome.
- Committee discussed whether to add an embedded Note on Use after the second sentence of the instruction to tell the judge to give the instructions pertaining to the elements needed to have a valid contract.
- Suggestion to take out the whole second paragraph of instruction, which explains that new consideration is needed for the "new" contract, and replace this with an embedded Note on Use to refer to contract formation instructions. Alternatively, Committee discussed deleting only the second sentence of the second paragraph which addresses the requirement for new consideration.
- Committee discussed removing the word "original" to refer to the old contract. Committee agreed to leave the word "original."
- Committee agrees to remove the word "valid" because it complicates the instruction. Also, Committee agrees to strike second sentence of second paragraph (addressing new consideration needed for "new" contract) and to add an embedded Note on Use.
  - Committee also discussed adding the text of instruction 302 within this instruction rather than a Note on Use.
  - Committee found that the reference to 302 as an embedded Note on Use properly references the need for consideration— Parties agreed to give each other something of value.
- Before tomorrow's (Saturday 4/16) meeting, Committee agreed to redraft this instruction and revisit it tomorrow.

4/16/11→ Administrative Matters on Saturday Morning:

- Consensus that there are enough instruction to send to the Florida Bar news. Within 2 weeks from today (4/30), an email will be sent to the Committee that these instructions are ready to send. People then have 2 weeks to respond whether or not they think these instructions are ready and provide a reason why the instructions are not ready. So, within a month, we can hopefully have some instructions to publish.
- Committee chairs are to make a list of outstanding tasks, and get those done within a month.
- We need to pick our next meeting date and time, as well.
  - July 21 and 22 at Orlando Courthouse. Judge Smith will make arrangements to get the Committee in through the attorney entrance. Meeting will start at 9:30 to avoid additional delay at courthouse security.
- Discussion regarding applicant, Joshua Spector. There are technically no openings; the next cycle will end on 6/30/12. However, the Committee could use additional help. Hard

copy of resume circulated through the room. Committee voted to recommend to the SC that Joshua Spector be added to the Committee.

337 (continued on 4/16 as redrafted):

- This redraft took out valid; and embedded the text of instruction 302 as modified by the word "new".
- Suggestion to revise paragraph numbered one to read "Essential terms of the new contract were clear enough…" rather than "Essential contract terms."
- First sentence says "Defendant insists that the original contract…" The Committee in the past has revised instructions that contain this language to provide that "Defendants argues." Committee agrees "Defendant says that the original contract" is best.
- Committee discussed language of the instruction that provides "To establish this defense…" It was suggested that this be revised to read "to establish this…" because the jury doesn't need to know that this is a defense.
- Committee discussed whether to restate terms of 302 within 337 OR simply refer to 302.
  - If we embed the text of 302 within 337, we are not copying exactly 302; which is problematic on one hand. On the other, that the novation must be a "new" contract with new consideration is a bit different from the precise wording of 302.
  - Suggestion—delete the 2nd paragraph, and leave the numbered paragraphs which expound on the concept of the terms of creating a new contract.
  - Alternative suggestion—leave non-numbered paragraphs, delete the other language, and send the reader to 302 for the formation terms with a note that the consideration must be new.
  - Committee agreed that it the text of 302 is inserted within 336, the EXACT language of 302 must be used.
- Consensus:
  - Keep two unnumbered paragraphs, and last sentence—"If you decided that (defendant) has prove this, then the original contract is not enforceable." (This deletes the text that mirrors 302 from the body of this instruction.) Committee agrees that the word in the last sentence should be decide rather than decided.
  - Committee approved these changes.
- Committee discussed precise language of the embedded Note on Use. Suggestion: "302 may be read at this point to address the issue of formation." Should this Note imply that 302 MAY be read, or that the applicable portions of 302 SHOULD be read. Revised Suggestion: "Standard Instruction 302 may be read in whole or in part at this point to address the issue of formation of a new contract." Alternatively, "If necessary, Standard Instruction 302 should be read in whole or in part at this point to address the issue of formation of the new contract."

- Committee approved the second alternative language of the embedded Note on Use "If necessary…"

338:

- Committee agrees that if there are statute of limitations instructions in the personal injury section of the civil instructions, those should be reviewed in connection with drafting this instruction.
- Sources and Authorities 3, 4, and 5 appear to be included here to distinguish this instruction from California.
- Effect of Delayed Discovery Doctrine: Committee discussed that in fraud cases, the delayed discovery doctrine applies to modify the statute of limitations. However, since these instructions apply in business/ contract cases, the Committee does not really need to address this. Committee discussed whether to add a reference to refer to SJI Civil if delayed discovery doctrine may apply since business cases may still address fraud, as opposed to just contract cases which would not. Perhaps add a Note on Use to provide that "if fraud is an element in the case, see…" In the business context, see *Davis*. There, bank officer stole someone's CD in 2001 but it was not discovered until 2005 and the bank told the Plaintiff that they were investigating and that they would make good on it for 3 more years. Then plaintiff filed suit, bank alleged SOL, but court found plaintiff's claim was viable.
- Discussion regarding Note on Use 4—Committee discussed whether damages are an element of a cause of action for breach and whether a plaintiff needs to be damaged by the breach to have a cause of action.
- *BDI Cons. Co. v. Hartford Fire Insur. Co.*, 995 So.2d 576 (Fla. 3d DCA 2008) held that in a breach of contract action, the statute of limitations runs from the time of the breach. The instruction says statute of limitations accrued from "(plaintiff's) claimed harm." Claimed harm sounds like the time of damage—which may be different from the moment of the breach.
- Motion to change instruction to: (Defendant) contends that (plaintiff)'s lawsuit was not filed within the time set by law. To succeed on this defense, (defendant) must prove that [his][her][its] breach of the contract occurred before (insert date four or five years before date of filing).
- Committee discussed whether courts find that the breach and the harm happen at the same time? That the non-breaching party is harmed by the breach per se? Is there damage separate and apart from the breach? Although a party may not know the amount of the harm at the time of the breach, there is technically harm because of the breach.

- Committee approved the following instruction: **(Defendant) contends that (plaintiff)'s lawsuit was not filed within the time set by law. To succeed on this defense, (defendant) must prove that [his][her][its] breach of the contract occurred before (insert date four or five years before date of filing).**
- Committee then discussed the Notes on Use for this instruction.
  - *Barbara G. Banks, P.A. v. Thomas D. Lardin, P.A.*, 938 So.2d 571 (Fla. 4th DCA 2006) distinguishes accrual of cause of action in anticipatory breach context from breach at the time of performance. The non-breaching party is allowed to sit and wait for the performance IF IT WANTS TO. In the anticipatory breach situation, the statute of limitations accrues from the date of PERFORMANCE, not necessarily the date of the breach. In *Larson* (Fla. 2009), the court found that common law will not toll the statute of limitations where there is no tolling permitted under statute.
- Committee discussed whether to add a Note on Use that the instruction may need to be changed in the anticipatory breach context?
- Committee discussed whether to address tolling in the instruction? Consensus that this is not necessary as there is no statutory tolling in contracts.
- Committee voted to remove Notes on Use 2, 3, and 4. Only Note on Use 1 remains. Sources and Authority remain as written.

350:

- First paragraph of the instruction says "The purpose of such damages"—Committee agreed to change to "these damages."
- Committee inserted the word "if" in last sentence of first paragraph of the instruction. Now reads: "The purpose of these damages is to put (claimant) in the same position as [he] [she] [it] would have been if (defendant) had not breached the contract."
- The last sentence of the first paragraph provides "put (claimant) in the same position." Although pulled directly from case law, perhaps "in as good of a position as he" would be better. "The same position as he would have been" is misleading because in a real estate deal, we may not be giving the plaintiff the property, so its not really the "same" position. This makes the language utilized in the CACI instruction, "in as good of a position as he," more accurate.
- Committee members were concerned with double negative at the end of the sentence "if defendant had not breached the contract." Suggested Redraft: "If you decide that (claimant) has proved [his] [her] [its] claim against (defendant) for breach of contract, you also must decide how much money will reasonably compensate (claimant) for the harm caused by the breach. This compensation is called "damages." The purpose of these damages is to put (claimant) <u>in as good a position</u> as [he] [she] [it] would have been if (defendant) <u>had performed as promised</u>." (Reincorporates CACI and changes such

damages to these damages). Committee noted perhaps there is a subtle advocacy in favor of the plaintiff by saying performed as promised—if you are the plaintiff you can keep hitting on the fact that the fact the defendant broke his promise.

- There are two issues (1) same position v. as good as position (2) would have been had the defendant performed as promised v. had defendant not breached.
  - Committee voted for language "in as good a position."
  - Committee voted on 2nd issue. Although vote somewhat split, the "negative" version won. Reimplemented drafter's version "if (defendant) had not breached the contract."
- Committee discussed language of the second sentence and found that the word "contemplated" may be misleading because damages properly extend to those that are foreseeable. However, contemplated implies that the parties actually did think about it and that is all the plaintiff can recover. That interpretation is not accurate. *Sharick v. Se. University of the Health Sciences, Inc.*, 780 So.2d 136, 139 (Fla. 3d DCA 2000).
- Committee noted there is an issue with the conjunctive—do you have to prove damages which would naturally result from the breach AND/OR can reasonably be said to have been contemplated. *Railway*, 537 So.2d 1065 uses the disjunctive and cites *Hadley* ("Under the rule articulated in Hadley v. Baxendale, 9 Ex. 341, 156 Eng.Rep. 145 (1854), the damages recoverable for breach of contract are: (1) such as may fairly and reasonably be considered as arising in the usual course of events from the breach of contract itself, or (2) such as may reasonably be supposed to have been in contemplation of the parties at the time they made the contract.") Committee noted that the *Railway* case also uses this "reasonably be supposed to have been in the contemplation of the parties." Although this is wordy, the "supposed" language modifies the impact of "contemplated."
- Committee noted that additional research may remedy the disjunctive v. conjunctive issue and noted the import of this instruction as it is the first on damages.
- Committee voted to table this instruction as additional research and Judge Gerber's assistance would be valuable here.

Recap:

- Committee reviewed instruction 308 and discussed alterative language in the numbered paragraphs of the instruction: "(1) That the offer was not withdrawn; or (2) That the offer was accepted before it was withdrawn; or (3) That the withdrawal of the offer was never communicated to the other party." Although discussed, the Committee did not vote to revise this language.
- The Committee has worked on 300–320, with 312 and 314 still under review.
- Manny Farach and Brian Spector agreed to work on the prologue.

- Committee discussed use of Notes on Use v. Sources and Authorities. Committee also discussed whether to show the sources for the instruction at the comment point. On one hand, when the Committee "shows its work," this may provide a better opportunity for comment because busy practitioners have a case law starting point. However, there is a timeliness issue because if cases are cited, they are going to be quickly outdated.
- Ultimately, each member of the Committee is asked to spend one hour, to look at SJI Civil to see their approach, and advise the Committee as to their opinion of whether to use Notes on Use, or Sources and Authorities, or both. Committee also seemed to accept the idea that all of the Notes on Use and Sources and Authorities be combined to "Committee Notes."

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS FOR BUSINESS AND CONTRACT CASES

Minutes for 7/22/11 Meeting

Members Present: Honorable Thomas B. Smith (Chair), Manuel Farach, Brian Spector, Honorable Jonathan Gerber, Mark Boyle, Eduardo Palmer, Jane Kreusler-Walsh, Maxine Long, Gary Rosen, Joshua Spector, Gera Peoples, James Kaplan, Lee Haas, Lee Barrett, Ronald Gache, Christine Lamia, Robert Norway, Kurt Lee

Members Absent: Robert Austin, Eric Lee, Honorable Bernard Nachman, Michael Olin, Steven Reininger, Tucker Ronzetti, Honorable Meenu Sasser, Paul Silverberg, Mark Wall, Roy Fitzgerald

Administrative Matters:

4. Judge Smith's introduction:

1. This will be Judge Smith's last meeting as Chair. He will stay on committee as a member. Although not official, Judge Gerber will likely be appointed Chair by the Chief Justice.

2. There have been no comments received to Instructions 300-320 published in the July Florida Bar News. The Committee discussed whether to re-publish the instructions in the hope of receiving some comments. If the Committee chooses not to republish, the Committee will submit the instructions by petition to the Florida Supreme Court and the Chair and Vice-Chairs will attend the Supreme Court hearing regarding same. Once the petition is filed, the court will typically republish the instructions in the Florida Bar News for comments again.

3. The Committee discussed whether to republish now or file the petition now. The Committee also expressed concern over having two jury instruction books (civil and business/contract). This discussion was ultimately tabled as it concerns the "final" product.

4. The Committee discussed whether to file a petition as to ALL instructions, or petition for approval for each set of published instructions. Some Committee members reasoned that petitioning all at once would allow the Committee to review the previously published instructions one more time. The Committee discussed the need to show the Florida Supreme Court periodic progress, although some members reasoned that sufficient progress is being reflected by means of the periodic publications (as opposed to periodic petitions). Committee consensus indicated that one petition is favored. Judge Gerber expressed that he would try to get on Justice Lewis' calendar to discuss these matters.

5. The Committee next discussed the numbering of instructions in the event that civil and business/contract instructions are combined in one book. One suggestion was that SJI Civil will be first (three digit numbering), and Business & Contract will be after that (four digit numbering that corresponds). This would give SJI Civil space to expand. The Committee agreed to delay a decision at this time as this is an "end product" issue and can be resolved at a later date.
6. Committee noted that at the end of the last meeting (April 2011), 303 and 312 were redrafted by Judge Smith and Gary Rosen and are ready to be reviewed by the Committee.

5. Approval of Minutes for 4/15 and 4/16 Meeting:

1. Motion to approve the minutes. Approved without revision.

325 (Breach of Implied Covenant of Good Faith & Fair Dealing):

- This Instruction was discussed at the 4/15 meeting, however, the Committee felt the drafter's presence was needed. The drafter explained that this instruction is problematic because there is a case pending before the Florida Supreme Court, *Chalfante Condominium*, in which the 11th Circuit certified questions to the Florida Supreme Court regarding the doctrine of good faith as applied to insurance policies. Cases have come down on both sides while this case has been pending. The whole point of the covenant is its foundation in the parties' reasonable expectations.
- The Committee discussed whether the breach of the covenant of good faith and fair dealing is a question of law such that the instruction would not be given unless the trial court made an initial determination that the covenant applied. Thus, some members felt that this obviated the need for the "in virtually contract…" introductory language. The Committee noted that cases have picked up this "virtually" language (see Note 1), but removed this language because whether there is an implied covenant is really a threshold question for the judge. As a result, the instruction can be revised to read: "In the [contract][agreement] in this case, there is an implied…."
- To adequately note that the question of whether there is an implied covenant of good faith is initially to be determined by the judge, the Committee agreed to revise Note 1 to begin: "The question of whether a particular contract is one in which an implied covenant of good faith and fair dealing applies is a question for the trial court to answer in the first instance." Previously drafted Notes on Use will be bumped down one number.
- Committee made grammatical and stylistic revisions: Corrected spelling of word "claimant," removed "that" from introduction of each element, inserted space that was missing between third and fourth elements.

- Committee discussed the commonplace affirmative defense that essentially says "there has been a breach of the implied covenant of good faith and fair dealing." Then the plaintiff usually files a motion to strike or motion to dismiss on the grounds that the breach of the implied covenant must relate to a specific contractual provision and defendant has failed to allege such a provision. The judge then grants the motion to strike, and the defense will get amended. The Committee then discussed how to revise the instruction to remedy this concern.
  - The Committee noted that there are cases that discuss the "reasonable expectations" of the parties, the idea that this doctrine is a "gap filler" of sorts, and the fact that this doctrine cannot be used to negate a specific contractual provision. All of these elements of the case law need to be reflected in this instruction.
  - Proposal:
    - That (defendant's) actions [or omissions] unfairly interfered with (claimant's) receipt of the benefits of the contract;
    - That (defendant's) conduct did not comport with the reasonable contractual expectations of (claimant);
  - Committee members suggested that this language be revised to include the specific language from the contract that has been breached. This should be done to make clear that the breach of the covenant of good faith and fair dealing is not an independent cause of action—that the party must specifically point to a specific provision.
  - Revised suggestion: That (defendant's) conduct did not comport with the reasonable contractual expectations of (claimant) <under the following part of the contract (quote applicable part of contract)>.
    - Committee discussed whether the carrotted language should be added, and if so, whether the language should be duplicated in the other elements of the instruction.
    - Committee noted, however, that physically inserting the specific language could get excessive when lawyers request that a three page provision be read.
    - Committee likes the word "part of the contract" more (as opposing to specific provision) because this would apply better to oral contracts as well. Revised carrotted language: <under certain part(s) of the [contract] [agreement]>.
  - Committee discussed whether to provide alternative [contract][agreement] language throughout instruction. However, Committee reverted to use of contract alone to be consistent with other instructions.

    - Committee then discussed whether to add an embedded note on use to indicate that the judge may wish to reference or quote the applicable contract provision. Committee agreed this Note on Use could be added.
- Committee member suggested that the carrotted language (<under certain part(s) of the contract>) be added to the body of the instruction (rather than to each element). Committee agreed.
- Committee discussed alternative language for "under certain part(s) of the contract—i.e. "Under one or more parts of the contract" or "specific parts of the contract." Committee chose the latter.
- Committee member expressed concern that by the time jury instructions are read, there really should be no confusion over which part of the contract gives rise to the breach of the implied covenant. The *Snow* case outlines that the breach of the covenant of good faith MUST RELATE to certain language of the contract. Committee members discussed that the implied covenant of good faith attaches to certain language and certain phrases, but not necessarily a whole section of the contract. The concern is that the new language "under a specific part of the contract" may be too narrow. Drafter argues that the case law really requires that the breach relate to a specific provision. This would also avoid the abuse of lawyers arguing breach of good faith generally; (including piecing together phrases throughout a contract to create a "provision" of sorts that implicates the implied covenant.
- The Committee discussed whether an attorney can argue that the "penumbra" of the contract implies the covenant of good faith. Committee members agreed that Florida law does not permit such an argument.
    - The *Snow* case says "specific or expressed"—Committee discussed that the instruction should use the word specific throughout to mirror the case law. Committee then discussed whether there are other instructive cases besides *Snow*. *Insurance Concepts* case uses the phrase "express term of the contract" and in dicta says "specific part of the contract." Committee is comfortable with the word specific and this change was made throughout. Put [a] to show optional and keep (s) for part(s). "Under [a] specific part(s) of the contract."
- Committee corrected a few non-substantive grammatical points throughout.
- Change to Notes on Use: Removed pin cites for non-quoted cases. Changed Restatement to normal font (as opposed to all caps). Used short cites for cases repeated and remove court information (Fla. 2d DCA 1998) in short cites.
- Committee discussed whether Notes 5 and 7 are so similar that they should be combined. The Committee noted subtle difference between the two, but agreed to reverse the last two elements so that the two similar elements are back to back.

- Discussion regarding whether to keep *Ernie* citation in Notes on Use since it is a federal case. Committee removed. Remove citing reference to Publix Supermarket Case.
- Motion to approve. Seconded. No opposition. This instruction was approved.

334 (Fraudulent Misrepresentation) (instruction regarding negligent misrepresentation discussed in tandem:

- In the last meeting, the Committee analyzed *Gilchrist*, *Besett*, and *Yusem* which indicated that there is no requirement for a party's reliance to be "reasonable" when scienter sufficient to support fraud exists. The Committee then discussed Florida case law which indicated that if a party KNOWS or if a cursory review should have revealed the representation to be fraudulent, then that party cannot claim they relied on the fraudulent misrepresentation.
- Committee reviewed 409.7 SJI Civil instruction regarding the claim of fraudulent misrepresentation (as opposed to an affirmative defense, which this instruction relates to).
- The drafter of this instruction indicated that his use of the word "reasonable" in past versions of this instruction was to encompass the two above-described exceptions. The Committee notes that the Supreme Court has used justified reliance to describe these two exceptions. Drafter noted that he used 409.7 (SJI Civil Instruction) as a guide.
- The Committee reviewed *Besett v. Basnett*, 389 So.2d 995 (Fla. 1980), wherein the court used the term justified (i.e., "justified in relying upon the representations"). Thus, the concept of "justified reliance" can be properly included in this instruction.
- Committee discussed whether the standard by which to judge whether the fraud was obvious is objective or subjective. The Committee noted that the instruction as drafted indicates it is a subjective standard, and the case law verifies this is correct (i.e., "obvious to him" as used in *M/I Schottenstein Homes, Inc. v. Azam*, 813 So.2d 91, 93 (Fla. 2002)).
- Committee agreed that introducing the word "reasonable" into this instruction would be confusing and may have unintended consequences.
- When *Gilchrist* was decided, the Eleventh Circuit certified the question of whether the rule in *Bessett* (which addresses fraudulent misrepresentation) applies where the misrepresentation is only negligent. The Florida Supreme Court's answer in *Gilchrist* is where we get the notion of reliance/justifiable reliance being the difference between fraudulent misrepresentation and negligent misrepresentation.
- The drafter noted that *Rocky Creek Retirement Properties, Inc. v. Estate of Fox ex rel. Bank of America, N.A.*, 19 So.3d 1105 (Fla. 2d DCA 2009) is the only case that uses negligent misrepresentation as a DEFENSE. However, perhaps its precedential value is

limited as it cites cases that use negligent misrepresentation as a claim, not a defense. When read closely, the language of *Rocky Creek* appears to confuse fraudulent and negligent misrepresentation rules ("the representor must either know of the misrepresentation, must make the representation without knowledge as to its truth or falsity, or must make the representation under circumstances in which he ought to have known of its falsity"—the underlined portion is the fraud standard!)

- Committee noted that in light of the fact that there is a lack of definitive case law on fraudulent/negligent misrepresentation as a defense, the Committee should review SJI Civil's instruction on these issues to make them consistent.
- (LUNCH BREAK AND WEBSITE INSTRUCTION)
- Committee reviewed *Schottenstein* in more detail and noted that although more recent, *Yusem* is more factually limited, and as a result *Schottenstein* may be more applicable. Committee discussed whether the distinction between fraudulent and negligent misrepresentation is built into the burden of proof—fraud once proven, is proven; however, once there is proof of negligent misrepresentation, defendant needs to establish that their reliance was reasonable.
- Committee discussed how to build in the language of *Schottenstein* which requires that the court consider all of the circumstances ("this factual examination is indeed a consideration of the totality of the circumstances surrounding the type of information, the nature of the communication between the parties, and the relative positions of the parties").
- Committee discussed the problems that may arise if this instruction (the defense of fraudulent misrepresentation) does not mirror SJI Civil's instruction regarding the claim. The insinuation is that the elements of the claim and the defense are the same although the case law does not explicitly state.
- SJI Civil Instruction 409.7 appears to combine the fraud/negligent misrepresentation instruction and use the bracketed language to separate the two. However, SJI Civil does have two separate instructions.
- Committee discussed the outcome in the event there is a successful negligent misrepresentation defense. Does the contract become void altogether or are damages merely limited by virtue of comparative negligence? Does it matter whether the breach is in connection with the payment of money or if the breach was in the performance? *Gilchrist* seems to imply that comparative negligence comes into play.
- Committee again reviewed *Rocky Creek* and found that the first element sounds like fraudulent misrepresentation, and thus perhaps the issues were confused. Additionally the procedural posture of the case is limited (regarding an arbitration contract) and perhaps this case is an "outlier," thus limiting its reliability. The Committee concurred

that it would be imprudent to rely on this case alone, and perhaps the Committee should avoid "speaking" on the issue until the law is more clearly established.

- Committee then discussed how to address the fact that negligent misrepresentation may be (and is often used as) a defense where there is no formal instruction. Committee agreed to include a Note on Use under the negligent misrepresentation instruction to flag that the law is not well settled enough to have a standard jury instruction here. Committee agreed that Fraud will be 335 and that Ron Gache will draft Note on Use to state that this defense exists, but the elements and terms are not sufficiently well settled.
- Remove starred language (***The bracketed language should be used for clarity when there is also a defense for negligent misrepresentation.)*
- Committee discussed language of current draft which provides "If you decide that *[name of defendant]* has proved all of the above, then no contract was created." The Committee discussed whether this is always the case. There is case law providing that in the context of the claim of fraudulent misrepresentation, the plaintiff gets to choose whether to void the contract or accept the benefits of the contract (i.e., deaccelerate a breach). There are no cases on this point in the context of the defense of fraudulent misrepresentation. Thus, the Committee concluded it would be imprudent to include a definitive statement regarding the outcome of a successful defense. Lee Barrett will continue to research the remedy issue. The Committee noted that the jury will have a form that will say "did the plaintiff make a fraudulent misrepresentation—yes or no." The jury would not determine the legal ramifications in any event.
    - In light of this discussion, the Committee agreed that the instruction's introductory language, "defendant claims that no contract was created because his her its consent was obtained by fraud" needs to be changed as a void contract is not always the relief sought. Suggestion→ Defendant claims as a defense that (claimant) persuaded [him][her][it] to agree to the contract using a false statement. This is referred to as a fraudulent misrepresentation. To prove this defense…" The Committee has issue with the first sentence's use of "defendant claims as a defense."
    - Minor changes→ Change second element to "knew that the representation was not true" to "false"; change "would not have entered into" to "would not have agreed to"; take out sentence regarding remedy; take out "that" before each element; change Plaintiff to Claimant; Claimant should be in parenthesis; [his][her][it] corrected throughout; Instead of "to succeed" the instruction should read "to establish this defense."
- Redrafting instruction to track SJI Civil 409.7 more closely

- Suggestion: "On the [first] defense of fraudulent misrepresentation, the issues for you to decide are whether (claimant) persuaded (defendant) to agree to the contract using a false statement."
- Alternative #1→ "On the [first] defense of fraudulent misrepresentation, the issues for you to decide are whether:"
- Alternative #2→ "Defendant has raised the defense of fraudulent misrepresentation, meaning… the issues for you to decide are…"
- Committee agreed with Alternative #1, which mirrors SJI Civil's instruction on the claim of fraudulent misrepresentation closest. As to the elements of the instruction, Committee agreed to pull the elements straight from *Yusem*—which is the state of the law as of 2010 and revise slightly into "plain English."
- Move to approve 335. Approved.

When revisited on Saturday:

- Ron drafted a proposed Note on Use regarding why there is no separate instruction for negligent misrepresentation. "The committee recognizes that authority exists suggesting that negligent misrepresentation can be asserted as an affirmative defense to a breach of contract claim with a citation to *Rocky Creek .* However, the law supporting this defense has not been sufficiently settled by the courts of this state to enable the Committee to propose a instruction on this defense."
- Jodi suggested adding: "Pending further development in the law, the committee takes no position on this issue." This is how SJI Civil words such notes.
- Committee discussed whether the sentence regarding sufficiently developed is unnecessary. The committee felt this sentence should remain to explain why a recognized defense is not being an instruction. Approved.
- Committee then discussed whether this language regarding no instruction for negligent misrepresentation should be as a Note on Use to fraudulent misrepresentation or to have this as the body of the instruction on negligent misrepresentation. Committee decided to use it as the instruction "body."
- **Constructive Fraud:** Committee member inquired as to how constructive fraud fits into the fraudulent misrepresentation instruction. Committee discussed whether to try to incorporate constructive fraud into the main fraudulent misrepresentation instruction, or whether constructive fraud should be a separate instruction. Additionally, how can fraud by omission be included in the current instruction? Is there an affirmative claim for fraud by omission? Committee noted that 409.7 does NOT include omission—rather an affirmative statement ONLY. Committee noted that the "fraud by omission" line of cases

in the residential real estate context is distinguishable as the Florida Supreme Court has spoken on that issue directly through *Johnson v. Davis*. Lee Haas agreed to research fraud by omission and constructive fraud and determine whether they should be independent instructions, combined with each other or combined in the main fraudulent misrepresentation instruction.

Website meeting with Belynda with the Florida Supreme Court:

- Cut short due to technical difficulties. Belynda will email all Committee members with three dates, and hold information sessions as to how to operate and use the website. Essentially, when you see the home page, the "meat" is along the left side of the screen under the heading "Documents."
- Brian Spector explained the structure of the website; showed the Committee that under the "Instructions in Progress" there is a file for each instruction. Within that file are the drafts of the instruction with "as of 7/22/2011" (for example) to show the progress. Additionally, within the numbered instruction folders, there is a Draft Instruction subfile and an Authorities subfile.
- The drafter of each instruction, should go into the most recent draft and write their name next to the date so that the Committee knows who wrote the instruction, and upload the authorities for their respective instructions.

336 (Waiver):

- Committee started with version sent by email by Lee Barrett on 7/21/11. Committee first made initial edits to have introductory language of instruction mirror new language introducing instruction 335 based on SJI Civil's format→ "On the [first] defense of waiver, the issues for you to decide are whether..."
- Drafter explained that the case law in this area is pretty well developed—waiver must be plead as a defense, must be knowing and voluntary, and the waiving party must not be misinformed.
- Minor revisions→ Changed Plaintiff to Claimant; took out "That" as introduction to each element; took out last paragraph because it states the legal ramifications if you find the defense (this is not the province of the jury).
- Committee notes that the instruction, as drafted, is in plain English and that so long as it is faithful to the case law, the Committee likes the instruction. Drafter agreed to go back and put the Notes on Use into sentence form prior to next meeting.
- Lee Haas to ascertain, prior to next meeting, whether the defense of estoppel should have an instruction. Committee notes that perhaps waiver and estoppel are

distinguishable insofar as waiver is a legal defense, but that estoppel is an equitable defense (because an equitable defense is not a defense to an action at law, perhaps this is the reason it is not in our instruction). Haas to research and determine before next meeting whether there should be an instruction on this.

337 (Novation):

- Committee started with version that was in working draft circulated after 4/16 meeting. Committee began by adding the same introductory language as SJI Civil and prior instructions on various defenses→ "On the [first] defense of novation, the issue for you to decide is whether: all parties agreed, by words or conduct, to cancel the original contract and to substitute a new contract in its place.

  If necessary, standard Instruction 302 should be read in whole or in part at this point to address the issue of formation of the new contract.

- Committee felt no substantive revisions were needed. Motion to approve. Approved.

338 (Statute of Limitations):

- Committee began with draft from website dated 4/16/11. Committee began by adding the same introductory language as SJI Civil and prior instructions on various defenses→ "On the [first] defense of statute of limitations, the issue for you to decide is whether (Claimant's) claim (describe claim as to which statute of limitations defense has been raised) was filed within the time set by law. To succeed on this defense, (defendant) must prove that [his][her][its] breach of the contract occurred before (insert date four or five years before date of filing)."
- Committee discussed whether SJI Civil has an instruction for the defense of an expired statute of limitations. SJI Civil has a blank for the date/what event as the "beginning point"—the date the cause of action accrues. Committee noted that this strategy puts the start date in the lap of the judge.
- Committee discussed how to incorporate the delayed discovery doctrine, and noted that there is a special statute that relates to the statute of limitations and provides that the clock begins when the breach was discovered. The Committee also discussed a factual scenario where a recently joined defendant raises the statute of limitations as a defense and the interplay of the relation-back doctrine.
- Committee determined that the presence of the drafter of the instruction is needed to address these, as well as other, issues in this instruction. Committee tabled this instruction.

350 (Damages Introduction):

- In the last meeting the Committee tabled this instruction to have the benefit of the drafter's presence. The Committee discussed whether the language of the instruction should be conjunctive or disjunctive. *Hadley* uses disjunctive ("The damages recoverable for breach of contract are: (1) such as may fairly and reasonably be considered as arising in the usual course of events from the breach of contract itself, **or** (2) such as may reasonably be supposed to have been in contemplation of the parties at the time they made the contract."). However, *Sharick* uses conjunctive ("Damages recoverable by a party injured by a breach of contract are those which would naturally result from the breach **and** can reasonably be said to have been contemplated by the parties at the time the contract was made."). Committee members suggested that if the instruction is put into the active voice, the conjunctive/disjunctive dispute is remedied→ Which would naturally result from the breach or which the parties understood at the time they made the contract.
- Committee discussed whether to make this an instruction on compensatory damages only and to have a separate on consequential damages. Alternatively, the Committee discussed using 350 as a "pure" introduction to damages.
- Committee reviewed SJI Civil instructions on damages and noted that 409.13 has some introductory language→ "If you find for defendant, you will not consider the matter of damages. If you find for claimant, you should award claimant an amount of damages…."

351 (Special Damages) (discussed with 350)

- The instruction, as written, presents an objective standard ("(defendant) knew or reasonably should have known of the special circumstances leading to such harm").
- Committee expressed consensus to scrap 350 as written, use 409.13 as a guide, and use nuggets of old 350 into new damage instructions regarding each "specific type" of damages. Now starting 350 with: "If you find for (defendant), you will not consider the matter of damages. But, if you find for (claimant), you should award (claimant) an amount of money that the greater weight of the evidence shows will fairly and adequately compensate (claimant) for (describe appropriate elements of those damages incurred by claimant)." Committee then looked through the old 350 to see what portions of that should be added. Committee agreed that the sentence "This compensation is called 'damages'" was important to have in the instruction because it is imperative that jurors understand the word damages as it will be repeated throughout. As drafted:
  - "The purpose of these damages is to put (claimant) in as good a position as [he] [she] [it] would have been if (defendant) had not breached the contract."

- "To recover damages for any harm caused by a breach of contract, (claimant) must prove that the damages are those which would naturally result from the breach or could reasonably be supposed to have been contemplated by the parties at the time the contract was made."
- Committee reviewed the language of the "old" 350 regarding the concept that the amount of damages must not be uncertain. Committee discussed whether this language should be made its own instruction so as to be read only when uncertainty/speculative damages is an issue. The Committee discussed creating an instruction called "Uncertainty Regarding Amount of Damages." Committee also noted the need to jive this concept with the language of 353 which provides "You do not have to calculate the amount of the lost profits with mathematical precision, but there must be a reasonable basis for computing the loss." Committee agreed that uncertainty of damages may arise in non-lost profit situations so it should be a separate instruction.
- Suggestion to make the uncertainty instruction 353.1 as it modifies 352 and 353→ This will be the "place holder": "Uncertainty as to the amount of damages or difficulty in proving the exact amount will not prevent (claimant) from recovering damages when it is clear that substantial damages were suffered and there is a reasonable basis in the evidence for the amount awarded."

- Reread of 350 as drafted: "If you find for (defendant), you will not consider the matter of damages. But if you find for (claimant), you should award (claimant) an amount of money that the greater weight of the evidence shows will fairly and adequately compensate (claimant) for (describe appropriate elements of those damages incurred by claimant). This compensation is called "damages."
- "The purpose of these damages is to put (claimant) is as good a position as [he][she][it] would have been if (defendant) had not breached the contract. To recover damages for any harm caused by a breach of contract (claimant) must prove that the damages are those which would naturally result from the breach."
  - Committee noted that the second paragraph of the instruction could be problematic if the Committee plans to make separate instructions for each type of damages as the language of 350 as drafted implies that the expectation standard applies in all cases.
  - Committee tomorrow will (1) hold second paragraph of 350 to be used in a later instruction, (2) will start tomorrow at 351.
  - **Saturday—revisit of 350**: Committee agreed to add the following sentence to the end of the first paragraph: "you shall consider the following elements:"
  - To reflect the formatting used by SJI Civil, the Committee revised the instruction to read as follows:

"if you find for defendant, you will not consider the matter of damages. But if you find for claimant, you should award claimant an amount of money that the greater weight of the evidence shows will fairly and adequately compensate claimant for (describe appropriate elements of those damages incurred by claimant). This compensation is called "damages." You shall consider the following elements:"

- Committee later discussed that the language in parenthesis, found it was duplicative and removed it. Committee discussed the use of language "fairly and adequately compensate claimant"—some felt it too broad; others felt it appropriate since 350 is going to be a "pure" introduction.
- Committee agreed to remove the sentence "this compensation is called 'damages'" because the instruction now starts "if you find for defendant, you will not consider the matter of damages" and the language as written is duplicative.
- There will be no Note on Use.
- Committee agreed to revise the last sentence to say "You shall consider the following type(s) of damages:" Committee discussed whether it is awkward to end this instruction with a colon but Committee decided to not get bogged down with the numbering/formatting.

350.1 (351.a) (Compensatory Damages)

- As discussed above, Committee decided to use 350 as an "introduction" to damages with instructions to follow regarding each "type" of damages. Committee pulled language from original 350 as a starting point for this instruction on compensatory damages. "These damages should put (claimant) in as good a position as [he][she][it] would have been if (defendant) had not breached the contract." Committee member suggested the following: Those damages which will put claimant in as good a position as [he][she][it] would have been in if (defendant) had not breached the contract and which naturally flow from the breach.
- Committee discussed using specific contract case language as opposed to the generic language used by SJI Civil. Committee felt the inclusion of the language regarding damages that naturally flow from the breach is true to contract case law.
- Committee agreed to move Notes on Use 1 and 2 from the old 350 to this instruction and that Notes on Use 3 and 4 will be connected with the new instruction regarding uncertainty (353.1).

- Committee agreed to change language "those damages which will put claimant" to "that amount of money which will put claimant…." Committee felt this change was necessary to avoid wordy instruction.
- After reviewing SJI Civil's formatting, it appears as though this instruction would be properly numbered 350.a rather than 350.1. Committee revised style of instruction to mirror SJI Civil. This instruction on compensatory damages will be like a sub-part to 350 (general damage introduction).
- Committee discussed whether this "general instruction on damages with sub-parts on each specific type of damage" strategy was problematic insofar as it would create one very long note on use. Committee decided 351 would be Breach of Contract Damages Elements, and then there would be subparts for the different types of damages. Committee decided to have interspersed Notes on Use after each sub-part (i.e. "Notes on Use for 351.a").
- Revised language→ "Compensatory damages, which is that amount of money which will put claimant in as good a position as [he][she][it] would have been in if (defendant) had not breached the contract and which naturally flow from the breach."
- Committee discussed use of word "flow" where the case cited in Note on Use said "naturally result." Committee noted that "naturally result" should be used to stay as close to case law language as possible.
- "Compensatory damages, which is that amount of money which will put claimant in as good a position as [he][she][it] would have been in if (defendant) had not breached the contract and which naturally result from the breach."
- Approved 350, 351, and 351 a..

351.b (Special Damages):

- Committee changed "Sources and Authority" to "Notes on Use" (from here on out, the Committee is going to combine these to categories into the latter).
- Committee discussed whether this instruction is a good place to add back in the language removed from 350 (*Sharick* language)? "Damages recoverable by a party injured by a breach of contract are those which would naturally result from the breach **and** can reasonably be said to have been contemplated by the parties at the time the contract was made."
- Committee discussed the difference between special damages and compensatory damages. Compensatory damages are those which naturally flow from the breach and special damages, which have a heightened pleading requirement, are those that *do not necessarily* flow from the breach—they are peculiar to the parties involved in the transaction and require that the breaching party know or should have known that this "special damage" was possible.

Committee discussed example of a real estate transaction with a time of the essence clause with a result that the nonbreaching party was not eligible for a tax credit due to the breaching party's delay. This would likely be a special damage as inability to receive a tax credit does not *normally* flow from a breach of real estate contract. If it is the natural consequence=compensatory; if subjectively within the contemplation of the parties=special damages.

- Committee agreed to not have language like "could have been within the contemplation of the parties" because that doesn't communicate that the parties actually did communicate their peculiar conditions.
- Committee expressed consensus that 350 should be introduction; 350(a) should be compensatory; and 351 should be special damages. With that in mind, the Committee was ok with 351 since there will be a separate note on compensatory.
    - Committee reverted to yesterday's discussion regarding incorporating the burden of proof in the instructions—this is not the traditional approach taken in the Florida standard jury instructions, and this Committee felt it was prudent to avoid including language in the instructions indicating who bears the burden of proof. Committee agreed that language in prior instructions that provides "to recover, Plaintiff must prove…" should be removed as this is not the method used by SJI Civil.
    - In light of this discussion regarding whether instructions should contain who has the burden of proof, the Committee discussed whether to go back to already-published instructions and revise. No clear answer was reached.
- Committee members suggested that there should be a Note on Use regarding this instruction that provides "If special damages have not been plead/do not apply, this instruction should not be read."
- Committee revised to begin instruction "Special damages is that amount of money which…" Committee next looked at cases cited in Notes on Use to get language for the instruction. Committee member expressed concern with use of word proximate in the case law as it sounds like a tort concept. Committee agreed "proximate" would not be included in the instruction since it is not "plain English" and that the Committee should try to wrestle with the case law presented to draft the instruction. Committee noted that the word "result" would sufficiently encompass the causation element of this type of damages.
- To begin, the Committee copied and pasted the definition of *Hardwick* into the instruction itself to start drafting the instruction. "Special damages is that amount of money which… is not likely to occur in the usual course of events, but which the parties, looking at all the facts and circumstances, reasonably considered at the time they made the contract. Special damages consist of items of loss which are peculiar to the party against whom the breach

was committed and would not be expected to occur regularly to others in similar circumstances."

- Committee expressed concern over the phrase "should have" (rather than reasonably considered) because that places the jury into the situation of inquiring into what should the parties have done. Committee reviewed the language in the CACI instruction which was basic and straightforward. Although it does not mirror the case law precisely, it is a good recitation of the law.
- Suggestion→ "Special damages is that amount of money which are unique to the claimant and which are not likely to occur in the usual course of events, but which the parties, looking at all the facts and circumstances, reasonably considered at the time they made the contract."
- New suggestion→ "Special damages is that ~~the~~ amount of money which will compensate the (claimant) for those damages which do not normally result from the breach of contract. ~~Rather, t~~o recover special damages, (claimant) must prove that when the parties made the contract, (defendant) knew or ~~reasonably knew or~~ should have known of the special circumstances leading to such harm."
  - Committee agreed to strike rather and begin the sentence with "to." Removed "reasonably knew" as it was duplicable (the instruction needs to read "knew or reasonably should have known" (this is the CACI language)); "that" amount of money rather than "the amount of money"; Changed "leading to such harm"—leading to such damages."
- Motion to Approve. Approved.

352 & 353 (Lost Profits):

- Currently 352 and 353 are instructions regarding loss profits and are divided into two instructions based upon "some profits earned" and "no profits earned." Committee noted that this is the structure used by CACI to incorporate the enhanced proof standard for new businesses and not profitable businesses, etc..
- Committee reasoned however that if 352 and 353 are read together, it appears almost a lower standard for new businesses—which is the inverse of what the Committee believes the law to be.
- Committee discussed whether to rename these instructions "established business" v. "new business." However, such names are a bit confusing and misleading in the circumstance where a company has one transaction under its belt. It is also confusing when a car business sells a piece of real property—it is a "new business" for them.

- Committee agreed to draft 352 first, and then discuss how to revise the language to "increase the bar" for new business/no profits earned cases.
- Committee discussed recent case law that outlines the heightened standard for new business. Jim Kaplan to locate and analyze this case.
- In light of the hour, and that further research is needed, the committee agreed to table this instruction for the next meeting.

Closing Remarks:

- The next Committee meeting has not been scheduled as it is the Committee's hope to schedule it near in time to Judge Smith's investiture so the Committee can attend.

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS FOR BUSINESS AND CONTRACT CASES

Minutes for 10/21-22/11 Meeting

Members Present: Honorable Jonathan Gerber (Chair), Manuel Farach (Saturday), Mark Boyle, Jane Kreusler-Walsh, Joshua Spector, Lee Haas (Friday), Lee Barrett, Ronald Gache, Christine Lamia (Friday), Robert Norway, Kurt Lee, Steven Reininger, Tucker Ronzetti, Mark Wall, Michael Olin (Friday), Eric Lee (Friday), Roy Fitzgerald

Members Absent: Brian Spector, Eduardo Palmer, Maxine Long, Gary Rosen, Gera Peoples, James Kaplan, Honorable Bernard Nachman, Honorable Meenu Sasser, Paul Silverberg

Administrative Matters:

- Review of minutes from prior meeting. Revise reference to instruction 334 to 335. Minutes approved.
- Committee will recognize Judge Smith at the Investiture and will present his assistant, Melissa, with a card today in appreciation of her service to the committee.
- Judge Gerber discussed the recent passing of Bob Austin and a moment of silence was held in his honor.
- Judge Gerber reported on his meeting with Justice Lewis.
  - The Court is happy with the Committee's membership, and members are encouraged to reapply upon expiration of their current terms.
  - Judge Gerber explained that the Committee should continue to publish instructions in batches, with the goal of today's meeting to be to complete a 2nd set of instructions for publication. The Committee's goal should be to submit a batch of instructions every 3 to 4 months. Once instructions are finalized, they should similarly be presented to the Court in batches by petition. In the event that no comments are received after publication of the instructions in the Florida Bar News, the Court may determine that republication is not necessary and that oral argument regarding the proposed instructions may not be required.
  - These instructions will be in a separate book from the SJI Civil instructions based on the idea that the SJI Civil book is large and that business and contract cases comprise a discrete area of the law.
  - The book of instructions will contain a standard introduction and closing materials. Pursuant to Judge Gerber's conversation with the Chair of SJI Civil, this Committee has SJI Civil's permission to duplicate the introductory and other materials from the SJI Civil book for incorporation in this Committee's instructions.
  - Judge Gerber noted that the numbering system for the instructions drafted by this Committee will change at the time the Committee submits its petition to the Florida Supreme Court, as the Committee will utilize the SJI Civil numbering scheme.
- Committee discussed possible dates and location for next meeting. Discussed January 13 & 14 (MLK 3 day weekend), Feb 17 & 18 (President's Day weekend) and February 3 & 4 and possible use of Orange County Bar building.

358 – Mitigation of Damages

- Drafter noted that this instruction is relatively simple and should be used in the context of exclusive contracts only (see Note on Use). Drafter noted that he started with the CACI instruction, and revised in accord with Calamari & Petrillo, as well as the Restatement. Florida Supreme Court case law in this area has relied on the Restatement, thus the Drafter felt it instructive here.

- Committee discussed use of the word "harm" and whether "damages" should be used instead. Committee noted that substituting the word "damages" for "harm" made the sentence a bit repetitive. Committee noted that Restatement utilized the word "loss." Committee noted value in the word "loss" as "harm" and "injury" sound like tort concepts.
  - "(claimant) is not entitled to recover for those damages which (defendant) proves (claimant) could have avoided with reasonable efforts or expenditures." (As rephrased as a result of above discussion).
- Committee revised the last sentence of the instruction to remove the word harm.
  - "If claimant made reasonable effort to avoid the damages caused by the breach, then your award should include reasonable amounts that [he] [she] [it] spent for this purpose."
- Drafter noted that he used the phrase "reasonable effort" to encompass the Florida Supreme Court's language in the applicable case law that the defendant is not required to use Herculean efforts. Committee noted that the *Systems Component* case says "ordinary and reasonable care." Another member suggested using "without undue risk, burden or hardship" as such language would be consistent with the Restatement and *Systems Component* case (essentially substitutes hardship for humiliation). Committee agreed that hardship is different than humiliation and does not add anything to the word burden. Committee noted that "humiliation" is meant to include situations where the injury would result in harm to reputation etc.. Another member suggested that because *Systems Component* uses both "Herculean" and "ordinary and reasonable care," that there is not a substantive distinction between the two.
- Drafter read humiliation example from the Restatement and Committee discussed the same. Committee discussed anecdote where B could only obtain a job as a farm laborer for $6,000, but did not do so. Restatement provides that B would be entitled to the full $10,000 in damages. Based on the Restatement examples, and others discussed, Committee found that utilizing the exact language from the Restatement was the best strategy. Member moved to approve with "undue risk, burden or humiliation."
  - All in favor. None opposed.
  - Changed last sentence to "efforts or expenditures without undue risk, burden or humiliation."
- Committee discussed how to address the portion of the instruction that provides "could have avoided with reasonable efforts or expenditures." Committee felt that the newly added Restatement language further defines what reasonable efforts means and that no additional definition was necessary.
- Committee also discussed bracketing [risk] [burden] [or] [humiliation] because not all may apply to a given scenario and may be confusing.
- Member moved to approve instruction as modified. Second. No further discussion. No opposition.
- Committee discussed the phrase "undue humiliation." Committee felt that undue was an appropriate modifier because a $100 pay decrease may be "humiliating" but doesn't rise to the level discussed in this instruction. Committee discussed that money might not be only element of humiliation—perhaps even if the compensation was the same, may be a lesser job title, for example. Committee discussed whether the "reasonableness" language in the instruction sufficiently modifies the concept of humiliation.
- 358 stands approved.

335(a) – Affirmative Defense Fraud & 335(b) – Negligent Misrepresentation

- Drafter noted that *Rocky Creek* (the one case that discusses negligent misrepresentation as an affirmative defense) has been cited by Federal Courts with approval, but substantive

discussion remains scarce. Drafter felt that instruction 335(b) should remain as is (Note on Use only).

- ❖ Drafter researched whether constructive fraud/fraud by omission should be addressed in conjunction with these instructions (as requested at the July 2011 meeting).
- ❖ Drafter to prepare 335(c) – Fraud by Omission and 335(d) – Constructive Fraud prior to the next meeting. Drafter noted that based on his initial research that these instructions may not be instructions, but rather a Note on Use similar to 335(b).
- ❖ Committee later decided that said instructions would not be necessary and that Drafter does not need to provide initial draft.

339, 340, 341 – Estoppel, Judicial Estoppel, Ratification, respectively

- ❖ Drafter explained that his research indicated that estoppel is generally an equitable defense, and that waiver is generally considered a legal defense.
- ❖ Committee then discussed whether estoppel is an appropriate defense to a breach of contract action. Committee noted that this defense is regularly asserted in practice. Drafter noted that case law does not evidence a clear differentiation between waiver and estoppel, which is likely the reason practitioners often assert both. Committee discussed whether there is a substantive distinction between estoppel and waiver and referred to a Fla. Jur. article on this point. Committee additionally reviewed *Bueno v. Workman*, 20 So.3d 993 and found that the research indicated that equitable estoppel does not require intent, rather just that the situation changed later. Committee noted that this may be the substantive distinction between equitable estoppel and waiver.
- ❖ Committee discussed judicial estoppel and how the elements differ from equitable estoppel. Committee noted that judicial estoppel usually requires privity, but this concept has been broadened by case law.
- ❖ Committee reasoned that estoppel should be an instruction, and that Drafter should draft prior to the next meeting. Drafter to draft 339-Equitable Estoppel; 340-Judicial Estoppel; and 341-Ratification. Committee noted that if the research indicates that judicial estoppel is a matter for the court, then the Committee should add a short instruction or Note on Use to that effect.

336 – Waiver

- ❖ Drafter noted that he revised the Notes on Use since our last meeting but that the structure of the instruction remains the same. Committee discussed whether some of the elements should be left off if they are not at issue in a particular situation. Committee noted that there are elements throughout the various other instructions and they are not noted as optional parts of the instruction.
- ❖ Committee discussed Note on Use #1 and did not find it necessary. Drafter noted that it was from CACI. Committee removed Note on Use #1.
- ❖ Last sentence provides "If (defendant) proves that (claimant) gave up [his] [her] [its] right to (defendant's) performance of (insert description of performance), then defendant was not required to perform these obligations." Committee removed "defendant's performance" before the (insert description of performance) as it was repetitive.
- ❖ Committee discussed second element ("should have known defendant had the right") and how to make it consistent with element 3 - "freely and knowingly gave up" (i.e., how can one freely and knowingly give up a right that one should have known they had). Committee discussed whether the distinction is that element 2 addresses that claimant knew or should have known it had the right, and that element 3 provides that claimant freely and knowingly did the act that gave rise to the waiver (not necessarily knowingly gave the right up).

- Committee noted that the wrong party is referenced in element 2: "claimant knew or should have known (defendant) had the right to (insert description of performance)." Now reads "claimant knew or should have known [he] [she] [it] had the right to have (defendant) (insert description of performance)." Later revised slightly to read "claimant's right to have (defendant)(insert description of performance)."
- Committee discussed whether to use "freely and intentionally gave up" rather than "freely and knowingly" in an effort to utilize plain language.
- Committee removed possessive language from last sentence (defendant's).
- Member suggested that element #1 ("(Claimant's) right to have (defendant) (insert description of performance) actually existed") should be removed because at the point a jury is being instructed on an affirmative defense, the defendant's performance obligation should have already been established and so element #1 should be already satisfied. Drafter noted that this element is straight from the case law.
  - Membership discussed the fact that the introduction to this instruction says "to establish this defense, defendant must prove…that claimant's right to have defendant insert description of performance." Committee noted that this is not correct—Defendant should not have to establish there was a right to performance in order to assert the defense.
  - Member noted that the 11th Circuit jury instructions have introductory language to the effect of "if you find that claimant had the legal right to defendant's obligation, then…"
  - Committee decided to delete element 1, and Drafter to research whether there are any negative implications of this removal.
  - Member noted that leaving first element in prevents defendant from arguing in the alternative, which is a regular strategy for practitioners. Committee discussed whether to add language like the 11th Circuit jury instructions to the introduction (if you find that…). Converse argument is that the first element is regularly recited in case law.
- Member suggested that last sentence of instruction be revised to read "if (defendant) proves that claimant gave up [his] [her] [its] right to have defendant (insert description of performance), then claimant waived the right to defendant's performance."
  - Committee fairly split on whether to revise last sentence.
- With respect to the introduction to the instruction, and the first element as a requirement that a right existed, Committee member expressed concern that the jury may be confused if there is no express language that requires the establishment of the obligation for performance as a condition precedent to considering this affirmative defense.
- Committee voted on whether instruction should contain elements 1, 2, and 3 or just 2 and 3. Majority of Committee felt that elements 1, 2, and 3 should remain.
- 336 is approved.
- Committee reviewed the Notes on Use. Drafter to review *Winans* case which is cited in Notes 2 and 4. Committee decided to remove Note 4.

335(a) – Affirmative Defense Fraud

- Committee removed first Note on Use (Same as Note on Use for Instruction 336 which was removed).

Damages.

- At our last meeting, the Committee reviewed 352- Loss of Profits (no profits earned) and 353 – Loss of Profits (some profits earned). Drafter revised 352 and 353, starting from scratch.
  - Language of prior instruction was from *Hiles*, but *Hiles* was a shareholder derivative case, and thus the Drafter thought that references from this case should be removed. Drafter noted that CACI instructions were not entirely accurate statements of Florida law.

352 – Lost Profits (Liability)

- ❖ As redrafted, 352 focuses on liability for lost profits and 353 focuses on the appropriate amount of damages if liability is established.
- ❖ Committee decided to remove the phrase "such as regular market values or other established data." Committee found that inserting an example in the instruction may tend to exclude other scenarios. "Market values" phrase is removed from the bracketed language as well. Committee discussed origins of the phrase, which came from the *Marshall* case cited in Notes on Use. *Marshall* relied on a Florida Supreme Court case and 11th Circuit case.
- ❖ Committee member noted that the proposed instruction on uncertainty (currently 353.1) may not be needed in light of this instruction. Member proposed that sentence be inserted before "Instead, claimant" which reads "Difficulty in proving damages or uncertainty as to the amount, will not prevent recovery as long as it is clear that substantial rather than merely nominal damages were suffered as a result of the wrong and the competent evidence is sufficient to satisfy the mind of a prudent impartial person as to the amount."
  - ➢ Revised proposed inserted language: "Difficulty in proving damages or uncertainty as to the amount, will not prevent recovery as long as it is clear that substantial rather than merely nominal damages were suffered by the defendant." This language is from 43 So.3d 68.
- ❖ Committee discussed whether the uncertainty of damages is an issue for the judge or the jury.
  - ➢ Committee discussed the "Difficulty in proving damages language" and member suggested the following as an alternative: "you do not have to calculate the amount of lost profits with mathematical precision."
- ❖ Revised to read: "(Claimant) does not have to be able to prove that the amount of lost profits can be calculated with mathematical precision as long as it is clear that [he][she][it] has suffered substantial damages."
  - ➢ Committee discussed the "suffered substantial damages" language and the insinuation that this may mean a large dollar amount of damages. Committee noted that this language is from the Florida Supreme Court case *Twiman*, 166 So. 215. Committee noted that this is very powerful language, but that it is true to the case law and should be included.
  - ➢ *W.W. Gay*, a 1989 Florida Supreme Court decision, provides "[w]e follow the holding in *Twiman*…." However, W.W. Gay does not address the substantial damages issue directly.
  - ➢ Another alternative: "Claimant does not have to be able to prove that the amount of lost profits can be calculated with mathematical precision as long as it is clear that [he][she][it] has shown there is a reasonable basis for determining the amount of the loss."
  - ➢ Committee discussed "mathematical precision" phrase. Member suggested "to the penny" as a "plain language" alternative. Committee decided that although helpful, the penny reference may imply that to the dollar, or to the hundred dollar, is more appropriate. Committee discussed whether "exact precision" was better than "mathematical precision."
  - ➢ Committee discussed the first element "Defendant's actions directly caused (claimant) to lose profits." Committee agreed to remove "directly."
  - ➢ Approved. None opposed.
  - ➢ Change name of instruction to Lost Profits only.

  - ➢ **[NOTE: Final instructions should include a general causation instruction. Committee also discussed whether there is currently an instruction for consequential damages.]**

353 – Lost Profits (Amount)

- ❖ Committee initially discussed that the formula, as drafted, is very confusing and would require the attorneys to walk the jury through how to do the calculation.

- Committee discussed whether 353 could be removed and whether 352 alone provides enough guidance for the jury as to the appropriate amount of damages.
  - Some members expressed concern that 352 alone does not provide enough guidance to reach the correct number. Committee discussed that generally each side will put forth an expert to opine on the amount of lost profits, and that in some situations there will be a person testifying to the amount of their own lost profits. Committee discussed how these scenarios would be affected by the inclusion/exclusion of 353.
- Committee also discussed the danger that the proposed equation may not take into account certain types of damages.
- Committee discussed whether a Note on Use should be inserted to encourage attorneys to use an interrogatory verdict form (like instruction 320).
- Committee discussed *Whitby v. Infinity Radio, Inc.*, 951 So. 2d 890 (Fla. 4th DCA 2007). Committee felt there are some cases that provide that specific considerations must be identified and specific amounts must be assigned or else the verdict is based upon conjecture. Committee discussed whether the case may be a bit of an outlier in light of its complicated facts.
- Committee discussed whether it should insert a Note on Use stating that because there are so many methods by which lost profits can be calculated, Committee takes no position, and judge is to serve as gatekeeper to ensure that there is a reasonable basis for the calculation.
  - Wall to draft Note on Use to this effect and explaining why there is no instruction.
- Approved to delete the instruction.

353.1 – Uncertainty of Damages

- Committee discussed whether to delete this instruction as the supportive case, *Hiles*, is not a true contract case. Motion to delete the instruction. Approved.

354 – Owner's Damages for Breach of Contract To Construct Improvements on Real Property

- Committee noted that *Grossman Holdings* is the Florida Supreme Court case that adopts the Restatement. Drafter noted that this instruction is pulled largely from the Restatement.
- Committee found that the case law provides that costs may be recovered so long as they did not constitute "unreasonable economic waste." Drafter meant the language "incidental costs" to extend to costs that are "incident to." Committee discussed option of "incident to the contract" but found the language was too narrow because there may be costs that were not in the contract.
- Committee discussed how to address the scenario where there is a dispute about how much work is completed and how much was paid. To remedy, Committee discussed adding the following after the words economic waste: "less the balance due under the contract." Committee reasoned that this would allow the parties to dispute what the balance due is. Committee considered two alternatives (i) less the balance due under the contract and (ii) any amounts unpaid to (defendant) under the contract. Committee agreed with the former.
- Committee discussed whether juries would understand the concept of "unreasonable economic waste" and whether additional explanation was required. Case law provides that fixing the house that faces the wrong way and tearing out comparable pipes because the party wanted a specific name brand constitutes unreasonable economic waste.
- Member suggested that the first element be revised to read "the reasonable cost to (claimant) of completing the work in accordance with the contract, if this is possible and does not involve unreasonable economic waste or the balance due under the contract."
- Committee discussed whether damages under this section would include real property improvements. Committee revised to read "real property as improved" in the last paragraph of the instruction.

- Member suggested that the second element be revised to read: "If construction and completing in accordance with the contract would involve unreasonable economic waste, then the difference between the fair market value of (claimant's) real property as improved and its fair market value and the improvements been constructed in accordance with the contract, measured at the time of the breach."
  - Committee discussed whether this element should have a "then" (to follow the usual if/then formula) phrase. Committee found it confusing and removed the same.
- Committee discussed whether the goal of this instruction was to establish the appropriate burden of proof or provide a calculation by which the jury may arrive at an amount of damages.
- Committee discussed whether the question of unreasonable economic waste is a judge or jury question.
- Committee reasoned that the way to revise the instruction would be to provide alternatives based on whether it is alleged that the damages sought by claimant constitute unreasonable economic waste—"the amount of damages recoverable… is either"
- Within the subsection where the defendant alleges that the damages sought by claimant would constitute unreasonable economic waste, the instruction should be further divided into two categories→ whether completion in accordance with the contract would constitute unreasonable economic waste or not. Committee reasoned that the introductory language should be the same for these two subparts ("If construction and completion in accordance with the contract would not invoke unreasonable economic waste…")
- Committee discussed whether economic waste is an "issue" and whether it would need to be plead.
  - Committee changed "alleged" to contend as allege may be viewed as something that may need to be plead.
- Committee discussed the "measured at the time of the breach" language and discussed its importance. Members discussed how this language affects situations where the price at the time the contract was made was very high and has since fallen. Committee discussed "all unavoidable harm" language.
- Committee revised grammar in Note on Use 1.
- Committee approved instruction as written.

- *Discussion regarding Notes on Use*
  - Committee discussed "incidental costs" language and "complete failure to construct improvements" language.
  - Committee found that in light of the internal instructions to the judge within the instruction itself, Notes on Use not really needed here.

- *Discussion regarding Sources and Authority*
  - Insert open quote. Approved.

355 – Obligation To Pay Money Only

- Committee noted that the important part of this short instruction is that the claimant needs to prove the amount due.
- Committee discussed whether additional language should be added to explain that damages don't need mathematical precision. Committee reasoned that such language was not necessary because damages under this instruction are for money damages only and should be ascertainable without issue.
- Committee approved instruction as written.

356 – Buyer's Damages for Breach of Contract for Sale of Real Property

- Committee discussed to ready, willing and able requirement and whether a claimant must establish that it was ready, willing and able at all times regardless of the measure of damages sought.
- Committee discussed the scenario where the claimant acted in bad faith and wasn't ready, willing and able. Committee consensus was that claimant could not recover.
- Committee found that if there is a breach of contract to sell property, the buyer can only get their money back with interest and costs or specific performance, but is not compensated for the difference in value. However, to recover the difference in value the defendant must have acted in bad faith or sold to a 3rd party.
- Committee discussed anecdotal cases where the time of the breach is very important in the context of a rising or falling market.
- Committee discussed whether the introductory paragraph of this instruction should be revised slightly to explicitly state the instruction is for the buyer to get damages in connection with seller's breach of contract. Committee felt this was adequately explained as drafted.
- Committee discussed how the ready, willing and able requirement can be written into the instruction to make clear that it is a requirement in all situations. Committee felt this requirement should be in the first part of the instruction, which will be read in each scenario (rather than as one of the elements).
- Proposed alternative:
  - "If (claimant) proves that [he] [she] [it] was ready, willing, and able to perform the contract, then (claimant) may recover:
    - 1. The amount of any payment made by (claimant) toward the purchase price; and
    - 2. The amount of any reasonable expenses for examining title;
  - If (claimant) also proves that (defendant) acted in bad faith in breaching the contract or that (defendant) sold the property to a third-party after entering into the contract, then (claimant) also may recover the difference between the fair market value of the property on the date of the breach and the contract price."
- Committee discussed whether to keep elements 1 and 2 separate, and found that the two should remain separate as they are two distinct elements.
- Motion to approve 356 (instruction only). Approved.

- *Discussion regarding Note on Use:*
  - Committee discussed whether the Note on Use is needed to make clear that the claimant is the purchaser. Committee found that the title of the instruction makes clear that the claimant is the buyer.
  - Committee discussed whether there should be a Note on Use that addresses the fact that specific performance is a companion remedy.
    - Mark Wall to draft short Note on Use regarding the interplay with specific performance as a remedy.
  - Committee discussed whether the phrase "fair market value" should be defined. Committee found that in most situations, there will be an appraiser, owner, etc. testifying as to the fair market value and further definition is not required.

- *Discussion regarding Sources and Authority:*
  - Committee discussed whether full quote from *Gassner* was necessary. Committee found that this may not be familiar area to all practitioners and that the quote is helpful.
  - Committee discussed whether cases cites in paragraphs 2–5 were necessary, as they appear a bit repetitive. Committee felt cases from each district would be helpful to practitioners. Committee also discussed whether citing so many cases made the law appear unsettled in this

area (which it is not). Committee noted that the Sources and Authorities will not be published in the Florida Bar News.

357 – Seller's Damages for breach of Contract to Purchase Real Property

- Committee noted that this instruction incorporates the case law for seller's damages.
  - Committed determined that this instruction should be revised to be similar to 356 (Buyer's Damages).
- Committee discussed whether the "ready, willing and able" concept carries into this instruction and discussed whether and to what extent a seller must be ready, willing and able to consummate the transaction in order to recover damages.
- Committee decided to change "amount that was due to claimant under the contract" to read "contract sales price." Committee discussed whether any other costs aside from the contract price are recoverable. Committee agreed to revise to "the difference because the contract sales price and the fair market value of the property on the date of the breach, less any amount which (defendant) previously paid;
- Committee made grammatical revisions to body of instruction.
- Committee discussed use of phrase "conditions precedent" (first sentence) and "proximate result" (last sentence) and whether the same could be substituted with more common language.
  - Committee changed conditions precedent to "All of [his][her][its] obligations under the contract before closing."
  - Committee found that the "before closing" language is not accurate as many of the conditions precedents can be satisfied at closing.
    - Later revised to "obligations necessary for closing."
- Committee revised introductory language of instruction to read: "To recover damages for the breach of a contract to buy real property, (claimant) must prove that [he][she][it] performed, or had the ability to perform, all of of [his][her][its] obligations at or before closing."
- Committee discussed revising "proximate damages" to "any damages which the parties contemplated and which naturally flow from the breach of contract."
  - Committee noted that 351 uses "normally result" instead of naturally flow. Committee decided to use "normally result."
- Committee discussed the need for the language "contemplated when the parties made the contract," and found that this language was important to determine what the parties intended at the pertinent point in time.
- Approved.

- *Discussion regarding Notes on Use*
  - When Mark Wall adds a Note on Use regarding specific performance for 356, it will be duplicated here as well.

- *Discussion regarding Sources of Authorities*
  - Check the quote to make sure correct. Revised.
  - Remove second part of Note on Use.
  - No other changes to sources.

359 – Present Cash Value of Future Damages

- Committee noted that this instruction, as drafted, is straight from CACI and does not mirror the SJI Civil instruction. Committee discussed whether and under what circumstances this instruction should differ from the SJI Civil instruction.
- Committee discussed older Florida cases that do not require a landlord to reduce damages to present value.

- ❖ Committee reviewed SJI Civil instruction and agreed to use the same as the basis for this instruction.
- ❖ Committee changed "allow for" to "award." (Any amount of damages which you award…)
- ❖ SJI Civil instruction uses phrase "award for future economic damages." Committee decided to remove the word "economic" and change the word "losses" to "damages."
- ❖ Committee discussed the Notes on Use used by SJI Civil. The Notes essentially provide that there are several methods by which you can calculate present value and that the Florida Supreme Court has not chosen one. Committee decided to mirror SJI Civil's Notes on Use as well. Committee discussed whether to insert the previously drafted addition from CACI that expert testimony may be used on this issue. Committee decided to remove this so as to avoid altering the meaning of the instruction, and avoid conflict with the SJI Civil instruction.
- ❖ Committee revised Note on Use to read "guided by this instruction and by argument."
- ❖ Committee reviewed previously drafted Sources and Authority.
  - ➢ 3rd Source and Authority is the *Mission Square* case, which addressed the issue of expert testimony. Committee agreed to remove the Sources and Authority and to use the SJI Civil instruction essentially verbatim.
- ❖ Approved.

360 – Nominal Damages

- ❖ Committee discussed whether this instruction is necessary. Committee determined that this instruction should be given in the event that breach is proven but that damage amounts are not.
- ❖ CACI instruction uses word "appreciable" damage, and *AMC/Jeep* case (4th DCA) uses phrase "suffered no damage." Committee decided to utilize the latter.
- ❖ Committee discussed whether the instruction should include "inadequately proven damages."
- ❖ Revised to read: "If you decide that (defendant) breached the contract but also that (claimant) did not prove any specific amount loss or damage, you may still award (claimant) nominal damages such as one dollar."
  - ➢ Committee removed the phrase "specific amount of loss or damage" because that sounds like uncertainty in calculating special damages and that the dollar figure must be calculated to the penny.
- ❖ Approved.

370 – Goods Sold (now Goods Sold and Delivered)

- ❖ Committee discussed whether the instruction tracked the Florida Rules of Civil Procedure form.
- ❖ Committee revised grammatical issues.
- ❖ Committee discussed whether to change last element to active voice.
- ❖ Committee discussed the fact that the last paragraph contains the burden of proof ("greater weight of evidence") and that the Committee has generally not included the burden of proof in prior instructions.
- ❖ Committee member inquired as to why element 3 provides a choice – "the price agreed upon or the reasonable value of goods." Drafter noted that the case law provides this alternative.
- ❖ Committee discussed whether the goods need to be sold and delivered, and agreed that they need to be sold and delivered. Committee agreed to change the title of this instruction to "Goods Sold and Delivered."
- ❖ Committee reviewed Florida Rules of Civil Procedure Form 7.331 and agreed that no changes were needed to the instruction as the form was adequately incorporated.
- ❖ Committee agreed to leave last paragraph with the burden of proof for now, which will be modified when the instructions are all put together. [**NOTE: THE BURDEN OF PROOF LANGUAGE SHOULD BE REVISED.**]

- ❖ Approved.

- ❖ Post-approval the Committee discussed the issue that there can be UCC complexities regarding insufficiency of tender, non-conforming goods etc.. Committee agreed that to remedy, a Note of Use should be added to state that this instruction only applies to common law causes of action.
  - ➢ Committee agreed to delete second sentence of Notes on Use regarding need to give additional instructions.
  - ➢ Committee discussed whether there is a common law cause of action for goods sold; this may be evidenced by the fact that the sources and authorities in this area appear to be pre-UCC.
  - ➢ Committee agreed to remove the Note on Use regarding the fact that the instruction applies to common law causes of action because it can apply to UCC matters as well.
  - ➢ Committee agreed to add a Note on Use to the effect that "This instruction may require modification based upon applicable provisions of the Uniform Commercial Code, Chapter 672, Florida Statutes."
- ❖ Committee discussed whether to add back in the first part of Notes on Use but limit the Note by stating "This instruction should be used for the common law cause of action of goods sold and delivered." *Alderman*. Committee discussed the post-UCC 4th DCA case.
- ❖ Ultimately, the Committee agreed to delete the Notes on Use to avoid confusion regarding whether the instruction should be read for common law causes of action (assuming the same exist) and/or UCC transactions.

371 – Open Account

- ❖ Committee cleaned up grammatical issues and formatted instruction using normal convention.
- ❖ Committee felt the last sentence of the first paragraph (where the parties expect to…) is confusing due to duplication of word further. Redrafted to read: "where the parties expect to conduct further business, the terms of which require further discussions or negotiations."
- ❖ To mirror structure of 370, sentence inserted at end of first paragraph to read: "To establish this claim (claimant) must prove all of the following:…"
- ❖ Removed "whether" from introduction of each element.
- ❖ Committee discussed whether to remove "the terms of which require further discussions or negotiations" based on the understanding that an open account is the situation where the parties almost have a standing deal.
  - ➢ Committee discussed case law cited in Sources and Authority.
  - ➢ Committee deleted "the terms of which require further discussions or negotiations" based on case law review.
- ❖ Committee discussed whether there is a requirement that the itemized transaction report be transmitted, and found that it is not a requirement and that this is the difference between an open account and account stated.
- ❖ Committee revised grammar of the second element→ "An account existed between (claimant) and (defendant) in which there was a series of debtors and credits between the parties which has a determinable amount."
  - ➢ Further revised "An account existed between (claimant) and (defendant) in which the parties had a series of debtors and credits which have a determinable amount."
  - ➢ Committee discussed which party determines the amount—seller, buyer, jury?
    - ▪ "from which you can determine the amounts"
      - Later changed to "those" amounts.
- ❖ Committee revised "debits and credits" to "a series of charges, payments, and adjustments."

- Committee discussed the no "reasonable value of the goods delivered" language in the Civil Procedure Form.
- Committee discussed revising element #2 to "An Account existed between (claimant) and (defendant) in which the parties had a series of changes, payments, and adjustments for which (defendant) owes money on the account; and"
- Committee discussed whether the statement needs to be delivered; Committee consensus is that no, the statement does not need to be delivered.
- Committee agreed to reorder the elements:
  - 1. (Claimant) and (defendant) had [a transaction] [transactions] between them;
  - 2. An account existed between (claimant) and (defendant) in which the parties had a series of charges, payments, adjustments;
  - 3. Claimant prepared an itemized statement of the account; and
  - 4. Defendant owes money on the account
- Committee discussed the fact that the Florida Rules of Civil Procedure Form requires that the statement of the account contain certain information (items, time of accrual, and amount of each). Committee discussed whether the requirement that the statement of the account contain the above items is a pleading requirement such that the judge would determine the same as a threshold question whether statement had all the required information. Committee discussed the following as an alternative to element #3 as drafted:
  - 3. (Claimant) prepared a statement of the account showing [items of work and labor][goods sold and delivered], when the charge[s] [was][were] incurred, and the amount of the charge[s]; and
    - Committee compared with "3. Claimant prepared a statement of the account."
      - Committee discussed the insertion of a Note on Use to the effect of "Florida Supreme Court form states that the statement should contain …." to avoid the insertion of this language within the text of the element itself.
    - There were 2 objections to deleting the [items of work…] language but the Committee agreed to delete it.
- Committee noted that the introductory paragraph is in the future ("parties expect to conduct future transactions") and the Committee determined that it should be in the past tense as the elements are in the past. Committee discussed revising to read "where the parties had an ongoing business transaction" or "parties expected to conduct future transactions."
- Committee reviewed the *Delro* case which is addressed in the Sources and Authorities as an outlier.
- Committed approved the instruction as written.
- Committee to review the last paragraph regarding greater weight of the evidence when the instructions are put together. [**NOTE: THE BURDEN OF PROOF LANGUAGE SHOULD BE REVISED.**]

- *Notes on Use*
  - Committee deleted Notes 1 and 2 as unnecessary.
  - Committee discussed the current Note on Use regarding the fact that if there is a contract there will not be an open account (i.e. claimant would need to choose its remedy). Committee reasoned that this issue would be resolved before the jury is asked for its verdict. Thus, the committee agreed that the Note on Use could be deleted.

- *Sources and Authorities*
  - Revised order of citations pursuant to blue book hierarchy.

372 – Accounts Stated

- Committee revised introductory paragraph to mirror prior instructions. Added "To establish this claim, (claimant) must prove all of the following:"
- Committee made grammatical revisions throughout.
- The word "involved" is repeated twice in the first sentence. Committee revised to read: "An account stated is an agreement between persons or entities involved in transactions, that a specific amount of money is due with respect to such transactions."
  - Alternative suggestion: "An account stated involves a transaction or series of transactions for which a specific amount of money is due. To establish this claim, (claimant) must prove all of the following:"
    - Committee noted that stating in the introduction that there is an agreement may confuse the jury when element 2 makes it optional as to whether there is an agreement.
  - Committee discussed the "express or implied" language in element 3.
    - Revised to read: "(Defendant) expressly or implicitly promised to pay (claimant) [this balance][the amount set forth in the statement];and"
  - Committee discussed whether to remove the alternative from element #2. Committee reasoned that there may be a situation where a judge may want to give both. Committee also discussed revising to insert "[or]" so that a judge could give either part or both parts if applicable.
- Committee discussed the scenario where they may have been a partial payment of the accounts stated. Committee felt this was addressed by the alternative language in element #4 "not paid [any][all] of the amount owed."

- *Notes on Use*
  - Committee decided to remove Note on Use 1.
  - Revised name to Sources and Authority.
  - Cases in Source 2 should generally apply to open accounts as well, but Committee noted that separate case cites should be provided because the cases cited are not in the open accounts context. Tucker Ronzetti to research and provide alternative citations.
  - Revised parentheticals for Source 3.
  - Committee agreed to delete citation to 1895 case.
  - Committee split Sources 2 into two different paragraphs to be consistent with prior convention (usually one case per paragraph).
- Approved as written.

373 – Money Had and Received

- Committee noted that this instruction is much different than CACI.
- Committee discussed whether this is an equitable claim. Drafter noted that this is addressed in the first Note on Use. Drafter additionally noted that this claim overlaps with unjust enrichment (that money had and received is like a subset of unjust enrichment). Drafter noted that there is also a common count for money lent, and a form on money lent, but no case law discussing this cause.
- Committee discussed "paid or received language" and found the two concepts to be substantially similar such that the paid language could be removed.
- Inserted "received" before money in first sentence.
- Committee discussed the fact that the elements state that the defendant is in possession of the money. However, this may not be accurate as the money could be gone. Committee revised instruction to provide "defendant received money" throughout the instruction.
- Committee discussed whether instructions for causes that are subsets of unjust enrichment are needed, or if just a general unjust enrichment instruction is necessary with Notes on Use with respect to the specific "subset" cause of action. Committee agreed to retain these instructions.

- ❖ The third element encapsulates the fairness concept that the case law discusses.
- ❖ Instruction approved.

- ❖ Changed Notes on Use to Sources and Authority. Committee deleted the second citation to *Sharp*.

374 – Mistaken Receipt (now Mistaken Receipt of Money)

- ❖ Committee made grammatical revisions throughout.
- ❖ Revised name to mistaken receipt of money.
- ❖ Drafter noted that this cause of action was used in '70s and '80s for interbank transfers. There was a statute in the 1980s that dealt with this, and the cause of action is currently used for escrow and real estate transactions.
- ❖ Committee noted that this is for the specific situation where money was *mistakenly* received and that this is essentially a subset of Money Had and Received. Committee discussed whether this instruction is needed. Money Had and Received is broader than this cause of action.
- ❖ Committee member again broached concern that this instruction is not necessary because it is a subset of Money Had and Received. The instructions are different insofar as Mistaken Receipt of Money requires a demand for the return of the money. Committee discussed why Mistaken Receipt requires a demand but Money Had and Received does not. If there are additional elements for Mistaken Receipt, why would someone bring a case under this cause?
- ❖ Committee compared this instruction with the instruction for Money Had and Received.
- ❖ 445 So.2d 675 is a Money Had and Received case, but in the instance of mistake the claimant must make a demand.
- ❖ Committee discussed whether, since *Anchor*, is a Money Had and Received case, but discusses mistake, the Committee should add a Note on Use to Money Had and Received to indicate the additional demand element in the case of the subset Money Received.
- ❖ Case law indicates that Money Received is always discussed as a subset of Money Had and Received. Thus, the Committee agreed to delete 374. Deleted.

- ❖ Case law identifies Mistaken Receipt as a subset. *Hall* case indicates that there is a cause of action for Mistaken Receipt.
- ❖ Committee readdressed the fact that Mistaken Receipt cases should be added to Note on Use to identify it as a cause of action—see Note 2 to instruction 373.
- ❖ Committee voted to delete instruction 374—2 opposed.

Miscellaneous

- ❖ Committee reviewed which instructions need to be reviewed and discussed by the Committee.
- ❖ Contract Implied in Law. Committee decided this should be inserted as instruction 306 to be close in proximity to Contract Implied in Fact. **[NOTE: NEXT MEETING WILL PICK UP WITH INSTRUCTION 306].**

- ❖ Agenda for next meeting:
  - ➢ Committee passed 13 instructions at this meeting and 24 are ready for publication.
    - In the next meeting, we will review the following:
      - 306–Implied in law/unjust enrichment (Norway)
      - 312–Substantial performance (Rosen/Josh Spector)
      - 324 (Olin)
      - 339–Equitable Estoppel (Haas)

- 340– Judicial Estoppel (Haas)
- 341– Ratification (Lee and Josh Spector)
- 338– Statute of Limitations (Judge Sasser, Gache, Reininger)
- 330 – Mutual Mistake of Fact
- 331 – Unilateral Mistake of Fact
- 334 – Affirmative Defense; Undue Influence
- 342 – Promissory Estoppel (Josh Spector/Rosen)
- 353 – Lost Profits—Total Destruction of Business (Wall)

- 12 instructions to do.
- Committee discussed tentative meeting date of February 3 and 4 at the Orange County Bar Association Building to be coordinated by Lee Barrett.

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS FOR BUSINESS AND CONTRACT CASES

Minutes for 2/3/12 and 2/4/12 Meeting

Members Present: Honorable Jonathan Gerber (Chair), Manuel Farach (Vice Chair), Richard Lee Barrett, Mark Boyle, Ronald Gache, James Kaplan, Jane Kreusler-Walsh, Kurt Lee, Maxine Long, Robert Norway, Michael Olin, Eduardo Palmer, Gera Peoples, Allison Perez, Gary Rosen, Brian Spector (phone), Joshua Spector, Honorable Meenu Sasser, Mark Wall, Roy Fitzgerald

Members Absent: Lee Haas, Christine Lamia, Eric Lee, Honorable Bernard Nachman, Steven Reininger, T. Tucker Ronzetti, Paul Silverberg

Administrative Matters:

- Chair thanked the OCBA and Lee Barrett for the accommodations and thanked Lee for breakfast and lunch. Chair additionally thanked the drafters of the recent instructions for their work. Minor tweaks have been made prior to this meeting to accommodate the format of our instructions.
- The previous set of instructions was published in the Bar News. No comments have been received yet, but two emails have requested copies of the minutes.
- Justice Lewis is pleased with this Committee's progress and publication of the second set of instructions.
- The Committee's goal this weekend is to complete the remainder of the instructions. After that, the Committee may review the introductory SJI Civil Instructions for possible application to these instructions and re-work the numbering system of the instructions.
- Chair noted that it may not be necessary to meet in person hereafter, but rather remotely cite check and draft the petition to the Supreme Court. Per Judge Gerber's discussion with Justice Lewis, the Committee will submit three separate petitions to the Supreme Court (in the same sections as were published in the Bar News). The Committee may consider meeting if there are more substantive issues and will meet in the event new instructions are needed. The Committee does not have verdict forms currently. The Committee would prefer to get the instructions completed, rather than draft verdict forms at this stage, but this Committee may be asked to draft such verdict forms in the future.
- The package to the Supreme Court will contain the proposed instructions, copies of the published notices published, comments received (if any), and all responses to commentators (if any). This will be a complete package to indicate that the instructions were published and comments were properly processed. One Committee member suggested that the verdict form is very important and should not be overlooked. To that end, the member proposed that post-petition, the Committee address the verdict forms.
- Committee discussed the recent appointment of Josh Spector and Allison Perez as members of the Committee.
- Minutes of prior meeting approved. No objections or comments.

324 - Anticipatory Breach

- The charge to the drafter was to (1) figure out whether there was a shift in the burden of proof of "willing and able," (2) determine at what point in time the "willing and able" requirement is material and (3) what kind of proof is required to fulfill the "willing and able" requirement. Drafter's research indicated that additional issues need to be addressed in connection with this instruction.
- Review of case law:
  - *Hospital Mortgage* (411 So. 2d 181) is a Florida Supreme Court case on this issue. This case indicates that if at the time of the breach the claimant was willing and able, that is good enough. The implication is that if a claimant seeks damages, he must have been willing and able at the time of the breach. However, if a claimant has a specific performance claim, the claimant must prove that he was willing and able at the time of the closing.
  - Burden of Proof issue: Drafter noted that there is a bit of a conflict in the case law. The cases discuss the "willing and able" requirement as a condition precedent. Per the Florida Rule of Civil Procedure 1.120, a condition precedent need only be averred in the complaint generally and that any denial thereof must be made "specifically and with particularity." If specifically denied, the comments to the rules say the defendant must prove this element (i.e. the burden shifts). Drafter was unsure as to whether the instruction should be bifurcated to address the willing and able requirement separately.
  - Drafter could not find substantial case law as to how much proof is required to establish a party was willing and able.
  - The language of *Hospital Mortgage* makes clear that the non-breaching party is required to plead and prove compliance with all conditions precedent. While reviewing the applicable case law, the Committee noted that *Hospital Mortgage* is a more specific case, whereas *Custer* (62 So. 3d 1086) is more general.
- Review of instruction as drafted.
  - Drafter included the language "at the time of the breach." The Committee noted that that would not be consistent in the specific performance context. However, the issue is avoided here as specific performance would not be a jury issue.
  - Committee discussed whether to add "and the other party would have been willing and able to perform the contract's terms at the time of the breach" to the end of the first paragraph. Committee reasoned that this language should not be added as the first paragraph is more definitional and seems to confuse the issue.
  - Committee discussed revising the second and third paragraphs as follows:
    - "If you find that (defendant) did not commit such a breach, then (claimant) has not proven [his] [her][its] claim."
    - "If you find that (defendant) committed such a breach, then you must decide whether (claimant) would have been willing and able to perform the contract's terms at the time of the breach. If you find that (claimant) would not have willing and able to perform the contract's terms at the time of the breach, then (claimant) has not proven [his][her][its] claim."
      - Committee discussed whether the SJI Civil instructions were similarly worded in the negative ("If you find that defendant <u>did not</u> commit such a breach…")

- Committee discussed whether "If you find that (claimant) would not have willing and able to perform the contract's terms at the time of the breach, then (claimant) has not proven [his][her][its] claim" should be a separate paragraph and be worded in the positive.
    - ♦ Committee reviewed prior instructions to determine how this Committee has drafted in the past (i.e. 302 "If you find…"). Committee member noted there are only a few instances in the instructions of "if you find" and thus it is not clear that the instructions are uniform. Committee agreed to revisit the issue in the final revisions to the instructions.
- Committee agreed to revise "would have" to "was" ("If you find that defendant committed such a breach, then you must decide whether claimant was willing and able to perform…")
- Committee discussed including "if you find that (claimant) was willing and able to perform the contract's terms at the time of the breach, then (claimant) has proven [his][her][its] claim" in addition to "If you find that (claimant) would not have willing and able to perform the contract's terms at the time of the breach, then (claimant) has not proven [his][her][its] claim."

▪ Committee member suggested that the Committee utilize the format used in other instructions to simplify the instruction and address the elements in list form:
- "To prove this claim, (claimant) must prove both of the following:
- (1) (Defendant) committed such a breach; and
- (2) (Claimant) was willing and able to perform the contract's terms at the time of the breach.
- If (claimant) has not proven both of the above, then [he][she][it] has not proven this claim."

▪ Committee member suggested that this clearly puts the burden of proof on the claimant.

▪ Committee member suggested that the Committee revise "(Defendant) committed such a breach" to "(Defendant) clearly and positively indicated, by words or conduct, or both, that [he][she][it] will not or cannot meet the contract's requirements." Said member's concern was that the use of the word "breach" may not adequately address the concept that "one party to the contract clearly and positively indicates, by words or conduct, of both, that [he][she][it] would not or could not meet the contract's requirements."
- Committee discussed whether to remove the definition of "anticipatory breach" in the first paragraph since the full definition is now duplicated in the first element. Some members felt the repetition was redundant and that it was sufficient to refer to the concept by its defined term – "anticipatory breach" in the second place. Other members suggested that there is a possibility that the jury may be confused by the repetition of "anticipatory breach" and the lack of repetition of the "willing and able" requirement.

▪ Committee agreed to delete the definition of anticipatory breach in the introductory paragraph since it is duplicated in the list of elements.

▪ Committee agreed to address the use of "established" vs. "proved" on a uniform basis.

- Committee discussed changing "meet the contract's requirements" to "perform the contract," and said change was made.
- Motion to approve instruction. Seconded. No further discussion and no opposition.

Notes on Use:

- Drafter noted that he did not revise the Notes on Use and that he thought Notes 1 and 2 should be deleted because they confuse the language used from *Hospital Mortgage*. Committee member suggested that Note 2 should not be deleted since it is not covered by the language of the instruction. Drafter felt that the *Hospital Mortgage* quote in Note 3 addresses this point and that Note 2 should be deleted ("Repudiation may be evidenced by…"). Drafter noted that *Hospital Mortgage* more clearly addresses the willing and able requirement (i.e. "unequivocally terminated" the contract).
- Committee members were tasked with finding language from *Hospital Mortgage* to include in the Notes on Use. Members suggested use of language quoted from the Restatement, which appears at headnotes 3 and 4 of *Hospital Mortgage*.
- Committee agreed to rearrange the Notes on Use so that *Hospital Mortgage* was addressed first since it is from the Florida Supreme Court, followed by the quoted District Court cases.
- Drafter suggested that the Notes on Use should address the fact that the burden of proof may be unsettled in the event the defendant does not deny the performance of the condition precedent. Alternatively, *Custer* (62 So.3d 1086) could just be a "but see" citation in the Notes on Use. Another Member suggested adding a comment that states that in the event a defendant specifically denies the performance of a condition precedent, then *Custer* applies and defendant has the burden of proof (*Custer* provides "Specifically, a defending party's assertion that a plaintiff has failed to satisfy conditions precedent necessary to trigger contractual duties under an existing agreement is generally viewed as an affirmative defense, for which the defensive pleader has the burden of pleading and persuasion.")
- Committee revised Note 1 regarding *Hospital Mortgage* to use only the quote "Where performances are…" The Committee reasoned that the other quote from *Hospital Mortgage* could be confusing. Additionally, Committee agreed to move the definition of repudiation from *Mori v. Matsushita* (380 So. 2d 461) into this instruction. Committee agreed to remove quotes to *Alvarez* as duplicative.
- Committee discussed the *Fabel* case briefly, the 4th DCA case that was pre-*Custer*, for its insinuation that the burden shifts to defendant when the defendant specifically denies the condition precedent. Committee removed several Notes on Use that cited to additional cases, the Restatement (since covered in the quote to *Hospital Mortgage*), and the UCC.
- Committee discussed whether the "but see" quotation from *Custer* adequately addresses the burden shift issue when the defendant has specifically denied the performance of a condition precedent. Several members felt this citation in the Notes on Use was as much as the Committee should safely say in light of the fact that the Florida Supreme Court has not issued an opinion on this issue. Many members felt that it would be inappropriate to add this scenario to the instruction or make a separate Note on Use on this point. Committee alternatively discussed whether bracketed language should be added to the instruction.

Committee agreed to go with Note on Use as drafted to address the issue, as it is inappropriate to ignore it all together, but is also not appropriate for an addition to the instruction.

- Committee agreed to change "Notes on Use" to "Sources and Authorities" and note that this issue needs to be addressed on a global and uniform basis.

306 - Implied in Law Contract

- Drafter noted this is instruction is not in the CACI instructions, but that case law in the unjust enrichment areas and implied in law contract areas indicates these are issues for a jury, thus this is an appropriate instruction to consider for inclusion. Drafter noted that the instruction is drafted based on *Commerce Partnership* 695 So.2d 383). Drafter noted that if the claimant seeks restitution it is an issue for the judge. Committee discussed whether case law exists that speaks to the reason for this judge/jury distinction.
- Committee members discussed the fact that often these causes of action would get swept up in a related cause of action, but that contracts implied in law may be a separate cause of action. Committee discussed whether to include a comment regarding the fact that this cause of action is often perceived as an equitable issue, but to the extent that it is raised as a question of law or used by a court in connection with a related legal cause of action, it is an issue for the jury. Committee then discussed several cases that addressed this issue.
- Proposed Note on Use 2: "This Committee recognizes that a claim to establish a contract implied in law is a claim in equity for the court to decide. However, to the extent some courts rely on juries to decide issues of fact when this claim is tried together with claims at law, the committee has drafted this instruction for courts' use."
  - Committee discussed whether the advisory opinion scenario should be addressed in the Note on Use and decided that it should not to keep the Note simple.
  - Committee revised "is a claim in equity" to "may be" due to *Della Ratta* (927 So.2d 1055) which provides that a claim for unjust enrichment is a claim at law.
  - Committee revised Note 2 to include a citation to and quotation from *Della Ratta* for the proposition that a contract implied in law may be a legal claim.
  - Committee also added "To the extent a claim to establish a contract implied-in-law may be a claim at law, the committee has drafted this instruction." Committee agreed to delete the last sentence and revise the introductory sentence to provide "the committee has drafted this instruction because a claim to establish a contract implied-in-law may be a claim in equity for the court to decide or a claim at law for a jury to decide.
- A claim for unjust enrichment under Florida law is a legal claim. However, the Committee noted that our view of this instruction should be specifically limited to contracts implied-in-law.
- Committee discussed whether "clean-up doctrine" from *Dairy Queen* should be addressed here.
- Note on Use 3: Committee agreed to append this Note to the end of Note on Use 1 which addresses the concept of a contract implied in law.
- Committee agreed to remove the Sources and Authorities as unnecessary. Committee specifically discussed the quotes from *Commerce Partnership* that list the elements of the claim. Committee felt this quotation should be included in the Notes on Use as it explains where the elements of the instruction came from.

- Committee member inquired as to whether quasi-contract, unjust enrichment, restitution, constructive contract, and quantum meruit all have the same elements. The Committee felt the answer was no and that *Commerce Partnership* specifically acknowledges this confusion.
- Note approved. No objections.

312 - Substantial Performance

- Drafter discussed the main scenario in which the need for this instruction would arise. Committee acknowledged that this arises most often in the construction context. The case law puts the burden of establishing substantial performance on the claimant. Drafter noted that this doctrine does not apply in the context of the payment of money and that this instruction ties in closely with Instruction 303 (Breach of Contract – Essential Elements).
- If substantial performance is in play, there is no dispute regarding 303 – there is a contract. However, the Drafter noted that where there is a dispute over whether there is a contract, this instruction does not adequately address that scenario. Member suggested that 312 be made a subset of 303 to address the option where substantial performance may be adequate.
- Committee noted that as 303 is currently drafted, 312 appears to be an off-shoot because element 2 of 303 says "claimant did all, or substantially all, of the essential things." However, the drafter noted that substantial performance is a huge issue in the construction context and should not merely be a Note of Use. Member suggested that a Note on Use be added to 303 that provides that if substantial performance is an issue, Instruction 312 should be given.
- Committee discussed how the second paragraph of 312 could be divided into listed elements.
- Committee discussed whether to include a note in 312 that "This issue frequently arises in the construction context."
- Committee noted that this cause of action can be raised by a plaintiff that performed or substantially performed the contract; or raised by the defendant in response to claim for breach of contract
- Proposed elements for Instruction:
  - (Claimant)'s performance was in good faith;
  - (Claimant)'s performance was nearly equivalent to what was bargained for and it would be unreasonable to deny (claimant) the full contract price subject to (defendant's) right to recover whatever damages (defendant) suffered as a result of (claimant's) failure to fully perform.
    - Committee discussed whether "and it would be unreasonable to…" modifies the second element or is a third element.
    - Committee discussed whether the claimant has to prove that it would be unreasonable to deny him the full contract price.
    - Committee discussed the "subject to (defendant's) right to recover" language and revised this portion of the second element to read: "less whatever losses (defendant) suffered as a result of (claimant's) failure to fully perform."
      - Committee agreed to use the word minus rather than less to keep the instruction in plain English.

        - Committee discussed whether there should be a separate instruction for substantial performance when raised as a claim and raised as a defense. Committee found that this may be necessary.
    - Committee discussed that the word "essential" was used in instruction 303 rather than the word "material." Committee agreed to use the word "essential" in this instruction as well.
    - Committee discussed the language "minus whatever losses (defendant) suffered as a result of (claimant's) failure to fully perform" and whether this should be revised back to "less whatever losses" in an effort to sound less like a calculation of damages. Committee stressed that this language is necessary to indicate that the claimant would not be able to recover the full amount of the contract, but some lesser amount.
        - Committee revised first sentence to read "Defendant claims that claimant did not perform all of the essential things which the contract required, and therefore…"
        - Committee member suggested that the use of word losses is problematic as the *Ocean Ridge* case (247 So.2d 72) uses the word "damages." Committee discussed whether "losses" is the plain-language equivalent of "damages," or if the two terms are substantively different.
        - Committee revised the instruction to read: "the full contract price less whatever losses (defendant) suffered because of (claimant's) failure to perform"
            - Committee noted that there are many scenarios in which this instruction would come into play – perhaps a different brand was used, or perhaps a change would require other serial changes thereafter. The real concept is the diminution in value due to the failure to perform correctly. Committee noted that although the construction context is common, it is not the only one.
    - Note: Committee agreed to review the 's uniform throughout the instructions (inside or outside of the parenthesis).
- Committee members suggested that the terms damages, losses, compensation, etc. should be used in a uniform manner throughout the instructions.
- Committee revised element 1 of the instruction to be in the active voice: "Claimant performed in good faith"
- Committee voted on the instruction as drafted, no additional discussion. No objections. Approved.

Notes on Use:

- Committee removed the Note on Use regarding the need to use this instruction only in the event there has been testimony regarding substantial performance.
- Committee discussed *National Constructors, Inc.* to determine whether this would apply outside the construction context and if this is the only measure of damages in that context (cost of making the work confirm to the contract specifications). Committee removed the second sentence of this quotation.
- Committee revised Note on Use 3 to clarify that Substantial Performance does not apply to contracts solely for the payment of money.
- Committee rearranged the Notes on Use.

- Committee discussed whether a willful breach is the same as bad faith.
- Committee discussed whether to remove Note 1 (*National Constructors*) and Note 2 (substantial performance does not apply to contracts solely for the payment of money).
  - No objection to deleting Note 1.
  - Add citation to Note 2 to *Hufcor/Gulfstream* which quotes *Enriquillo* ("There is almost always no such thing as 'substantial performance' of payment between commercial parties…")
- Member suggested that the instruction as drafted makes it appear as though less-than-perfect performance is an alternative to perfect performance, rather than an exception thereto. Member also suggested that a reference to the fact that substantial performance often arises in the construction context may sufficiently flag the fact that perfect performance should still be the base rule.
  - Member noted that in the SJI Civil instructions, there is at least one place where there is an introductory instruction to tell when to read the substantial performance instruction and when to read the perfect performance instructions. Committee member requested to draft introductory instruction.

- Committee agreed that members would draft an introductory comment to Instruction 312, and that 312 may be renumbered as 303(b).

330 - Mutual Mistake of Fact

- Drafter noted that this is modeled after CACI and that it was structured in "the defendant must prove X. If proven, y" format.
- Committee discussed the fact that a mutual mistake must go to the essence of the contract.
- Committee member noted that the Note of Use implies that the judge will determine materiality; but the instruction has a built in materiality standard ("which was a basic assumption on which the contract was made"). Committee agreed to remove built-in standard and rely on the Note on Use. Note on Use revised to stand independently ("The court should not give this instruction if it determines that the alleged mistake was not material").
  - Committee member broached concern that the instruction no longer references materiality. However, drafter made clear that materiality is an initial question to be determined by the judge before it is given to the jury.
- Committee member was a bit concerned that that "bear the risk of mistake" language should be explained in more detail.
- Restatement §154 provides that a party bears the risk when (1) the risk is allocated to him by the agreement, (2) he is aware at the time the contract is made that he has limited knowledge, or (3) the risk is allocated to him by the court on the grounds that it is reasonable to do so. *Rawson* (933 So.2d 1206.
    - Committee agreed to remove the third element because if the court allocates the risk to one party, the jury would not consider this point. Committee agreed to add the following Note on Use: "if the Court allocates the risk of mistake to the defendant on the ground that it is reasonable to do so, this instruction should not be given."

        - Element 2 of the instruction revised to read "(Defendant) did not bear the risk of mistake. A party bears the risk of a mistake when [the parties' agreement assigns the risk to [him][her][it]] [or] [he][she][it] is aware at the time the contract is made, that [he][she][it] has only limited knowledge about the facts to which the mistake relates but treats [his][her][its] limited knowledge as sufficient]."
            - Committee discussed whether to change last phrase to "but proceeds with the contract" or "but decides to proceed with the contract."
    - Committee discussed whether to add a Note on Use to the effect that the first option is only given if the court finds that the contract is ambiguous regarding whether the contract assigns the risk to the defendant.
        - Committee discussed the difference between whether the contract ambiguously and unambiguously assigns the risk.
        - Proposed Notes on Use:
            - If the court finds that the contract unambiguously assigns the risk to the defendant, or if the court assigns the risk of mistake to the defendant on the ground that it is reasonable under the circumstances to do so, then the court should not give this instruction.
            - If the court finds that the contract is ambiguous regarding whether the contract assigns the risk to the defendant, then the court should give the first option.
            - If the court finds that the contract is silent regarding the assignment of risk, then the court should give the second option.
                - Committee decided not to include this last Note.
                - Committee noted that if the contract is silent as to which party bears the risk, no instruction on this part should be given because the jury would be unable to decide the party to whom the risk had been assigned.
            - Committee agreed to add a Note on Use regarding the use of the second option since failing to address the second option, but having Notes on Use regarding the first option, would be confusing.
- Committee discussed the fact that mutual mistake may also be a claim. A plaintiff may seek a declaratory judgment seeking rescission of a contract on the grounds of mutual mistake.
- Committee rearranged the Notes on Use to mirror the order of the instruction.
- Committee member suggested a formatting alternative to specifically point a particular Note on Use to a specific part of the instruction. Committee agreed to revise the instruction to insert internal Notes on Use using asterisks.
- Committee removed references to "both of the following" because there may be two parts to element 2 and it would be a bit confusing to use the term "both."
- Member noted that the phrases "the parties" and "both parties" are each used in the instruction. This was revised to "the parties" in the event there are more than two and to be consistent.
- "About the facts to which the mistake relates" was revised to read "facts relating to the mistake."
- Revised internal Notes on Use to be consistent with one another in formatting. Revised grammar throughout instruction to be in the past tense.

- * The court should give the first option only if the court finds that the contract is ambiguous regarding whether the contract assigns the risk to the defendant.
- ** The court should give the second option only if there is competent, substantial evidence that, at the time the contract was made, the defendant had only limited knowledge with respect to the facts relating to the mistake but treated the limited knowledge as sufficient.

- Committee member raised concern that the language of the instruction implies that the contract must literally assign the risk, not impliedly.
  - However, Members agreed that *Rawson* expressly states "the risk is allocated to him by agreement of the parties" and that the Committee should avoid embellishment.
  - Committee discussed use of words assign, allocate, apportion.
- Motion to approve the instruction. No further discussion. Approved.

331 - Unilateral Mistake of Fact

- *Krasnek* (174 So.2d 541) is a Florida Supreme Court case that acknowledges unilateral mistake of fact is a valid affirmative defense. Drafter noted that the *Krasnek* and *BMW (471 So.2d 585)* cases were used in drafting. Florida is a bit of a rare state in that it recognizes unilateral mistake as a defense that may rescind the contract.
- Regarding the third element, Committee member suggested that "rescission of the contract would be unconscionable" is quite wordy and may be difficult for a juror to work through. Member suggested "contract should be cancelled because it is unfair."
- Committee reviewed the restatement as cited and relied upon in *Orkin* (454 So.2d 697). Committee noted that there are only a handful of cases on the issue and Florida is of the minority position. This gave some members of the committee pause as to this instruction. Members felt it was important to draft an instruction if the law is settled, regardless of the fact that there are only a few cases.
- Committee started with Restatement §153 as the basis for this instruction. Committee used the Mutual Mistake instruction as a guide, and added unconscionability/claimant had reason to know of the mistake as an additional element.
- Member noted that subparts of each element are in the disjunctive. This change was also made to 330 (removed the [and][or]).
- Committee used same internal Notes on Use as the Mutual Mistake instruction, but struggled a bit with where to put the Notes.
- Committee discussed the fact that unilateral mistake is often raised as a claim, rather than affirmative defense. Committee decided that it should proceed with drafting instructions for unilateral mistake and mutual mistake in the affirmative defense context, and that additional instructions for claims may be drafted later.
- Committee discussed the slight differences in the elements of unilateral mistake evident in the case law. Committee reviewed *Passport Leasing Corp.* (945 So.2d 660). Committee found that most of the case law relied on the restatement, whether directly or indirectly.
- Committee discussed use of the word unconscionable and reviewed alternatives. Members generally agreed with unconscionable.
- Instruction approved.

- Committee reviewed Notes on Use and duplicated Notes from Mutual Mistake instruction and inserted Section 153 and 154 of the Restatement into the Sources and Authorities section.

334 - Undue Influence

- *Peacock v. Du Bois* (105 So. 321) is a 1925 Florida Supreme Court that lists the elements that justify setting aside a contract due to undue influence.
- Committee discussed that a contract is voidable if there is a mutual or unilateral mistake or if undue influence is found. As a result, Instruction 330, 331 and 334 were all revised to read "Defendant claims that [he][she][it] should be able to set aside the contract because…"
- Committee discussed whether undue influence and duress are addressed the same way/are the same thing and the Committee noted that the difference is the fiduciary element.
- Member expressed pause over drafting an instruction on this point that relies on very old case law and seems to unnecessarily breathe new life into the concept. Additionally, the member expressed concern that the phrase "defendant's weakness of mind" could be expanded beyond its intent.
- Committee discussed whether undue influence applies only in a confidential relationship. Committee reasoned that it does not apply to non-confidential relationship.
- Committee found that the lack of recent case law on the issue should weigh on the side that this instruction should not be included. Committee noted this defense is often raised in the foreclosure context.
    - Committee reviewed *Jordan v. Noll* (423 So.2d 368), which is a 1982 case, and is an evolution of *Peacock*. Committee found that there is a well-established body of law regarding undue influence as an affirmative claim in the estate and trust world; but not necessarily in the contract arena.
- Committee had lengthy discussion over whether this instruction should be included.
    - Members in favor of tabling this instruction: 11
    - Members in favor of including now: 5
    - Instruction is tabled.

338 - Statute of Limitations

- In our last discussion of this instruction, the Committee raised the impact of the delayed discovery doctrine. Drafter noted that he read many delayed discover cases, they noted that they were not in the contracts context. Additionally, the Drafter noted that the *Davis* case (832 So.2d 708) states that the delayed discovery doctrine has not been applied in certain areas. However, cases cite to *Davis* for the proposition that the Florida Supreme Court has rejected an expansion of the delayed discovery doctrine (i.e. *Medical Jet*, 941 So.2d 576). *Yusef* (793 So.2d 1127) provides that the delayed discovery doctrine does not apply to contract actions.
- Members felt that a note regarding the non-applicability of the delayed discovery doctrine should be added.
- Review of instruction:
    - Member suggested that the Committee remove the "breach of contract, *if one in fact occurred*" language because the jury would have already decided there was a breach. Comment was withdrawn on the grounds that it is an affirmative defense and may be considered.

- Motion to approve instruction. No opposition. Approved.

Notes on Use:

- Committee discussed whether damages an element of a cause of action for breach of contract? This was the issue in the *Medical Jet* case. There, the majority said the cause of action accrued from the breach, whereas the dissent said from the damages.
- Committee agreed to revise Note 4 to include a case law quote for the proposition that the delayed discovery doctrine does not apply to breach of contract actions.
- Committee reviewed Notes on Use regarding §95.11, Florida Statutes. The statute says within four or five years but doesn't state "of what." Committee felt Notes 1 and 2 should more closely track the language of the statute rather than attempt to rephrase it.

339 - Equitable Estoppel

- Committee discussed optional words to use in the first element of the instruction: actions, words, inaction, and silence. Drafter noted that these were taken from the case law.
- Committee discussed whether to remove the introductory definitional paragraph and begin the instruction with: "Defendant raised the defense of equitable estoppel. To establish this defense, defendant must prove all of the following…"
- Proposed instruction:
- (Defendant) raised the defense of equitable estoppels. To establish this defense, (defendant) must prove all of the following:
  - [(Claimant) voluntarily acted upon or spoke about (describe material fact)] [(Claimant) concealed or was silent about (describe material fact) at a time when [he][she][it] knew of [that fact] [those facts]
    - Because specific act/words will vary, committee agreed to revise to read [(Describe Claimant's action or words)]
  - Committee discussed whether there should be an element before the first – Defendant asked for the "extra" action (i.e. will you throw in the helmet, I'll paint the extra room for $500 etc.); to which the claimant responded with the subject action/silence.
- Committee separated the options for the first element into separate lines for easy reading, and revised format to be uniform in each option. Proposed first element:
  - [(Claimant)took action by (describe action)]
  - [(Claimant) spoke about (describe material fact)]
  - [(Claimant) concealed or was silent about (describe material fact) at a time when [he][she][it] knew of [that fact][those facts]
- Motion to approve. Second. One opposed. Approved.

Notes on Use:

- Committee agreed to revise Note 2 to cite to *State v. Harris* (881 So.2d 1079) for recitation of the elements of equitable estoppel.

- Committee also agreed to revise Note 3 to cite to *Thomas v. Dickinson* (30 So.2d 382) regarding silence.

340 - Judicial Estoppel

- Committee discussed whether judicial estoppel presents an issue for the judge or jury to decide. The experience of the Members indicates that this is an equitable issue for the judge to determine.
- Instruction was withdrawn. Committee discussed whether to add a Note on Use that judicial estoppel is not an instruction because it is an equitable issue. Committee agreed to do so.

341 - Ratification

- Committee noted that this instruction was drafted based on *Frankenmuth* (769 So.2d 1012).
- Committee discussed whether to add case law support for what constitutes an "unauthorized act" (the term of art used in *Frankenmuth*).
- Committee discussed whether the "unauthorized act" concept can be substituted with "breach."
  - The use of the word breach makes this instruction appear to be more akin to waiver than ratification. Ratification usually involves an extra act, which the Committee found was appropriately incorporated by the language as drafted. Additionally, the Committee reasoned that the "unauthorized act" doesn't always constitute a breach.
  - Committee removed the word unauthorized and referred to it as "the act" or "the transaction."
  - Committee discussed the use of the word "disavow" and discussed alternatives.
- Committee member noted that ratification often arises where the plaintiff sues for breach of contract, defendant says that the contract wasn't authorized, and plaintiff replies that the contract had been ratified.
- Committee discussed changing the third element to "(Claimant) knew that [he][she][it] could reject the contract because of the [act][transaction]."
- Fourth element:
  - (Claimant) [accepted the benefits of the [act][transaction] [expressed [his][her][its] intention to accept the benefits of the [act][transaction]].
  - Revised to: (Claimant) [accepted the [act][transaction] [expressed [his][her][its] intention to accept the [act][transaction]].
    - This was revised to adjust the language to make clear that there do not need to be "benefits."
- Committee discussed whether to add "nevertheless", "but", etc. and Committee reasoned that this is unnecessary as it is not "part" of the elements.
- Committee discussed whether "breached the contract" is necessary here, and if it could be utilized in other contexts besides as a pure defense to a breach of contract claim. Committee discussed broadly the fact that the defenses should be drafted only as defenses to a breach of contract action.
  - Committee discussed whether to add a Note on Use to flag the issue that this concept can be applied in other commercial contexts. However, Committee found against this suggestion as many of the instructions could be applied to contexts other than those for which they were drafted. Committee agreed to insert a general Note that instructions can be utilized in other areas.

- Committee noted that in final proofreading of the instructions the use of "that" and "which" should be edited appropriately.
- Motion to approve. Approved, no objections.

Sources and Authorities:

- Committee discussed whether *Frankenmuth* should be used as the primary Source and Authority. Committee found that a case where ratification was used as a defense to a breach of contract action should be cited to more closely parallel the instruction. Drafter to find said case which will be substituted in the Sources and Authorities.

342 - Promissory Estoppel

- Proposed instruction: (Defendant) has raised the defense of "promissory estoppel." To establish this defense, (defendant) must prove all of the following:
  - 1. (Claimant) voluntarily promised to (describe material fact);
  - 2. (Defendant) in good faith relied upon (claimant's) promise; and
  - 3. (Defendant's) reliance on (claimant's) promise caused (defendant) to change [his][her][its] position for the worse.
- Committee felt an instruction on promissory estoppel raised as a claim should be added to the instructions.
- Committee revised element 2 to read: "Defendant relied in good faith upon claimant's promise"
- Committee discussed use of phrase "change his position for the worse" as a substitute for the case law's use of "detrimentally relied." Some members felt that the drafted language read more into detrimental reliance.
  - Committee discussed various alternatives to the phrase "detrimentally relied" and noted that "change his position for the worse" was not completely accurate since the defendant could have relied on claimant's promise and done nothing as a result thereof (i.e. there would be no "change of position").
- Member noted that the CACI instruction describes promissory estoppel as a promise to be performed in the future, and noted that this was the major distinction between promissory and equitable estoppel. This concept is not present in the instruction as drafted.
  - Committee revised the first element to read: "(Claimant) voluntarily promised to (describe material act to be performed or not performed) in the future."
- Committee noted that an element needs to be added that claimant did not keep the promise or perform as promised.
- Committee discussed the need to add an additional element based on the case law requirement that the claimant reasonably should have expected that his affirmative representations would induce the promisee into action or forbearance substantial in nature.
- Committee discussed whether there are two paths to obtain promissory estoppel.
- Committee discussed "good faith" reliance on the promise. Committee agreed to change to "defendant reasonably relied upon claimant's promise."

- Committee discussed *W.R. Grace* case (547 So.2d 919), which provides that a promise must be definite and specific. Committee noted this case was in the context of a claim. Committee discussed whether the first element communicates the fact that the promise must be clear and definite. *Mt. Sanai* (290 So.2d 484). Committee reasoned no additional language is needed because the claimant must reasonably rely on the promise and it would not be reasonable if the promise was vague or indefinite.
- Motion to approve instruction, approved with no objections.

Sources and Authorities:

- Committee discussed the use of the *Crown Life* case (517 So.2d 660) since it is an insurance case and whether a non-insurance case should be used. Drafter noted that the defense of promissory estoppel is often raised in the insurance context. Committee condensed the Sources and Authorities and specifically discussed the very strong language from the *Crown Life* case regarding the refusal to enforce such a promise would "sanction the perpetration of fraud or would result in other injustice."
- Motion to approve Sources and Authorities. Approved.

353 - Damage for Total Destruction of Business

- Drafter noted that 352 was previously approved, but that an additional instruction is need when there is a total destruction of business. Drafter noted that if the bad act causes a total destruction of the business, the claimant cannot recover lost profits, but is limited to the lost market value of the business on the date of the loss.
- Committee discussed what the outcome would be if a new business (with little equity and a lot of debt) was totally destroyed. It seemed to the Members that the claimant would not be compensated as much for a total loss as it would have been if there was a partial loss.
- Drafter noted that there are two main cases in this topic, *Polyglycoat* (442 So. 2d 958) and *Montage* (889 So.2d 180). Additionally, there is a recent 4th DCA case, *Fidelity Warranty* (74 So.3d 506).
- Committee discussed how the value of the business is determined. *Fidelity Warranty* noted that an expert testified on behalf of the plaintiff, but the court felt this testimony was based on some questionable data, and subsequently the owner of the plaintiff testified as to the value. As usual, speculative data may not be used for valuation. Drafter noted that the cases cited in Instruction 352 regarding valuation may be instructive here as well.
- Committee reasoned that the terms "market value" and "fair market value' are synonymous. However, "fair value" is a different measure. Committee discussed whether the instruction should read "damages based upon the fair market value" or "value." Some members felt changing to just "value" would be carte blanch for damage calculations. Some members felt the Committee should decide whether the measure of damages must be market measured (i.e. "fair market value"). Committee members noted that the cases almost uniformly say "market value."
- Committee agreed to revise Note on Use 2 to reference market value only. Committee noted that there are different methods to arrive at market value – book, income, cost of replacement, asset,

market - depending on the type of asset. Committee noted that a Note on Use to the effect of "the court may need to define market value" may create a substantial issue for the judge, as this verbiage makes it sound like the court needs to decide what market value is.

- Committee discussed whether to include a general note on use that there are different methods to calculate market value and included a citation to *Fidelity Warranty*.
- Committee engaged in an extended discussion regarding whether a Note that "the court may need to define market value" would require the judge to adopt a specific approach for determining market value or rather explain the general definition of market value (i.e. the amount a willing buyer pays to a willing seller with neither compelled…).
- Committee alternatively discussed including the definition of market value within the instruction itself. Some members expressed pause over including a definition of market value. The definition reviewed by the Committee from *Thompson v. Thompson* (176 So.2d 267) insinuated to some members that this was an "approach" rather than a generic definition of market value. Some members preferred to avoid discussing the definition of market value since it will be an issue for the experts in most cases.
- Motion to NOT include definition of "market value" in the instruction. 3 opposed.
- Motion to approve the instruction. Approved as drafted.

Notes on Use:

- Committee noted that the quote from *Fidelity Warranty* specifically states that there are three approaches. Because the *Thompson* case said there are 5 approaches (although this may be limited to the valuation of good will context), the Committee revised the language of the Note on Use to state there are many methods.

356 & 357 – Buyer/Seller's Damages for Breach of Contract for Sale of Real Property

- Committee member was previously assigned the task of reviewing and revising the Notes on Use for 356 and 357, which should mirror each other.
- Committee discussed whether the citation to *Alberta* (675 So.2d 1385) is necessary for the proposition that a jury trial applies only to legal and not equitable causes of action. Committee agreed to leave this citation in. However, the Committee noted that a jury would decide if there was a breach, although would not decide the issue of whether specific performance is the appropriate remedy. To address, a member suggested that a Note that provides "this instruction does not apply to claims for specific performance" should be added.
- Motion to approve the revised Notes on Use for 356 and 357. None opposed.

Introductory Instruction for 303 – Breach of Contract – Essential Factual Elements

- Proposed language: "Instruction 303a sets forth the elements for a breach of contract claim where the (claimant) has perfected performance. Instruction 303b applies to cases where either the (claimant) does not contend it has perfected performance or where (defendant) contends that claimant did not perfect performance. Where Instruction 303b is read, the second element of Instruction 303a should not be read."

- Member suggested: "The committee recognizes that, in certain cases, Instruction 303a and Instruction 303b both may apply. However, in such cases, the second element of instruction 303a should not be read."
- Additional suggestion: "303a sets forth the elements for a breach of contract claim where the (claimant) contends it has fully performed. 303b applies to cases where either the (claimant) does not contend it has fully performed or where (defendant) contends that (claimant) did not fully perform."
- Motion to approve introduction as written immediately above. No opposition. One abstention.

Closing Remarks

Chair thanks the Committee for its hard work in getting the instructions together. Chair will not schedule the next meeting at this time, but the Committee will need to work to get the first petition before the Supreme Court at this point.