

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

SECURITY NATIONAL BANK, as
Conservator for JMK, a minor child,

Plaintiff,

vs.

ABBOTT LABORATORIES,

Defendant.

No. C 11-4017-MWB

**INSTRUCTIONS
TO THE JURY**

TABLE OF CONTENTS

INSTRUCTIONS

No. 1 — INTRODUCTION	1
No. 2 — BURDEN OF PROOF	3
No. 3 — DEFINITION OF EVIDENCE.....	4
No. 4 — TESTIMONY OF WITNESSES	7
No. 5 — THE PARTIES’ CLAIMS AND DEFENSES	9
No. 6 — THE CONSERVATOR’S “DESIGN DEFECT” CLAIM	12
No. 7 — THE CONSERVATOR’S “MANUFACTURING DEFECT” CLAIM	16
No. 8 — THE CONSERVATOR’S “WARNING DEFECT” CLAIM	18
No. 9 — DAMAGES IN GENERAL	22
No. 10 — COMPENSATORY DAMAGES	24
No. 11 — PUNITIVE DAMAGES	27
No. 12 — ABBOTT’S “STATE OF THE ART” SPECIFIC DEFENSE.....	30
No. 13 — ABBOTT’S “INTERMEDIARY” SPECIFIC DEFENSE.....	32
No. 14 — OUTLINE OF THE TRIAL	35
No. 15 — OBJECTIONS	37
No. 16 — BENCH CONFERENCES	38

No. 17 — NOTE-TAKING 39
No. 18 — QUESTIONS BY JURORS 40
No. 19 — CONDUCT OF JURORS DURING TRIAL..... 41
No. 20 — DELIBERATIONS 44

VERDICT FORM

No. 1 — INTRODUCTION

Congratulations on your selection as a juror!

These Instructions are to help you better understand the trial and your role in it.

This is a civil case brought by Conservator Security National Bank for damages for permanent injuries to a newborn, JMK, from meningitis from an *E. sak* bacterial infection. The Conservator alleges that the source of the *E. sak* bacteria was Similac Neosure powdered infant formula (PIF) produced by defendant Abbott Laboratories (Abbott). Therefore, the Conservator alleges that JMK's injuries were caused by design, manufacturing, and warning defects in the PIF. Abbott denies the Conservator's claims and asserts certain specific defenses.

You have been chosen and sworn as jurors to try the issues of fact related to the Conservator's claims and Abbott's defenses. In making your decisions, you are the sole judges of the facts. You must not decide this case based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these Instructions. Do not take anything that I have said or done or that I may say or do as indicating what I think of the evidence or what I think your verdict should be.

You should consider and decide this case as an action between persons of equal standing in the community, of equal worth, and holding the same or similar

stations in life. Individuals and corporations—whether acting as the conservator for a minor child or as the producer of commercial products—stand equal before the law, and each is entitled to the same fair consideration.

A corporation can act only through its agents or employees, however. Any agent or employee of a corporation may bind it by acts and statements made while acting within the scope of the authority delegated to the agent by the corporation or within the scope of his or her duties as an employee of the corporation.

Also, please remember that this case is important to the parties and to the fair administration of justice. Therefore, please be patient, consider all of the evidence, and do not be in a hurry to reach a verdict just to be finished with the case.

In these Instructions, I will explain how you are to determine whether or not the parties have proved their claims or defenses. First, however, I will explain some preliminary matters, including the burden of proof, what is evidence, and how you are to treat the testimony of witnesses.

No. 2 — BURDEN OF PROOF

Your verdict depends on what facts have been proved. Unless I tell you otherwise, facts must be proved “by the greater weight of the evidence.” This burden of proof is sometimes called “the preponderance of the evidence.”

“Proof by the greater weight of the evidence” is proof that a fact is more likely true than not true.

- It does not depend on which side presented the greater number of witnesses or exhibits
- It requires you to consider all of the evidence and decide which evidence is more convincing or believable
 - For example, you may choose to believe the testimony of one witness, if you find that witness to be convincing, even if a number of other witnesses contradict that witness’s testimony
 - You are free to disbelieve any testimony or other evidence that you do not find convincing or believable
- If, on any issue in the case, you find that the evidence is equally balanced, then you cannot find that the issue has been proved

You may have heard that criminal charges require “proof beyond a reasonable doubt.” That is a stricter standard that does not apply in a civil case, such as this one.

No. 3 — DEFINITION OF EVIDENCE

Evidence is

- Testimony
 - Testimony may be either “live” or “by deposition”
 - A “deposition” is testimony taken under oath before the trial and preserved in writing or on video
 - Consider “deposition” testimony as if it had been given in court
- Answers to interrogatories
 - An interrogatory is a written question asked before trial by one party of another, who must answer it under oath in writing
 - Consider interrogatories and the answers to them as if the questions had been asked and answered here in court
- Exhibits admitted into evidence
 - Just because an exhibit may be shown to you does not mean that it is more important than any other evidence
- Stipulations
 - Stipulations are agreements between the parties
 - If the parties stipulate that certain facts are true, then you must treat those facts as having been proved

Evidence is *not*

- Testimony that I tell you to disregard
- Exhibits that are not admitted into evidence
- Statements, arguments, questions, and comments by the lawyers
- Objections and rulings on objections
- Anything that you see or hear about this case outside the courtroom

Some exhibits consisting of charts and summaries may be shown to you in order to help explain the facts disclosed by books, records, or other underlying evidence in the case

- Such summary exhibits are not evidence or proof of any facts
- They are used for convenience
- In deciding how much weight to give summaries, you must
 - decide if they correctly reflect the facts shown by the evidence
 - consider testimony about the way in which the summaries were prepared

You may have heard of “direct” or “circumstantial” evidence.

- “Direct” evidence is direct proof of a fact
 - An example is testimony by a witness about what that witness personally saw or heard or did
- “Circumstantial” evidence is proof of one or more facts from which you could find another fact

- An example is testimony that a witness personally saw a broken window and a brick on the floor from which you could find that the brick broke the window
- You should consider both kinds of evidence, because the law makes no distinction between their weight

Some evidence may be admitted only for a limited purpose.

- I will tell you if that happens
- I will instruct you on the purposes for which the evidence can and cannot be used

The weight to be given any evidence—whether that evidence is “direct” or “circumstantial,” or in the form of testimony, an exhibit, or a stipulation—is for you to decide.

No. 4 — TESTIMONY OF WITNESSES

You may believe all of what any witness says, only part of it, or none of it.

In evaluating a witness's testimony, consider the following:

- the witness's
 - intelligence
 - memory
 - opportunity to have seen and heard what happened
 - motives for testifying
 - interest in the outcome of the case
 - manner while testifying
 - drug or alcohol use or addiction, if any
- the reasonableness of the witness's testimony
- any differences between what the witness says now and said earlier
- any inconsistencies between the witness's testimony and any other evidence that you believe
- whether any inconsistencies are the result of seeing or hearing things differently, actually forgetting things, or innocent mistakes, or are, instead, the result of lies or phony memory lapses
- whether the witness has been convicted of a felony offense, but only to help you decide whether to believe that witness and how much weight to give his or her testimony, and
- any other factors that you find bear on believability or credibility

You should not give any more or less weight to a witness's testimony just because the witness is an expert

- An expert witness may be asked a "hypothetical question," in which the expert is asked to assume certain facts are true and to give an opinion based on that assumption
- If a "hypothetical question" assumes a fact that is not proved by the evidence, you should decide if the fact not proved affects the weight that you should give to the expert's answer

You may give any witness's opinion whatever weight you think it deserves, but you should consider

- the reasons and perceptions on which the opinion is based
- any reason that the witness may be biased, and
- all of the other evidence in the case

It is your exclusive right to give any witness's testimony whatever weight you think it deserves.

No. 5 — THE PARTIES' CLAIMS AND DEFENSES

The Conservator contends that Abbott's Similac Neosure PIF was the source of the *E. sak* bacteria that infected JMK. The law does not impose absolute liability on the manufacturer or seller of a product. The mere fact that JMK contracted bacterial meningitis does not mean that the Similac Neosure PIF was contaminated with *E. sak* bacteria or that Abbott is liable for JMK's injuries as the manufacturer or seller of the PIF. Rather, to establish Abbott's liability, the Conservator must establish one or more of the following claims:

- a "design defect" claim, based on the Conservator's allegations that the design of Abbott's PIF did not prevent the presence of the *E. sak* bacteria and that distribution of commercially sterile Ready To Feed for the first 28 days is a reasonable alternative safer design to Abbott's PIF
- a "manufacturing defect" claim, based on the Conservator's allegation that the presence of *E. sak* bacteria in Abbott's PIF was a departure from the intended design of the PIF, and
- a "warning defect" claim, based on the Conservator's allegations that Abbott's warning label on its PIF is inadequate to warn of the dangers of use of PIF for newborn or low birth weight babies, making the PIF not reasonably safe

Unless I tell you otherwise, you must consider each claim separately

- you must decide whether or not the Conservator has proved each claim without regard to any other claim, and
- you must decide each claim, and what damages, if any, to award if the Conservator wins on one or more claims, without regard to any of Abbott’s specific defenses, described below
- I will determine the effect of any specific defense, described below, that you find Abbott has proved

In addition to Abbott’s arguments that the Conservator cannot prove its claims, Abbott asserts two specific defenses to the Conservator’s claims:

- a “state of the art” defense, to all claims, based on Abbott’s allegation that its Similac Neosure PIF was “state of the art” at the time that it was designed, manufactured, and labeled
- an “intermediary” defense, to the “warning defect” claim, based on Abbott’s allegation that medical staff members were responsible for providing adequate warnings to JMK’s mother about Similac Neosure PIF

Again, unless I tell you otherwise, you must consider each specific defense separately

- you must decide whether or not Abbott has proved each specific defense without regard to any other claim or specific defense
- I will determine the effect of any specific defense that you find Abbott has proved

Each claim or specific defense consists of “elements,” which are the parts of the claim or specific defense

- The party asserting the claim or specific defense must prove all of the elements of that claim or specific defense by the greater weight of the evidence
- I will explain the “elements” of the claims and specific defenses in the following instructions

No. 6 — THE CONSERVATOR’S “DESIGN DEFECT” CLAIM

The Conservator’s first claim is that the Similac Neosure PIF that JMK consumed was defectively designed. Abbott denies that its PIF was defectively designed.

To win on its “design defect” claim, the Conservator must prove all of the following elements by the greater weight of the evidence:

***One*, Abbott designed the Similac Neosure PIF that JMK consumed.**

***Two*, Abbott was engaged in the business of designing Similac Neosure PIF.**

***Three*, the Similac Neosure PIF had a design defect.**

The Similac Neosure PIF had a “design defect,” if the design made it not reasonably safe

- The Conservator alleges that the Similac Neosure PIF had a “design defect,” because the design did not prevent the presence of the *E. sak* bacteria

***Four*, a reasonable alternative safer design existed at the time of sale or distribution of the Similac Neosure PIF.**

The Conservator alleges that a “reasonable alternative safer design” to the PIF was the following:

- distribution of commercially sterile Ready To Feed for the first 28 days

You must unanimously agree on whether this alternative was a “reasonable alternative safer design” at the time of the sale or distribution of the Similac Neosure PIF.

To prove that “a reasonable alternative safer design” existed at the time of the sale or distribution of the PIF, the Conservator must prove *all* of the following:

- that an alternative design was practical at the time that the PIF was sold or distributed;
- that the alternative design would have reduced or avoided the foreseeable risks of harm posed by the PIF;
- that omission of the alternative design rendered the PIF not reasonably safe; *and*
- that the alternative design would have reduced or prevented the harm to JMK

To determine whether “a reasonable alternative safer design” existed, you may consider the following factors and their interaction:

- the magnitude and probability of the foreseeable risks of harm from the PIF;
- any instructions or warnings accompanying the PIF;
- consumer expectations about performance of PIF, including expectations arising from product portrayal and marketing;
- whether the risk presented by the PIF was open and obvious to, or generally known by, foreseeable users;
- the technological feasibility and practicality of the alternative design;

- whether the alternative design could be implemented at a reasonable cost;
- the relative advantages and disadvantages of the PIF as designed and as it could have been alternatively designed;
- the likely effects of the alternative design on the PIF's longevity, esthetics, efficiency, and utility;
- the range of consumer choice among similar products, with and without the alternative design;
- the overall safety of the PIF with and without the alternative design, including whether the alternative design would have introduced other dangers of equal or greater magnitude to those posed by the PIF as designed;
- the custom and practice in the industry and how Abbott's design of the PIF compared with other competing products in actual use; and
- any other factor shown by the evidence to have some bearing on this question

Five, the Similac Neosure PIF had the design defect at the time that it left Abbott's control.

Six, the design defect was a cause of JMK's damages.

A design defect in a product was "a cause" of damage if the damage would not have happened except for the design defect. The design defect does not have to be the only cause of JMK's damages.

If the Conservator does *not* prove *all* of these elements by the greater weight of the evidence, then you must find in favor of Abbott on the Conservator's "design defect" claim. On the other hand, if the Conservator *does* prove *all* of these elements by the greater weight of the evidence, then you must consider the Conservator's claims for "damages" for JMK's injuries.

**No. 7 — THE CONSERVATOR’S
“MANUFACTURING DEFECT” CLAIM**

The Conservator’s second claim is that the Similac Neosure PIF that JMK consumed was defectively manufactured. Abbott denies that its PIF was defectively manufactured.

To win on its “manufacturing defect” claim, the Conservator must prove all of the following elements by the greater weight of the evidence:

One, Abbott manufactured the Similac Neosure PIF that JMK consumed.

Two, Abbott was engaged in the business of manufacturing Similac Neosure PIF.

Three, the Similac Neosure PIF had a manufacturing defect.

The Similac Neosure PIF had a “manufacturing defect,” if it departed from its intended design in one or more ways

- The Conservator alleges that the Similac Neosure PIF had a “manufacturing defect,” because it contained *E. sak* bacteria

Four, the Similac Neosure PIF had the manufacturing defect at the time that it left Abbott’s control.

Five, the manufacturing defect was a cause of JMK’s damages.

A manufacturing defect in a product was “a cause” of damage if the damage would not have happened except for the manufacturing defect. The manufacturing defect does not have to be the only cause of JMK’s damages.

If the Conservator does *not* prove *all* of these elements by the greater weight of the evidence, then you must find in favor of Abbott on the Conservator's "manufacturing defect" claim. On the other hand, if the Conservator *does* prove *all* of these elements by the greater weight of the evidence, then you must consider the Conservator's claims for "damages" for JMK's injuries.

No. 8 — THE CONSERVATOR’S “WARNING DEFECT” CLAIM

The Conservator’s third claim is that the Similac Neosure PIF that JMK consumed had defective warnings. Abbott denies that its PIF had defective warnings.

To win on its “warning defect” claim, the Conservator must prove all of the following elements by the greater weight of the evidence:

***One*, Abbott labeled and distributed the Similac Neosure PIF that JMK consumed.**

***Two*, Abbott was engaged in the business of labeling and distributing Similac Neosure PIF.**

***Three*, the presence of *E. sak* bacteria in the PIF, creating a potential for bacterial infection in newborn or low birth weight babies, was a foreseeable risk of harm posed by the Similac Neosure PIF.**

As to “foreseeable risk of harm,”

- unforeseeable risks arising from foreseeable use or consumption of a product cannot specifically be warned against
- the Conservator must prove that the presence of *E. sak* bacteria in PIF, creating a potential for bacterial infection in newborn or low birth weight babies, was known to or should have been known to manufacturers of PIF, such as Abbott
- Abbott was responsible for performing reasonable testing prior to marketing a

product and to discover risks and ways to avoid risks that such testing would have revealed

- You should also treat Abbott as having known what reasonable testing would have revealed

***Four*, this risk of harm was not obvious to, or generally known by, foreseeable users of the PIF.**

***Five*, this risk of harm could have been reduced or avoided by providing one or more reasonable instructions or warnings.**

The Conservator alleges that the foreseeable risk of harm could have been avoided by informing the consumer of the following:

- the risk of *E. sak* bacterial infection in newborn or low birth weight babies
- the potential harm resulting from *E. sak* bacterial infection
- the availability in the marketplace of alternative, sterile liquid infant formulas

You must unanimously agree on which one or more of these instructions or warnings, if any, could have avoided the foreseeable risk of harm.

A seller of a commercial product must provide reasonable instructions and warnings

- about the risks of injury posed by their product
- about how to use and consume products safely

- about the existence and nature of product risks so that consumers can prevent harm either by appropriate conduct during use or consumption or by choosing not to use or consume the product

In deciding whether an instruction or warning would have reduced or avoided the foreseeable risk of harm, you should consider the following factors:

- whether the instruction or warning addresses the foreseeable risk of harm
- whether the instruction or warning is likely to be understood by the expected user group
- whether the instruction adequately conveys the severity of the foreseeable risk of harm
- the characteristics of the expected user group, and
- whether the foreseeable risk of harm is sufficiently obvious or generally known that a warning may be ignored by users or may make other warnings less effective

Six, the omission of one or more of the instructions or warnings rendered the PIF not reasonably safe.

Seven, the omission of one or more instructions or warnings was a cause of JMK's damages.

An omission of an instruction or warning was “a cause” of damage if the damage would not have happened except for the omission of that instruction or warning. The omission of the instruction or warning does not have to be the only cause of JMK's damages.

If the Conservator does *not* prove *all* of these elements by the greater weight of the evidence, then you must find in favor of Abbott on the Conservator's "warning defect" claim. On the other hand, if the Conservator *does* prove *all* of these elements by the greater weight of the evidence, then you must consider the Conservator's claims for "damages" for JMK's injuries.

No. 9 — DAMAGES IN GENERAL

It is my duty to instruct you about the measure of damages. By instructing you on damages, I do not mean to suggest what your verdict should be on any claim.

If you find for the Conservator on one or more of its claims, you must determine what damages to award. “Damages” are the amount of money that will reasonably and fairly compensate the Conservator for any injury that you find JMK suffered as a result of a defect in Abbott’s Similac Neosure PIF

- It is for you to determine what damages, if any, have been proved
- Any damages award must be based upon evidence and not upon speculation, guesswork, or conjecture
- You cannot determine the amount for a particular item of damages by taking down each juror’s estimate and agreeing in advance that the average of those estimates will be your award for that item of damages
- You must not award duplicate damages, so do not allow amounts awarded under one item of damages to be included in any amount awarded under another item of damages

Future damages

- must be reduced to “present value”
 - “Present value” is a sum of money paid now, in advance, that, together with interest earned at a reasonable rate of return, will compensate for future losses
 - must be limited to JMK’s life expectancy, as supported by the evidence
 - a Standard Mortality Table indicates that the normal life expectancy of people who are the same age as JMK is 76 years, but those statistics are not conclusive
 - You may use all of the evidence about JMK’s
 - health
 - habits
 - lifestyle, and
 - life expectancy
- when deciding the amount of future damages

No. 10 — COMPENSATORY DAMAGES

The Conservator seeks compensatory damages for “past and future medical expenses,” “past and future loss of full mind and body,” “past and future pain and suffering,” and “loss of future earning capacity.” You must consider each item of damages separately and award only those amounts of damages, if any, that will compensate the Conservator for injuries that JMK suffered as a result of a defect in Abbott’s Similac Neosure PIF.

Medical Expenses

- **“Past medical expenses”** include, but are not limited to, the reasonable costs of necessary
 - hospital charges
 - doctor charges
 - prescriptions
 - other medical services

from JMK’s birth until the time of your verdict

- **“Future medical expenses”** include the present value of “medical expenses” that JMK is reasonably certain to incur from the date of your verdict into the future
- In determining the reasonable cost of necessary hospital and doctor charges, prescriptions, and other medical services, you may consider:
 - the amount charged

- the amount actually paid, and
- any other evidence of what is reasonable and proper for such medical expenses

Loss Of Full Mind And Body

- **“Past loss of full mind and body”** is
 - loss of the ability of a particular part of the body to function in a normal manner
 - loss of the ability of a particular part of the mind to function in a normal manner

from JMK’s birth until the time of your verdict

- **“Future loss of full mind and body”** is the present value of the future loss of function of the mind and body that JMK is reasonably certain to experience from the date of your verdict into the future

Pain and suffering

- **“Past physical pain and suffering”** may include, but is not limited to:
 - unpleasant feelings
 - bodily distress or uneasiness
 - bodily suffering, sensations, or discomfort

from JMK’s birth until the time of your verdict

- **“Past mental pain and suffering”** may include, but is not limited to:
 - mental anguish
 - loss of enjoyment of lifefrom JMK’s birth until the time of your verdict
- **“Future pain and suffering”** includes the present value of physical or mental “pain and suffering” that JMK is reasonably certain to experience from the date of your verdict into the future
- Factors for determining the amount of damages for physical or mental pain and suffering include, but are not limited to:
 - the nature and extent of the injury
 - whether the injury is temporary or permanent
 - whether the injury results in partial or total disability

Loss Of Future Earning Capacity

- **“Loss of future earning capacity”** is the present value of
 - the reduction in the ability to work generally
 - the reduction in the ability to earn money generally, but
 - is *not* the reduction in the ability to work in a particular job

No. 11 — PUNITIVE DAMAGES

In addition to compensatory damages, the law permits the jury, under certain circumstances, to award punitive damages. Punitive damages are not intended to compensate for injury, but are allowed to punish willful and wanton conduct and to discourage the defendant and others from like conduct in the future. However, punitive damages are not available on the Conservator's "manufacturing defect" claim.

If the Conservator has won on either or both of its "design defect" and "warning defect" claims, you must consider separately whether or not to award punitive damages on each those claims. You may award

- the same or different amounts of punitive damages for each claim
- some punitive damages on one claim and none on the other, or
- no punitive damages at all on either claim

Burden of proof

An award of punitive damages is subject to a higher standard of proof than is applicable to other issues in this case:

- The elements required to award punitive damages must be proved "by the greater weight of clear, convincing, and satisfactory evidence"
- Evidence is "clear, convincing, and satisfactory," if there is no serious or substantial uncertainty about the conclusion to be drawn from it

Awarding punitive damages

You may award punitive damages on a particular “product defect” claim, only if the Conservator proves *all* of the following elements by the greater weight of clear, convincing, and satisfactory evidence:

One, Abbott’s conduct with regard to that “product defect” claim warrants a penalty in addition to any amount that you award to compensate the Conservator for actual injuries to JMK.

Conduct warrants an award of punitive damages if it constituted a willful and wanton disregard for the rights or safety of another. Conduct was “willful and wanton” if

- a person intentionally did an act of an unreasonable character
- the person did so in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow

Two, Abbott’s conduct caused actual damage to JMK.

You can only award punitive damages if you first find that Abbott’s wrongful conduct caused actual damage to JMK and you award compensatory damages to the Conservator for such actual damage pursuant to Instruction No. 10.

Three, the amount, if any, of punitive damages that is warranted by Abbott’s wrongful conduct at issue in that “product defect” claim.

There is no exact rule to determine the amount of punitive damages, if any, you should award. In

determining what amount, if any, to award for punitive damages, you may consider the following factors:

- the nature of Abbott’s conduct that harmed JMK
- the amount of punitive damages that will punish and discourage like conduct by Abbott
 - you may consider Abbott’s financial condition or ability to pay
 - you may not award punitive damages solely because of Abbott’s wealth or ability to pay
- the amount of punitive damages that is reasonably related to the amount of compensatory damages that you award to the Conservator on the “product defect” claim in question
- the existence and frequency of similar conduct, **but** you may *not* award punitive damages to punish Abbott for any of the following:
 - harm caused to others
 - for out-of-state conduct that was lawful where it occurred
 - any conduct by Abbott that is not similar to the conduct that caused the harm to JMK in this case

No. 12 — ABBOTT’S “STATE OF THE ART” SPECIFIC DEFENSE

Abbott’s first specific defense is that its Similac Neosure PIF was “state of the art” at the time that it was designed, manufactured, and labeled. The “state of the art” is the safest and most advanced technology and the most current scientific knowledge that reasonably could have been used in the design of PIF at the time that Abbott’s Similac Neosure PIF was designed, manufactured, and labeled. The Conservator denies that the PIF was “state of the art.”

To prove its “state of the art” defense, Abbott must prove the following by the greater weight of the evidence:

Abbott’s Similac Neosure PIF was the best that feasibly could be done to design, manufacture, or label PIF to prevent JMK’s injuries at the time it was designed, manufactured, or labeled.

For a product to meet this requirement, it must have been all of the following:

- technologically possible
 - something was “technologically possible,” if
 - it was based on the latest scientific knowledge, and
 - it was based on the latest discoveries in the field
- practical
 - something was “practical,” if

- it met the user’s needs, and
- it was economically reasonable
- not every alternate design or safety procedure for which technology exists is necessarily practical
- You may consider whether the design, manufacture, and labeling of the product met the custom in the industry, *but*
 - custom in the industry is only what was being done
 - it may be something less than the best that feasibly could be done
- You may consider whether the design, manufacture, and labeling of the product complied with applicable laws or regulations, *but*
 - laws and regulations may set only minimum requirements

You will be asked to indicate in the Verdict Form whether Abbott has proved by the greater weight of the evidence that its Similac Neosure PIF was “state of the art” in design, manufacture, or labeling. You need not be concerned with the effect of this determination; I will determine the effect of this specific defense, if you find that Abbott has proved it.

No. 13 — ABBOTT’S “INTERMEDIARY” SPECIFIC DEFENSE

Abbott’s second specific defense is a defense to the Conservator’s “warning defect” claim. Abbott contends that the medical staff of JMK’s birth hospital, including the doctor who prescribed Similac Neosure without specifying liquid or PIF to JMK and the nurse who provided JMK’s mother with the Similac Neosure PIF, were “intermediaries” who were responsible for providing warnings about safe usage of the Similac Neosure PIF to JMK’s caregivers. The Conservator denies that Abbott could rely on such “intermediaries” to provide appropriate instructions and warnings.

To prove its “intermediary” defense, Abbott must prove the following by the greater weight of the evidence:

One, the ~~medical providers~~ doctor who prescribed or provided Similac Neosure without specifying liquid or PIF or the nurse who provided Similac Neosure PIF to JMK’s caregivers knew or should have known that the presence of *E. sak* bacteria in PIF, creating a potential for bacterial infection in newborn or low birth weight babies, was a foreseeable risk of harm posed by the Similac Neosure PIF.

In deciding whether the medical providers knew or reasonably should have known about the foreseeable risk of harm from the PIF, you may consider the following:

- whether Abbott provided medical providers with information about the foreseeable risk of harm from PIF

- whether the medical providers had access to other sources of information about the foreseeable risk of harm from PIF

***Two*, Abbott reasonably relied on the ~~medical providers~~ doctor who prescribed or provided Similac Neosure without specifying liquid or PIF or the nurse who provided Similac Neosure PIF to provide JMK's caregivers with instructions and warnings about the risk of the presence of *E. sak* bacteria in PIF and its potential for bacterial infection in newborn or low birth weight babies.**

In deciding whether Abbott reasonably relied on the medical providers to provide JMK's caregivers with instructions and warnings, you may consider the following:

- whether the medical providers were in a better position than Abbott to provide adequate and effective warnings
- the severity of the risks posed by the product
- the likelihood that the medical providers would convey the information to the ultimate caregiver
- the practicality, reasonableness, and effectiveness of Abbott giving a warning directly to the ultimate caregiver

You will be asked to indicate in the Verdict Form whether Abbott has proved its "intermediary" defense to the "warning defect" claim by the greater weight of the evidence. You need not be concerned with the effect of this

determination; I will determine the effect of this specific defense, if you find that Abbott has proved it.

No. 14 — OUTLINE OF THE TRIAL

I will now explain how the trial will proceed.

After I have read all but the last Instruction,

- The lawyers may make opening statements
 - An opening statement is not evidence
 - It is simply a summary of what the lawyer expects the evidence to be
- The Conservator will present evidence and call witnesses and the lawyer for Abbott may cross-examine them
- Abbott may present evidence and call witnesses, and the lawyer for the Conservator may cross-examine those witnesses
- The parties will make their closing arguments
 - Closing arguments summarize and interpret the evidence for you
 - Like opening statements, closing arguments are not evidence
- I will give you the last Instruction, on “deliberations”
- You will retire to deliberate on your verdict
- You will indicate your verdict on the Conservator’s claims in a Verdict Form, a copy of which is attached to these Instructions
 - A Verdict Form is simply a written notice of your decision

- When you have reached a unanimous verdict, your foreperson will complete one copy of the Verdict Form by marking the appropriate blank or blanks for each question
- You will all sign that copy to indicate that you agree with the verdict and that it is unanimous
- Your foreperson will then bring the signed Verdict Form to the courtroom when it is time to announce your verdict

No. 15 — OBJECTIONS

The lawyers may make objections and motions during the trial that I must rule upon.

- If I sustain an objection to a question before it is answered, do not draw any inferences or conclusions from the question itself
- Do not hold it against a lawyer or a party that a lawyer has made an objection, because lawyers have a duty to object to testimony or other evidence that they believe is not properly admissible

No. 16 — BENCH CONFERENCES

During the trial, it may be necessary for me to talk with the lawyers out of your hearing.

- I may hold a bench conference while you are in the courtroom or call a recess
- Please be patient, because these conferences are
 - to decide how certain evidence is to be treated
 - to avoid confusion and error, and
 - to save your valuable time
- We will do our best to keep such conferences short and infrequent

No. 17 — NOTE-TAKING

You are allowed to take notes during the trial if you want to.

- Be sure that your note-taking does not interfere with listening to and considering all the evidence
- Your notes are not necessarily more reliable than your memory or another juror's notes or memory
- Do not discuss your notes with anyone before you begin your deliberations
- Leave your notes on your chair during recesses and at the end of the day
- At the end of trial, you may take your notes with you or leave them to be destroyed
- No one else will ever be allowed to read your notes, unless you let them

If you choose not to take notes, remember that it is your own individual responsibility to listen carefully to the evidence.

An official court reporter is making a record of the trial, but her transcripts will not be available for your use during your deliberations.

No. 18 — QUESTIONS BY JURORS

When the attorneys have finished questioning a witness, you may propose questions in order to clarify the testimony.

- Do not express any opinion about the testimony or argue with a witness in your questions
- Submit your questions in writing by passing them to the Court Security Officer (CSO)

I will review each question with the attorneys. You may not receive an answer to your question:

- I may decide that the question is not proper under the rules of evidence
- even if the question is proper, you may not get an immediate answer, because a witness or an exhibit you will see later in the trial may answer your question

Do not feel slighted or disappointed if your question is not asked. Remember, you are not advocates for either side, you are impartial judges of the facts.

No. 19 — CONDUCT OF JURORS DURING TRIAL

You must decide this case *solely* on the evidence and your own observations, experiences, reason, common sense, and the law in these Instructions. You must also keep to yourself any information that you learn in court until it is time to discuss this case with your fellow jurors during deliberations.

To ensure fairness, you must obey the following rules:

- Do not talk among yourselves about this case, or about anyone involved with it, until you go to the jury room to decide on your verdict.
- Do not talk with anyone else about this case, or about anyone involved with it, until the trial is over.
- When you are outside the courtroom, do not let anyone ask you about or tell you anything about this case, anyone involved with it, any news story, rumor, or gossip about it, until the trial is over. If someone should try to talk to you about this case during the trial, please report it to me.
- During the trial, you should not talk to any of the parties, lawyers, or witnesses—even to pass the time of day—so that there is no reason to be suspicious about your fairness. The lawyers, parties, and witnesses are not supposed to talk to you, either.

- You may need to tell your family, friends, teachers, co-workers, or employer about your participation in this trial, so that you can tell them when you must be in court and warn them not to ask you or talk to you about the case. However, do not provide any information to anyone by any means about this case until after I have accepted your verdict. That means do not talk face-to-face or use any electronic device or media, such as the telephone, a cell or smart phone, a Blackberry, a PDA, a computer, the Internet, any Internet service, any text or instant messaging service, any Internet chat room, any blog, or any website such as Facebook, MySpace, YouTube, or Twitter, to communicate to anyone any information about this case until I accept your verdict.
- Do not do any research—on the Internet, in libraries, in the newspapers, in dictionaries or other reference books, or in any other way—or make any investigation about this case, the law, or the people involved on your own.
- Do not visit or view any place discussed in this case and do not use Internet maps or Google Earth or any other program or device to search for or to view any place discussed in the testimony.
- Do not read any news stories or articles, in print, on the Internet, or in any “blog,” about this case, or about anyone involved with it, or listen to any radio or television reports about it or about anyone involved with it, or let anyone tell you anything about any such news reports. I assure you that when you have heard all the evidence, you

will know more about this case than anyone will learn through the news media—and it will be more accurate.

- Do not make up your mind during the trial about what the verdict should be. Keep an open mind until you have had a chance to discuss the evidence with other jurors during deliberations.
- Do not decide the case based on biases. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.
- If, at any time during the trial, you have a problem that you would like to bring to my attention, or if you feel ill or need to go to the restroom, please send a note to the Court Security Officer (CSO), who will give it to me. I want you to be comfortable, so please do not hesitate to tell us about any problem.

I will read the remaining Instruction at the end of the evidence.

No. 20 — DELIBERATIONS

In conducting your deliberations and returning your verdict, there are certain rules that you must follow.

- When you go to the jury room, select one of your members as your foreperson to preside over your discussions and to speak for you here in court
- Discuss this case with one another in the jury room to try to reach agreement on the verdict, if you can do so consistent with individual judgment
 - Nevertheless, each of you must make your own conscientious decision, after considering all the evidence, discussing it fully with your fellow jurors, and listening to the views of your fellow jurors
- Do not be afraid to change your opinions if the discussion with other jurors persuades you that you should, but do not come to a decision simply because other jurors think it is right, or simply to reach a verdict
- Remember that you are not advocates, but judges—judges of the facts
 - Your sole interest is to seek the truth from the evidence in the case.

- If you need to communicate with me during your deliberations, you may send a note to me through the Court Security Officer (CSO), signed by one or more jurors
 - I will respond as soon as possible, either in writing or orally in open court
 - Remember that you should not tell anyone—including me—how your votes stand numerically
- Base your verdict solely on the evidence and on the law as I have given it to you in my Instructions
 - Nothing I have said or done is intended to suggest what your verdict should be—that is entirely for you to decide
- Your verdict on each question submitted must be unanimous
- Complete and sign one copy of the Verdict Form
 - The foreperson must bring the signed Verdict Form to the courtroom when it is time to announce your verdict
- When you have reached a verdict, the foreperson will advise the Court Security Officer that you are ready to return to the courtroom.

Good luck with your deliberations.

DATED this 6th day of January, 2014.



MARK W. BENNETT
U.S. DISTRICT COURT JUDGE
NORTHERN DISTRICT OF IOWA

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

SECURITY NATIONAL BANK, as
Conservator for JMK, a minor child,

Plaintiff,

vs.

ABBOTT LABORATORIES,

Defendant.

No. C 11-4017-MWB

VERDICT FORM

On the Conservator’s claims and Abbott’s specific defenses, we, the Jury,
find as follows:

I. THE CONSERVATOR’S CLAIMS			
Step 1: Verdicts	On each of the Conservator’s claims, in whose favor do you find? <i>(If you find in favor of Abbott on all claims, then do not answer any further questions in Part I of the Verdict Form. Instead, go on to consider your verdict on Abbott’s specific defenses in Part II.)</i>		
(a)	The “design defect” claim, explained in Instruction No. 6	___ The Conservator	___ Abbott
(b)	The “manufacturing defect” claim, explained in Instruction No. 7	___ The Conservator	___ Abbott
(c)	The “warning defect” claim, explained in Instruction No. 8	___ The Conservator	___ Abbott
	<i>If you found in favor of the Conservator on the “warning defect” claim in Step 1(c), which one or more of the following warnings do you find would have reasonably reduced the foreseeable risk of harm?</i>		
	___ a warning about the risk of <i>E. sak</i> bacterial infection in newborn or low birth weight babies		
	___ a warning about the potential harm resulting from <i>E. sak</i> bacterial infection		
	___ a warning about the availability in the marketplace of alternative, sterile liquid infant formulas		

Step 2: Compensatory Damages	<i>If you found that the Conservator won on one or more of the claims in Step 1, what amounts, if any, do you award for each of the following items of compensatory damages, as compensatory damages are explained in Instruction No. 10?</i>	
	Past medical expenses:	\$ _____
	The present value of future medical expenses:	\$ _____
	Past loss of full mind and body:	\$ _____
	The present value of future loss of full mind and body:	\$ _____
	Past pain and suffering:	\$ _____
	The present value of future pain and suffering:	\$ _____
	The present value of the loss of future earning capacity:	\$ _____
	Total Compensatory Damages	\$ _____
Step 3: Punitive Damages	<i>If you found in favor of the Conservator on the “design defect” claim in Step 1(a) and/or the “warning defect” claim in Step 1(c), and you awarded compensatory damages in Step 2, what amount, if any, do you award for “punitive damages” on that claim or those claims, as such damages are explained in Instruction No. 11? (“Punitive damages” are not available on the “manufacturing defect” claim.)</i>	
(a)	\$ _____ for punitive damages for a “design defect”	
(b)	\$ _____ for punitive damages for a “warning defect”	

II. ABBOTT’S SPECIFIC DEFENSES		
“State Of The Art” Specific Defense		
(a)	Has Abbot proved that the design of its Similac Neosure PIF was state of the art, as this defense is explained in Instruction No. 12?	___ Yes ___ No
(b)	Has Abbot proved that the manufacture of its Similac Neosure PIF was state of the art, as this defense is explained in Instruction No. 12?	___ Yes ___ No
(c)	Has Abbot proved that its warnings on its Similac Neosure PIF were state of the art, as this defense is explained in Instruction No. 12?	___ Yes ___ No

“Intermediary” Specific Defense

Has Abbott proved its “intermediary” specific defense as to the Conservator’s “warning defect” claim, as this defense is explained in Instruction No. 13?

Yes
 No

Date

Foreperson

Juror

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

SECURITY NATIONAL BANK, as
Conservator for JMK, a minor child,

Plaintiff,

vs.

ABBOTT LABORATORIES,

Defendant.

No. C 11-4017-MWB

**COURT’S PROPOSED
INSTRUCTIONS
TO THE JURY**

(01/03/14 FINAL “ANNOTATED”
VERSION)

TABLE OF CONTENTS

INSTRUCTIONS

No. 1 — INTRODUCTION	1
No. 2 — BURDEN OF PROOF	4
No. 3 — DEFINITION OF EVIDENCE.....	6
No. 4 — TESTIMONY OF WITNESSES	10
No. 5 — THE PARTIES’ CLAIMS AND DEFENSES	13
No. 6 — THE CONSERVATOR’S “DESIGN DEFECT” CLAIM	17
No. 7 — THE CONSERVATOR’S “MANUFACTURING DEFECT” CLAIM	24
No. 8 — THE CONSERVATOR’S “WARNING DEFECT” CLAIM	27
No. 9 — DAMAGES IN GENERAL	33
No. 10 — COMPENSATORY DAMAGES	35
No. 11 — PUNITIVE DAMAGES	39
No. 12 — ABBOTT’S “STATE OF THE ART” SPECIFIC DEFENSE.....	44
No. 13 — ABBOTT’S “INTERMEDIARY” SPECIFIC DEFENSE.....	48
No. 14 — OUTLINE OF THE TRIAL	52
No. 15 — OBJECTIONS	54

No. 16 — BENCH CONFERENCES 55
No. 17 — NOTE-TAKING 56
No. 18 — CONDUCT OF JURORS DURING TRIAL..... 57
No. 19 — DELIBERATIONS 60

VERDICT FORM

No. 21 — INTRODUCTION¹

Congratulations on your selection as a juror!

These Instructions are to help you better understand the trial and your role in it.

This is a civil case brought by Conservator Security National Bank for damages for permanent injuries to a newborn, JMK, from meningitis from an *E. sak* bacterial infection. The Conservator alleges that the source of the *E. sak* bacteria was Similac Neosure powdered infant formula (PIF) produced by defendant Abbott Laboratories (Abbott). Therefore, the Conservator alleges that JMK's injuries were caused by design, manufacturing, and warning defects in the PIF. Abbott denies the Conservator's claims and asserts certain specific defenses.²

You have been chosen and sworn as jurors to try the issues of fact related to the Conservator's claims and Abbott's defenses. In making your decisions, you are the sole judges of the facts. You must not decide this case based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason

¹ My current "plain language" stock Jury Instructions. *Compare* 8th Cir. Model 1.03 (2013); Joint Proposed Preliminary Jury Instruction No. 1.

² *See* my Proposed Statement Of The Case; *and compare* Joint Statement Of The Case.

and common sense, and these Instructions.³ Do not take anything that I have said or done or that I may say or do as indicating what I think of the evidence or what I think your verdict should be.⁴

You should consider and decide this case as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. Individuals and corporations—whether acting as the conservator for a minor child or as the producer of commercial products—stand equal before the law, and each is entitled to the same fair consideration.⁵

A corporation can act only through its agents or employees, however. Any agent or employee of a corporation may bind it by acts and statements made while acting within the scope of the authority delegated to the agent by the corporation or within the scope of his or her duties as an employee of the corporation.⁶

Also, please remember that this case is important to the parties and to the fair administration of justice. Therefore, please be patient, consider all of the evidence, and do not be in a hurry to reach a verdict just to be finished with the case.

³ My stock first instruction on “implicit bias.” *Compare* 8th Cir. Model 1.03 (2013) (penultimate paragraph); 9th Cir. Model 1.1B, unnumbered ¶ 3.

⁴ *Compare* 8th Cir. Civil Model 1.03 (2013) (last paragraph); *see* Joint Proposed Jury Instruction, requested model instruction.

⁵ *See* Iowa Civil Jury Instruction No. 100.20.

⁶ *See* 8th Cir. Model 5.23 (2013); *and compare* Joint Proposed Jury Instruction No. 1 (business entity acts only through natural persons).

In these Instructions, I will explain how you are to determine whether or not the parties have proved their claims or defenses. First, however, I will explain some preliminary matters, including the burden of proof, what is evidence, and how you are to treat the testimony of witnesses.

No. 22 — BURDEN OF PROOF⁷

Your verdict depends on what facts have been proved. Unless I tell you otherwise, facts must be proved “by the greater weight of the evidence.”⁸ This burden of proof is sometimes called “the preponderance of the evidence.”

“Proof by the greater weight of the evidence” is proof that a fact is more likely true than not true.

- It does not depend on which side presented the greater number of witnesses or exhibits
- It requires you to consider all of the evidence and decide which evidence is more convincing or believable
 - For example, you may choose to believe the testimony of one witness, if you find that witness to be convincing, even if a number of other witnesses contradict that witness’s testimony
 - You are free to disbelieve any testimony or other evidence that you do not find convincing or believable
- If, on any issue in the case, you find that the evidence is equally balanced, then you cannot find that the issue has been proved

⁷ My “plain language” stock Jury Instructions. *Compare* 8th Cir. Model 3.04 (2013); Joint Proposed Jury Instruction No. 2.

⁸ Because I have indicated that “the greater weight of the evidence” standard applies “[u]nless I tell you otherwise,” this instruction leaves open the possibility that certain matters, such as punitive damages, may have a different burden of proof.

You may have heard that criminal charges require “proof beyond a reasonable doubt.” That is a stricter standard that does not apply in a civil case, such as this one.

No. 23 — DEFINITION OF EVIDENCE⁹

Evidence is

- Testimony
 - Testimony may be either “live” or “by deposition”
 - A “deposition” is testimony taken under oath before the trial and preserved in writing or on video
 - Consider “deposition” testimony as if it had been given in court¹⁰
- Answers to interrogatories
 - An interrogatory is a written question asked before trial by one party of another, who must answer it under oath in writing
 - Consider interrogatories and the answers to them as if the questions had been asked and answered here in court¹¹
- Exhibits admitted into evidence
 - Just because an exhibit may be shown to you does not mean that it is more important than any other evidence

⁹ My “plain language” Jury Instructions. *Compare* 8th Cir. Model 1.04 (2013); Joint Proposed Jury Instruction Nos. 3 and 4.

¹⁰ *Compare* 8th Cir. Model 2.14 (2013).

¹¹ *Compare* Iowa Civil Jury Instruction No. 100.6.

- Stipulations
 - Stipulations are agreements between the parties
 - If the parties stipulate that certain facts are true, then you must treat those facts as having been proved¹²

Evidence is *not*

- Testimony that I tell you to disregard
- Exhibits that are not admitted into evidence
- Statements, arguments, questions, and comments by the lawyers
- Objections and rulings on objections
- Anything that you see or hear about this case outside the courtroom

Some exhibits consisting of charts and summaries may be shown to you in order to help explain the facts disclosed by books, records, or other underlying evidence in the case

- Such summary exhibits are not evidence or proof of any facts
- They are used for convenience
- In deciding how much weight to give summaries, you must
 - decide if they correctly reflect the facts shown by the evidence

¹² *Compare* 8th Cir. Model 2.03 (2013). Unless stipulations are expressly identified with reference to particular elements of claims or defenses, the parties are responsible for entering stipulations into evidence.

- consider testimony about the way in which the summaries were prepared¹³

You may have heard of “direct” or “circumstantial” evidence.

- “Direct” evidence is direct proof of a fact
 - An example is testimony by a witness about what that witness personally saw or heard or did
- “Circumstantial” evidence is proof of one or more facts from which you could find another fact
 - An example is testimony that a witness personally saw a broken window and a brick on the floor from which you could find that the brick broke the window
- You should consider both kinds of evidence, because the law makes no distinction between their weight¹⁴

Some evidence may be admitted only for a limited purpose.

- I will tell you if that happens

¹³ See 8th Cir. Civil Models 2.11 and 2.12 (2013) and the parties’ requested model instructions.

¹⁴ See 9th Cir. Criminal Model 1.9 (modified); *but see* 8th Cir. Criminal Model 1.04 (2013) (suggesting that definitions of direct and circumstantial evidence are ordinarily not required).

- I will instruct you on the purposes for which the evidence can and cannot be used¹⁵

The weight to be given any evidence—whether that evidence is “direct” or “circumstantial,” or in the form of testimony, an exhibit, or a stipulation—is for you to decide.¹⁶

¹⁵ Compare 8th Cir. Model 2.09 (2013); Abbott’s Proposed Additional Jury Instruction, requesting this model instruction.

¹⁶ See 9th Cir. Model 1.9 (modified), and compare 8th Cir. Model 1.02 (2012) (last unnumbered paragraph).

No. 24 — TESTIMONY OF WITNESSES¹⁷

You may believe all of what any witness says, only part of it, or none of it. In evaluating a witness's testimony, consider the following:

- the witness's
 - intelligence
 - memory
 - opportunity to have seen and heard what happened
 - motives for testifying
 - interest in the outcome of the case
 - manner while testifying
 - drug or alcohol use or addiction, if any
- the reasonableness of the witness's testimony
- any differences between what the witness says now and said earlier
- any inconsistencies between the witness's testimony and any other evidence that you believe
- whether any inconsistencies are the result of seeing or hearing things differently, actually forgetting things, or innocent mistakes, or are, instead, the result of lies or phony memory lapses

¹⁷ My "stock" Jury Instructions. *Compare* 8th Cir. Models 1.03 (2013) (unnumbered ¶¶ 5-6); *id.* 3.03; *and* Joint Proposed Jury Instruction No. 5 ("Credibility"). For some time, I have not given separate instructions on "testimony" and "credibility."

- whether the witness has been convicted of a felony offense, but only to help you decide whether to believe that witness and how much weight to give his or her testimony,¹⁸ and
- any other factors that you find bear on believability or credibility

You should not give any more or less weight to a witness's testimony just because the witness is an expert¹⁹

- An expert witness may be asked a “hypothetical question,” in which the expert is asked to assume certain facts are true and to give an opinion based on that assumption
- If a “hypothetical question” assumes a fact that is not proved by the evidence, you should decide if the fact not proved affects the weight that you should give to the expert's answer²⁰

¹⁸ See 8th Cir. Civil Model 2.10 (2013). The plaintiffs' Proposed Jury Instruction No. 6 ostensibly relies on 8th Cir. Civil Model 2.10, but is more specifically based on note 1 to that model and 8th Cir. Crim. Model 2.16, because it includes Rule 404(b) language. I excluded evidence of Abbott's “Depakote” misbranding conviction, but I ruled that I would allow evidence that Mr. Kunkel, a witness, had a prior felony conviction. Thus, the pertinent “bad acts” instruction is a Rule 609 instruction, concerning “bad acts” of a witness, like 8th Cir. Civil Model 2.10. I also believe that it is more appropriate to place such an instruction here, in the list of factors relevant to a witness's testimony, rather than in a stand-alone instruction.

¹⁹ Compare 9th Cir. Model 2.11 and Joint Proposed Jury Instruction No. 5 concerning expert and lay opinions. This language is ordinarily applied to both experts and law enforcement officials, but I am not aware that there will be any testimony from law enforcement officials in this case.

You may give any witness's opinion whatever weight you think it deserves, but you should consider

- the reasons and perceptions on which the opinion is based
- any reason that the witness may be biased, and
- all of the other evidence in the case

It is your exclusive right to give any witness's testimony whatever weight you think it deserves.²¹

²⁰ Compare Iowa Civil Jury Instruction No. 100.11 (“hypothetical question”), which was an additional model instruction requested by the parties.

²¹ See 8th Cir. Civil Model 3.07 (2013) (“Allen” charge, stating, “You are, instead, judges — judges of the facts; judges of the believability of the witnesses; and judges of the weight of the evidence.”)

No. 25 — THE PARTIES' CLAIMS AND DEFENSES²²

The Conservator contends that Abbott's Similac Neosure PIF was the source of the *E. sak* bacteria that infected JMK. The law does not impose absolute liability on the manufacturer or seller of a product. The mere fact that JMK contracted bacterial meningitis does not mean that the Similac Neosure PIF was contaminated with *E. sak* bacteria or that Abbott is liable for JMK's injuries as the manufacturer or seller of the PIF. Rather, to establish Abbott's liability, the Conservator must establish one or more of the following claims:²³

²² Compare Joint Proposed Jury Instruction Nos. 7 ("Plaintiff's Claims: In General") and 15 ("Abbott's Defenses: In General"). I have included both the Conservator's claims and Abbott's defenses in one instruction, because the evidence on these claims may not be neatly separated, even if the jurors are to consider them separately.

²³ Compare Joint Proposed Jury Instruction No. 7. As I noted in my summary judgment ruling, the Conservator's primary contention is "that Abbott's PIF was the source of the *C. sak* that infected JMK." See Summary Judgment Ruling (docket no. 108), 5, published at *Security Nat'l Bank of Sioux City, Iowa v. Abbott Labs.*, ___ F. Supp. 2d ___, ___, 2013 WL 2420841, *2 (N.D. Iowa June 3, 2013). I have used a description of the Conservator's claims drawn from my Summary Judgment Ruling (docket no. 108), 5-6, see *Security Nat'l Bank*, ___ F. Supp. 2d at ___, 2013 WL 2420841, at *2. I have attempted to clarify the "design defect" alleged to be "that the design of Abbott's PIF did not prevent the presence of the *E. sak* bacteria." As noted in my Summary Judgment Ruling, the descriptions of the "reasonable alternative safer designs" for the "design defect" claim are based on the allegations found adequate by Senior District Judge O'Brien in his ruling on Abbott's Motion To Dismiss. See Memorandum Opinion And Order (docket no. 64), 33, *Security Nat'l Bank of Sioux City, Iowa v. Abbott Labs.*, 2012 WL 327863, *12 (N.D. Iowa Feb. 1, 2012). I have also placed the three product defect claims in what I believe is logical (*i.e.*, chronological) order: design defect, manufacturing defect, and warning defect (which

- a “design defect” claim, based on the Conservator’s allegations that the design of Abbott’s PIF did not prevent the presence of the *E. sak* bacteria and that distribution of commercially sterile Ready To Feed for the first 28 days is a reasonable alternative safer design to Abbott’s PIF²⁴
- a “manufacturing defect” claim, based on the Conservator’s allegation that the presence of *E. sak* bacteria in Abbott’s PIF was a departure from the intended design of the PIF, and
- a “warning defect” claim, based on the Conservator’s allegations that Abbott’s warning label on its PIF is inadequate to warn of the dangers of use of PIF for newborn or low birth weight babies, making the PIF not reasonably safe

Unless I tell you otherwise, you must consider each claim separately

- you must decide whether or not the Conservator has proved each claim without regard to any other claim, and

presupposes distribution of the product as designed and manufactured). I found the descriptions of the claims in Joint Proposed Jury Instruction No. 7 too vague to have any meaning for the jurors.

²⁴ **In an e-mail response to the 12/31/13 Version, the Conservator notified me of the following: “Just to cut down the issues here, PI will not present the alternative design of biocidal treatment so that language should be struck from Instruction 5 and 6. The design defect we will present to the jury is the alternative of commercially sterile Ready To Feed for the first 28 days.” I have changed the allegation of a “reasonable alternative safer design” as requested.**

- you must decide each claim, and what damages, if any, to award if the Conservator wins on one or more claims, without regard to any of Abbott’s specific defenses, described below
- I will determine the effect of any specific defense, described below, that you find Abbott has proved²⁵

In addition to Abbott’s arguments that the Conservator cannot prove its claims, Abbott asserts two specific defenses to the Conservator’s claims:

- a “state of the art” defense, to all claims, based on Abbott’s allegation that its Similac Neosure PIF was “state of the art” at the time that it was designed, manufactured, and labeled
- an “intermediary” defense, to the “warning defect” claim, based on Abbott’s allegation that medical staff members were responsible for providing adequate warnings to JMK’s mother about Similac Neosure PIF

Again, unless I tell you otherwise, you must consider each specific defense separately

- you must decide whether or not Abbott has proved each specific defense without regard to any other claim or specific defense
- I will determine the effect of any specific defense that you find Abbott has proved

²⁵ I prefer the term “specific defense” to “affirmative defense” for purposes of jury instructions.

Each claim or specific defense consists of “elements,” which are the parts of the claim or specific defense²⁶

- The party asserting the claim or specific defense must prove all of the elements of that claim or specific defense by the greater weight of the evidence
- I will explain the “elements” of the claims and specific defenses in the following instructions

²⁶ We take for granted that claims and defenses consist of “elements,” but that concept may be foreign to jurors.

No. 26 — THE CONSERVATOR’S “DESIGN DEFECT” CLAIM²⁷

The Conservator’s first claim is that the Similac Neosure PIF that JMK consumed was defectively designed. Abbott denies that its PIF was defectively designed.

To win on its “design defect” claim, the Conservator must prove all of the following elements by the greater weight of the evidence:²⁸

²⁷ Compare Iowa Civil Jury Instruction No. 1000.2; Joint Proposed Jury Instruction No. 9.

²⁸ My statement of the elements departs substantially from Iowa Civil Jury Instruction No. 1000.2 and Joint Proposed Jury Instruction No. 9, in light of RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (RESTATEMENT (THIRD) § 2):

First, I conclude that the concepts of the “defective condition” of the PIF and the time at which it was defective (when it left Abbott’s control) should be separate elements. Therefore, I made “defective condition” element *three*, and “defective condition when it left Abbott’s control” element *five*.

Second, I found the treatment of a “reasonable alternative safer design” in Iowa Model Jury Instruction 1000.2 at best cumbersome and at worst confusing, particularly when tied to the factors relevant to the determination of whether there was such a “reasonable alternative safer design” set out in Iowa Model Civil Jury Instruction 1000.4. To overcome these problems, I have combined all of the elements of the model relating to the “reasonable alternative safer design” of 1000.2 into a single element, my element *four*, concerning the existence of a “reasonable alternative safer design.” In the first paragraph of the explanation to element *four*, I have stated the Conservator’s allegations of “reasonable alternative safer designs,” then identified the constituent inquires (practicality, reduction of risks, omission rendering the design unsafe, and reduction or prevention of the plaintiff’s harm, *i.e.*, elements 4, 5, 6, and 7 of Iowa Civil Jury Instruction No. 1000.2) in the second paragraph of the explanation to element *four*. In the third paragraph to the explanation to element *four*, I have

One, Abbott designed the Similac Neosure PIF that JMK consumed.

Two, Abbott was engaged in the business of designing Similac Neosure PIF.²⁹

Three, the Similac Neosure PIF had a design defect.³⁰

identified the pertinent factors to consider, as in 1000.4, modified as I found appropriate to fit this case. Thus, all of the factors properly relate to the overarching question of the existence of a “reasonable alternative safer design,” rather than leaving the jury with questions about which factors in 1000.4 go to which of the “alternative design” elements in 1000.2.

²⁹ The first two elements of the relevant Iowa Civil Jury Instructions for each of the “product defect” claims are the same: That the defendant “sold or distributed” the product and that the defendant was “in the business of selling or distributing” the product. Where there does not appear to be any dispute that Abbott was the designer, manufacturer, and labeler of the product, and liability is not based merely on “seller’s liability” for product defects, I believe that a closer relationship of the defendant’s conduct and business to the specific product defect at issue is appropriate. *See, e.g., Osborn v. Massey-Ferguson, Inc.*, 290 N.W.2d 893, 901-02 (Iowa 1980) (identifying the pertinent elements of a manufacturing defect claim as “manufacture of a product by defendant” and “the manufacturer was engaged in the business of manufacturing such a product”); *Franzen v. Deere and Co.*, 377 N.W.2d 660, 663 (Iowa 1985) (quoting *Osborn*, 290 N.W.2d at 901).

³⁰ I find it unnecessary to cast this element in terms of the PIF being “in a defective condition,” then explaining that it was in a “defective condition” if it had a “design defect,” then explaining that it had a “design defect” if it was “not reasonably safe.” It is simpler, and I believe just as correct, to cast the element as “the PIF had a design defect.” *Cf.* Iowa Civil Jury Instruction No. 1000.1 (“manufacturing defect” instruction simply referring to the “manufacturing defect” rather than to a “defective condition” as the result of a “manufacturing defect”). Furthermore, under RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2, what separates an adequate or safe design from a “defective design” is, ultimately, that it “renders the product not reasonably safe.” RESTATEMENT (THIRD) § 2(b). Therefore, I have defined “design defect” in the explanation to element *three* as follows: “The Similac Neosure PIF had a ‘design defect,’ if the design made it not reasonably safe.”

The Similac Neosure PIF had a “design defect,” if the design made it not reasonably safe

- The Conservator alleges that the Similac Neosure PIF had a “design defect,” because the design did not prevent the presence of the *E. sak* bacteria³¹

***Four*, a reasonable alternative safer design existed at the time of sale or distribution of the Similac Neosure PIF.**

The Conservator alleges that a “reasonable alternative safer design” to the PIF was the following:³²

- distribution of commercially sterile Ready To Feed for the first 28 days³³

³¹ The explanation states the specific allegation of a “design defect” here to be that the “design did not prevent the presence of the *E. sak* bacteria.” *Compare* Joint Proposed Jury Instruction No. 9, element 3 (defining the defect as “the PIF contained *E sakazakii*”). I am not aware of any allegations that the presence of *E. sak* was an *intended* part of the design, in the same way that the presence of diacetyl was an *intended* part of the design of the flavorings in my “popcorn” cases, such as *Kuiper*. Thus, I think that a proper formulation of the alleged defect is that “the design did not prevent the presence of the *E. sak* bacteria.”

³² The Joint Proposed Jury Instructions do not identify any alleged “reasonable alternative safer design(s)” for the PIF. Again, I have used a description of the “reasonable alternative safer designs” for this claim drawn from my Summary Judgment Ruling (docket no. 108), 5-6, *Security Nat’l Bank*, ___ F. Supp. 2d at ___, 2013 WL 2420841, at *2, which was based on allegations found adequate by Senior District Judge O’Brien in his ruling on Abbott’s Motion To Dismiss.

³³ **Because only one “reasonable alternative safer design” is now at issue, in light of the Conservator’s e-mail response to the 12/31/13 Version, there is no need to include an inquiry in the Verdict Form about which one or more “reasonable alternative safer designs” the jury found.**

You must unanimously agree on whether this alternative was a “reasonable alternative safer design” at the time of the sale or distribution of the Similac Neosure PIF.

To prove that “a reasonable alternative safer design” existed at the time of the sale or distribution of the PIF, the Conservator must prove *all* of the following:

- that an alternative design was practical at the time that the PIF was sold or distributed;³⁴
- that the alternative design would have reduced or avoided the foreseeable risks of harm posed by the PIF;³⁵
- that omission of the alternative design rendered the PIF not reasonably safe;³⁶ *and*
- that the alternative design would have reduced or prevented the harm to JMK³⁷

To determine whether “a reasonable alternative safer design” existed, you may consider the following factors and their interaction:³⁸

³⁴ See Iowa Civil Jury Instruction No. 1000.2, element 4.

³⁵ See Iowa Civil Jury Instruction No. 1000.2, element 5.

³⁶ See Iowa Civil Jury Instruction No. 1000.2, element 6.

³⁷ See Iowa Civil Jury Instruction No. 1000.2, element 7.

³⁸ See Iowa Civil Jury Instruction No. 1000.4; *compare* Joint Proposed Jury Instruction 9, explanation to element 4.

- the magnitude and probability of the foreseeable risks of harm from the PIF;
- any instructions or warnings accompanying the PIF;
- consumer expectations about performance of PIF, including expectations arising from product portrayal and marketing;
- whether the risk presented by the PIF was open and obvious to, or generally known by, foreseeable users;
- the technological feasibility and practicality of the alternative design;
- whether the alternative design could be implemented at a reasonable cost;
- the relative advantages and disadvantages of the PIF as designed and as it could have been alternatively designed;
- the likely effects of the alternative design on the PIF's longevity, esthetics, efficiency, and utility;³⁹
- the range of consumer choice among similar products, with and without the alternative design;
- the overall safety of the PIF with and without the alternative design, including whether the alternative design would have

³⁹ I do not believe “maintenance” and “repair” are relevant to a PIF product, even if they are listed as part of this factor in Iowa Civil Jury Instruction No. 1000.4 and Joint Proposed Jury Instruction No. 9.

introduced other dangers of equal or greater magnitude to those posed by the PIF as designed;

- the custom and practice in the industry and how Abbott’s design of the PIF compared with other competing products in actual use; and
- any other factor shown by the evidence to have some bearing on this question

Five, the Similac Neosure PIF had the design defect at the time that it left Abbott’s control.

Six, the design defect was a cause of JMK’s damages.

A design defect in a product was “a cause” of damage if the damage would not have happened except for the design defect. The design defect does not have to be the only cause of JMK’s damages.⁴⁰

⁴⁰ See Iowa Civil Jury Instruction No. 1000.8 (modified by deleting the erroneous reference to “proximate” cause in the model). It is plain that the specific defect in question—in this instruction, the “design defect”—must be a cause of the damage, not simply JMK’s consumption of the product (where the consumption of the product could have caused damage despite the lack of a design, manufacturing, or warning defect, if, for example, it was contaminated while being prepared). It is also plain that the “damage” in question is the damage to “JMK,” not to the plaintiff (*i.e.*, the Conservator). For these reasons, I decline the Conservator’s request to give a single “causation” instruction, which would muddy the waters about what “defect” was in question for each claim, and I reject Abbott’s contention that this statement of causation is inconsistent with the RESTATEMENT (THIRD) § 1 standard.

Although there is authority for Abbott’s contention that “causation” must include both “general” causation—that the product is capable of causing the kind of injury the plaintiff suffered—and “specific” causation—that the product did cause the injured person’s injury—I do not find any discussion of “general” and “specific” causation in RESTATEMENT (THIRD) § 1, the comments to it, or controlling precedent applying it.

If the Conservator does *not* prove *all* of these elements by the greater weight of the evidence, then you must find in favor of Abbott on the Conservator’s “design defect” claim. On the other hand, if the Conservator *does* prove *all* of these elements by the greater weight of the evidence, then you must consider the Conservator’s claims for “damages” for JMK’s injuries.⁴¹

Although Abbott asserts that this is a “toxic tort” case, in which bifurcation of “general” and “specific” causation is appropriate, citing, *e.g.*, *Ranes v. Adams Labs., Inc.*, 778 N.W.2d 677, 687-88 (Iowa 2010), I do not agree. *Ranes* noted that, under the RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 28 cmt. c, “[t]he Restatement authors supplement their explanation by asserting factual causation is a necessary element in every tort case; the ‘general and specific’ language has simply become more prevalent in toxic-tort cases.” 778 N.W.2d at 688. Moreover, the court explained, “General causation is a showing that a drug or chemical is capable of causing the type of harm from which the plaintiff suffers.” *Id.* at 687. Here, the question is not whether the PIF was capable of causing harm, but whether the PIF was contaminated by the *E. sak* bacteria that caused JMK’s meningitis, as a result of a design defect (or other product defect). I do not believe that there is any dispute that *E. sak* is capable of causing the kind of injury that JMK suffered, nor do I understand there to be a dispute about whether or not JMK’s injuries were caused by an *E. sak* infection, but only about whether or not the source of the *E. sak* infection was Abbott’s PIF. I do not believe that instructing the jurors on “general” and “specific” causation is either appropriate or likely to be helpful.

⁴¹ There is no reason to direct the jurors to consider Abbott’s “state of the art” specific defense, if they find that the Conservator has proved the elements of the “design defect” claim, where the parties agreed, in Joint Proposed Jury Instructions Nos. 7 and 15, that claims are to be considered without regard to specific defenses and that I would determine the effect of any specific defenses that Abbott may prove.

**No. 27 — THE CONSERVATOR’S
“MANUFACTURING DEFECT” CLAIM⁴²**

The Conservator’s second claim is that the Similac Neosure PIF that JMK consumed was defectively manufactured. Abbott denies that its PIF was defectively manufactured.

To win on its “manufacturing defect” claim, the Conservator must prove all of the following elements by the greater weight of the evidence:

One, Abbott manufactured the Similac Neosure PIF that JMK consumed.

Two, Abbott was engaged in the business of manufacturing Similac Neosure PIF.⁴³

Three, the Similac Neosure PIF had a manufacturing defect.⁴⁴

The Similac Neosure PIF had a “manufacturing defect,” if it departed from its intended design in one or more ways⁴⁵

⁴² See Iowa Civil Jury Instruction No. 1000.1; Joint Proposed Jury Instruction 8.

⁴³ See, *supra*, note 29.

⁴⁴ I have again separated the element requiring proof of the existence of the defect from the element requiring proof that the defect existed at the time that the product left Abbott’s control, just as I did in the “design defect” elements instruction.

⁴⁵ See Joint Proposed Jury Instruction No. 8, element 3. Although Abbott asserts that proof of the “intended design” is a required element to prove a “manufacturing defect” claim, Abbott does not offer an instruction setting out proof of the “intended design” as a separate element. Also, Abbott argues that such a requirement is important here, where the Conservator has also argued that the PIF had

- The Conservator alleges that the Similac Neosure PIF had a “manufacturing defect,” because it contained *E. sak* bacteria

Four, the Similac Neosure PIF had the manufacturing defect at the time that it left Abbott’s control.

Five, the manufacturing defect was a cause of JMK’s damages.

A manufacturing defect in a product was “a cause” of damage if the damage would not have happened except for the manufacturing defect. The manufacturing defect does not have to be the only cause of JMK’s damages.⁴⁶

If the Conservator does *not* prove *all* of these elements by the greater weight of the evidence, then you must find in favor of Abbott on the Conservator’s “manufacturing defect” claim. On the other hand, if the Conservator *does* prove *all* of these elements by the greater weight of the

a “design defect,” because the design of the PIF did not exclude *E. sak* contamination. Abbott argues, further, that, if the alleged defective condition is inherent in the design, then the presence of the defect does not, in itself, demonstrate a departure from that design. I find that this argument borders on sophistry. Surely Abbott is not arguing that its intended design was to *include E. sak*! The fact that a design is “defective,” because it is “unreasonably dangerous,” where reasonable alternative safer designs would have excluded the presence of *E. sak*, does not mean that the *intended design* (for purposes of a “manufacturing defect” claim) was to *include E. sak*. I conclude that the definition of a “manufacturing defect” as “depart[ure] from the intended design,” coupled with the Conservator’s specific allegation of a “manufacturing defect” because the PIF contained *E. sak*, are sufficient to address the relevance and nature of the “intended design.”

⁴⁶ See Iowa Civil Jury Instruction No. 1000.8 (modified by deleting the erroneous reference to “proximate” cause in the model); *see also, supra*, note 40.

evidence, then you must consider the Conservator's claims for "damages" for JMK's injuries.⁴⁷

⁴⁷ Again, there is no reason to direct the jurors to consider Abbott's "state of the art" specific defense, if they find that the Conservator has proved the elements of the "manufacturing defect" claim, where the parties agreed, in Joint Proposed Jury Instructions Nos. 7 and 15, that claims are to be considered without regard to specific defenses and that I would determine the effect of any specific defenses that Abbott may prove.

**No. 28 — THE CONSERVATOR’S “WARNING
DEFECT” CLAIM⁴⁸**

The Conservator’s third claim is that the Similac Neosure PIF that JMK consumed had defective warnings. Abbott denies that its PIF had defective warnings.

To win on its “warning defect” claim, the Conservator must prove all of the following elements by the greater weight of the evidence:⁴⁹

***One*, Abbott labeled and distributed the Similac Neosure PIF that JMK consumed.**

***Two*, Abbott was engaged in the business of labeling and distributing Similac Neosure PIF.⁵⁰**

⁴⁸ See Iowa Civil Jury Instruction No. 1000.3; Joint Proposed Jury Instruction No. 10.

⁴⁹ My statement of the elements departs substantially from Iowa Civil Jury Instruction No. 1000.3 and Joint Proposed Jury Instruction No. 10, in light of RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (RESTATEMENT (THIRD) § 2. Specifically, I conclude that the relationship between the “foreseeable risks of harm posed by the PIF” and the “reasonable warnings” in Iowa Civil Jury Instruction No. 1000.3 is at best cumbersome and at worst confusing. Consequently, I have separated the “foreseeable risks of harm” part of element 3 from the “reduction of risks by reasonable warnings” part, as my element *three*, then placed the “risks not obvious” part of element 5 into my element *four*. The remainder of element 3 of the model, concerning reduction of the foreseeable risks by reasonable warnings then becomes my element *five*. Elements 4 and 6 of the model then follow as my elements *six* and *seven*.

⁵⁰ See, *supra*, note 29.

Three, the presence of *E. sak* bacteria in the PIF, creating a potential for bacterial infection in newborn or low birth weight babies, was a foreseeable risk of harm posed by the Similac Neosure PIF.⁵¹

As to “foreseeable risk of harm,”

- unforeseeable risks arising from foreseeable use or consumption of a product cannot specifically be warned against
- the Conservator must prove that the presence of *E. sak* bacteria in PIF, creating a potential for bacterial infection in newborn or low birth weight babies, was known to or should have been known to manufacturers of PIF, such as Abbott⁵²

⁵¹ It appears from the Conservator’s formulation of element 3 of Joint Proposed Jury Instruction No. 10 that the “foreseeable risk of harm” alleged by the Conservator is “the risk of [*E. sak* bacterial] infection in low birth weight babies [and] the potential harm resulting from such an infection.” I have paraphrased this “foreseeable risk of harm” as “the presence of *E. sak* bacteria in the PIF, creating a potential for bacterial infection in low birth weight babies.” **In its response to the 12/31/03 Version, the Conservator asserts that it inadvertently omitted “neonate” as well as “low birth weight babies.” I have made appropriate changes in this instruction, the “intermediary” defense instruction, and the Verdict Form, but I have preferred the word “newborn.”**

⁵² See Restatement (Third) § 2, cmt. *m* (last paragraph before Illustration 15: “Unforeseeable risks arising from foreseeable product use or consumption by definition cannot specifically be warned against. Thus, in connection with a claim of inadequate . . . warning, plaintiff should bear the burden of establishing that the risk in question was known or should have been known to the relevant manufacturing community.”); Joint Proposed Jury Instruction No. 10, Abbott’s requested explanation of element 3.

- Abbott was responsible for performing reasonable testing prior to marketing a product and to discover risks and ways to avoid risks that such testing would have revealed
- You should also treat Abbott as having known what reasonable testing would have revealed⁵³

***Four*, this risk of harm was not obvious to, or generally known by, foreseeable users of the PIF.**

***Five*, this risk of harm could have been reduced or avoided by providing one or more reasonable instructions or warnings.⁵⁴**

The Conservator alleges that the foreseeable risk of harm could have been avoided by informing the consumer of the following:

- the risk of *E. sak* bacterial infection in newborn or low birth weight babies
- the potential harm resulting from *E. sak* bacterial infection
- the availability in the marketplace of alternative, sterile liquid infant formulas⁵⁵

⁵³ The last two bullet points are also drawn from RESTATEMENT (THIRD), § 2, cmt *m* (last paragraph before Illustration 15).

⁵⁴ I find Abbott's objection to "one or more instructions or warnings," rather than "instruction(s) or warning(s)" in elements *five*, *six*, and *seven* is frivolous. This is a distinction without a difference. Moreover, the plaintiff only has to prove that one or more such instructions or warnings would have avoided the plaintiff's damages, not that all of the instructions or warnings were required to avoid the plaintiff's damages.

You must unanimously agree on which one or more of these instructions or warnings, if any, could have avoided the foreseeable risk of harm.

A seller of a commercial product must provide reasonable instructions and warnings

- about the risks of injury posed by their product
- about how to use and consume products safely
- about the existence and nature of product risks so that consumers can prevent harm either by appropriate conduct during use or consumption or by choosing not to use or consume the product⁵⁶

In deciding whether an instruction or warning would have reduced or avoided the foreseeable risk of harm, you should consider the following factors:

- whether the instruction or warning addresses the foreseeable risk of harm
- whether the instruction or warning is likely to be understood by the expected user group
- whether the instruction adequately conveys the severity of the foreseeable risk of harm

⁵⁵ See Joint Proposed Jury Instruction No. 10, element 3 (the Conservator's allegations of adequate warnings).

⁵⁶ RESTATEMENT (THIRD), § 2, cmt *i*.

- the characteristics of the expected user group,⁵⁷ and
- whether the foreseeable risk of harm is sufficiently obvious or generally known that a warning may be ignored by users or may make other warnings less effective⁵⁸

Six, the omission of one or more of the instructions or warnings rendered the PIF not reasonably safe.

Seven, the omission of one or more instructions or warnings was a cause of JMK's damages.

An omission of an instruction or warning was “a cause” of damage if the damage would not have happened except for the omission of that instruction or warning. The omission of the instruction or warning does not have to be the only cause of JMK's damages.⁵⁹

If the Conservator does *not* prove *all* of these elements by the greater weight of the evidence, then you must find in favor of Abbott on the Conservator's “warning defect” claim. On the other hand, if the Conservator

⁵⁷ The first four bullet points are paraphrased, in plain English, from the last line of the first paragraph of RESTATEMENT (THIRD), § 2, cmt *i* (in making their assessment of the adequacy of warnings, “courts must focus on various factors, such as content and comprehensibility, intensity of expression, and the characteristics of expected user groups”).

⁵⁸ See Joint Proposed Jury Instruction No. 10, agreed explanation to element 5; see Restatement (Third) § 2, cmt. *j* (paraphrased in plain English).

⁵⁹ See Iowa Civil Jury Instruction No. 1000.8 (modified by deleting the erroneous reference to “proximate” cause in the model); see also, *supra*, note 40.

does prove *all* of these elements by the greater weight of the evidence, then you must consider the Conservator's claims for "damages" for JMK's injuries.⁶⁰

⁶⁰ Again, there is no reason to direct the jurors to consider Abbott's "state of the art" or "intermediary" specific defense, if they find that the Conservator has proved the elements of the "manufacturing defect" claim, where the parties agreed, in Joint Proposed Jury Instructions Nos. 7 and 15, that claims are to be considered without regard to specific defenses and that I would determine the effect of any specific defenses that Abbott may prove.

No. 29 — DAMAGES IN GENERAL⁶¹

It is my duty to instruct you about the measure of damages. By instructing you on damages, I do not mean to suggest what your verdict should be on any claim.

If you find for the Conservator on one or more of its claims, you must determine what damages to award. “Damages” are the amount of money that will reasonably and fairly compensate the Conservator for any injury that you find JMK suffered as a result of a defect in Abbott’s Similac Neosure PIF

- It is for you to determine what damages, if any, have been proved
- Any damages award must be based upon evidence and not upon speculation, guesswork, or conjecture
- You cannot determine the amount for a particular item of damages by taking down each juror’s estimate and agreeing in advance that the average of those estimates will be your award for that item of damages
- You must not award duplicate damages, so do not allow amounts awarded under one item of damages to be included in any amount awarded under another item of damages

⁶¹ My stock instruction for damages. *Compare* Joint Proposed Jury Instructions No. 12 and No. 13, first paragraph.

Future damages

- must be reduced to “present value”
 - “Present value” is a sum of money paid now, in advance, that, together with interest earned at a reasonable rate of return, will compensate for future losses⁶²
- must be limited to JMK’s life expectancy, as supported by the evidence
 - a Standard Mortality Table indicates that the normal life expectancy of people who are the same age as JMK is 76 years, but those statistics are not conclusive
 - You may use all of the evidence about JMK’s
 - health
 - habits
 - lifestyle, and
 - life expectancywhen deciding the amount of future damages⁶³

⁶² IOWA CODE §§ 624.18(2), 668.3(b); Iowa Civil Jury Instruction No. 200.35B.

⁶³ *See* Joint Proposed Jury Instruction No. 13. The Conservator’s requested instruction on “mortality tables,” apparently drawn from Iowa Civil Jury Instruction No. 200.36, allows the parties to argue what JMK’s life expectancy is, based on the evidence in the case, as requested by Abbott.

No. 30 — COMPENSATORY DAMAGES⁶⁴

The Conservator seeks compensatory damages for “past and future medical expenses,” “past and future loss of full mind and body,” “past and future pain and suffering,” and “loss of future earning capacity.” You must consider each item of damages separately and award only those amounts of damages, if any, that will compensate the Conservator for injuries that JMK suffered as a result of a defect in Abbott’s Similac Neosure PIF.

Medical Expenses

- **“Past medical expenses”** include, but are not limited to, the reasonable costs of necessary
 - hospital charges
 - doctor charges
 - prescriptions
 - other medical servicesfrom JMK’s birth until the time of your verdict⁶⁵
- **“Future medical expenses”** include the present value of “medical expenses” that JMK is reasonably certain to incur from the date of your verdict into the future⁶⁶

⁶⁴ Compare Joint Proposed Jury Instruction No. 13.

⁶⁵ Iowa Civil Jury Instruction No. 200.6.

⁶⁶ Iowa Civil Jury Instruction No. 200.7.

- In determining the reasonable cost of necessary hospital and doctor charges, prescriptions, and other medical services, you may consider:
 - the amount charged
 - the amount actually paid, and
 - any other evidence of what is reasonable and proper for such medical expenses⁶⁷

Loss Of Full Mind And Body

- **“Past loss of full mind and body”** is
 - loss of the ability of a particular part of the body to function in a normal manner
 - loss of the ability of a particular part of the mind to function in a normal mannerfrom JMK’s birth until the time of your verdict⁶⁸
- **“Future loss of full mind and body”** is the present value of the future loss of function of the mind and body that JMK is reasonably certain to experience from the date of your verdict into the future⁶⁹

⁶⁷ See Iowa Civil Jury Instruction No. 200.6, second paragraph.

⁶⁸ Iowa Civil Jury Instruction No. 200.10.

⁶⁹ Iowa Civil Jury Instruction No. 200.11B.

Pain and suffering

- **“Past physical pain and suffering”** may include, but is not limited to:
 - unpleasant feelings
 - bodily distress or uneasiness
 - bodily suffering, sensations, or discomfortfrom JMK’s birth until the time of your verdict
- **“Past mental pain and suffering”** may include, but is not limited to:
 - mental anguish
 - loss of enjoyment of lifefrom JMK’s birth until the time of your verdict⁷⁰
- **“Future pain and suffering”** includes the present value of physical or mental “pain and suffering” that JMK is reasonably certain to experience from the date of your verdict into the future⁷¹
- Factors for determining the amount of damages for physical or mental pain and suffering include, but are not limited to:
 - the nature and extent of the injury
 - whether the injury is temporary or permanent

⁷⁰ Iowa Civil Jury Instruction No. 200.12.

⁷¹ Iowa Civil Jury Instruction No. 200.13B.

- whether the injury results in partial or total disability⁷²

Loss Of Future Earning Capacity

- **“Loss of future earning capacity”** is the present value of
 - the reduction in the ability to work generally
 - the reduction in the ability to earn money generally, but
 - is *not* the reduction in the ability to work in a particular job

⁷² See, e.g., 8th Cir. Civil Model 15.70 (2013), item 1 (damages: injury to employee).

No. 31 — PUNITIVE DAMAGES⁷³

In addition to compensatory damages, the law permits the jury, under certain circumstances, to award punitive damages. Punitive damages are not intended to compensate for injury, but are allowed to punish willful and wanton conduct and to discourage the defendant and others from like conduct in the future.⁷⁴ However, punitive damages are not available on the Conservator's "manufacturing defect" claim.⁷⁵

⁷³ See Joint Proposed Jury Instruction No. 13; Iowa Civil Jury Instruction Nos. 210.1-210.4. In its response to the 12/31/13 VERSION, Abbott contends that the jury should not be instructed on "punitive damages" before the close of evidence and then only if there is sufficient evidence to warrant submitting such an instruction. The authorities cited by Abbott do not stand for the proposition that it is improper to instruction on "punitive damages" before any evidence is submitted, only for the proposition that, if there is not sufficient evidence, punitive damages should not be submitted. If I determine prior to submitting the case to the jury that there is insufficient evidence to support an award of "punitive damages," I will withdraw "punitive damages" from the jury's consideration.

⁷⁴ *Hamilton v. Mercantile Bank of Cedar Rapids*, 621 N.W.2d 401, 407 (Iowa 2001) ("The purpose of imposing punitive damages in such a case is to punish the willful and wanton conduct and deter the defendant, and others, from repeating such conduct in the future."); *Team Central, Inc. v. Teamco, Inc.*, 271 N.W.2d 914, 925 (Iowa 1978) (explaining that the purpose of punitive damages "is to punish the wrongdoer rather than to compensate the victim").

⁷⁵ The parties agree that the Conservator is not seeking "punitive damages" on the "manufacturing defect" claim.

If the Conservator has won on either or both of its “design defect” and “warning defect” claims, you must consider separately whether or not to award punitive damages on each those claims. You may award

- the same or different amounts of punitive damages for each claim
- some punitive damages on one claim and none on the other, or
- no punitive damages at all on either claim

Burden of proof

An award of punitive damages is subject to a higher standard of proof than is applicable to other issues in this case:

- The elements required to award punitive damages must be proved “by the greater weight of clear, convincing, and satisfactory evidence”
- Evidence is “clear, convincing, and satisfactory,” if there is no serious or substantial uncertainty about the conclusion to be drawn from it⁷⁶

Awarding punitive damages

You may award punitive damages on a particular “product defect” claim, only if the Conservator proves *all* of the following elements by the greater weight of clear, convincing, and satisfactory evidence:⁷⁷

⁷⁶ See Iowa Civil Jury Instruction No. 100.19.

One, Abbott’s conduct with regard to that “product defect” claim warrants a penalty in addition to any amount that you award to compensate the Conservator for actual injuries to JMK.

Conduct warrants an award of punitive damages if it constituted a willful and wanton disregard for the rights or safety of another.⁷⁸ Conduct was “willful and wanton” if

⁷⁷ I have decided to recast my punitive damages instruction under Iowa law into three elements: two “eligibility” elements, and a third “amount of punitive damages” element.

In the past, I have cast the two “eligibility” elements for punitive damages in terms of “willful and wanton disregard for rights or safety” and “actual damage to the plaintiff,” relying on the two requirements for an award of punitive damages stated in the first unnumbered paragraph of Iowa Civil Jury Instruction No. 210.1. However, after some reconsideration, I believe that it is conduct that was “willful and wanton” that establishes that a penalty in addition to the amount of compensatory damages is warranted. *See, e.g., Wolf v. Wolf*, 690 N.W.2d 887, 894 (Iowa 2005) (“We believe that clear, convincing, and satisfactory evidence supports the district court’s finding of willful and wanton conduct warranting punitive damages.”); *McClure v. Walgreen Co.*, 613 N.W.2d 225, 230-31 (Iowa 2000) (explaining that punitive damages “are appropriate when actual or legal malice is shown,” and “legal malice is shown by wrongful conduct committed or continued with a willful or reckless disregard for another’s rights”); *but see Brokaw v. Winfield-Mt. Union Cmty. Sch. Dist.*, 788 N.W.2d 386, 396 n.2 (Iowa 2010) (“If the threshold determination of ‘willful and wanton conduct’ has been met, the court proceeds to a second step: whether in its discretion the facts of a particular case warrant the imposition of punitive damages.”). Therefore, I have recast the “eligibility” elements as “punitive damages are warranted” and “actual damage.”

I have now included as the third element for an award of punitive damages proof of what amount, if any, of punitive damages is warranted by the defendants’ wrongful conduct.

⁷⁸ *See* Iowa Civil Jury Instruction No. 210.1, first unnumbered paragraph.

- a person intentionally did an act of an unreasonable character
- the person did so in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow⁷⁹

Two, Abbott’s conduct caused actual damage to JMK.

You can only award punitive damages if you first find that Abbott’s wrongful conduct caused actual damage to JMK and you award compensatory damages to the Conservator for such actual damage pursuant to Instruction No. 10.⁸⁰

Three, the amount, if any, of punitive damages that is warranted by Abbott’s wrongful conduct at issue in that “product defect” claim.

There is no exact rule to determine the amount of punitive damages, if any, you should award. In determining what amount, if any, to award for punitive damages, you may consider the following factors:

- the nature of Abbott’s conduct that harmed JMK
- the amount of punitive damages that will punish and discourage like conduct by Abbott
 - you may consider Abbott’s financial condition or ability to pay

⁷⁹ See Iowa Civil Jury Instruction No. 210.4.

⁸⁰ This explanation follows from the “actual damage” requirement in the first unnumbered paragraph of Iowa Civil Jury Instruction No. 210.1.

- you may not award punitive damages solely because of Abbott’s wealth or ability to pay
- the amount of punitive damages that is reasonably related to the amount of compensatory damages that you award to the Conservator on the “product defect” claim in question
- the existence and frequency of similar conduct, **but** you may *not* award punitive damages to punish Abbott for any of the following:
 - harm caused to others
 - for out-of-state conduct that was lawful where it occurred
 - any conduct by Abbott that is not similar to the conduct that caused the harm to JMK in this case⁸¹

82

⁸¹ See Iowa Civil Jury Instruction No. 210.1, third unnumbered paragraph and numbered factors. I have included the parties’ requested limitations on “similar conduct.”

⁸² I recognize that IOWA CODE § 668A.1(1)(b) requires an inquiry about whether the wrongful conduct was directed specifically at JMK. Nevertheless, in this case, I cannot conceive of the evidence that would permit the jurors to find that the wrongful conduct at issue was directed specifically at JMK. I have long decried the failure of the Iowa Supreme Court to explain or fully analyze its interpretation of IOWA CODE § 668A.1(1)(b), requiring this inquiry. See *Chadima v. National Fidelity Life Ins. Co.*, 894 F. Supp. 1300, 1304-09 (N.D. Iowa 1995). Unfortunately, it appears that the Iowa Supreme Court still has not done so. I believe that the “different plaintiff” test is the test called for by existing Iowa case law. *Id.* I would use that test with considerable

**No. 32 — ABBOTT’S “STATE OF THE ART”
SPECIFIC DEFENSE⁸³**

reluctance, however, because I do not believe that is in accord with the plain meaning of the language of IOWA CODE § 668A.1(1)(b). *Id.* Ultimately, it is the Iowa Supreme Court’s responsibility to interpret state statutes, and I believe that this is the test called for by existing Iowa case law. *Id.*

Here, if the plaintiff can demonstrate—contrary to my belief—that there is evidence that would demonstrate that the wrongful conduct at issue was directed specifically at JMK under the required “different plaintiff” test, I would give the following instruction:

Additional inquiry

In addition, if you award the Conservator punitive damages against Abbott on a “product defect” claim, then you will be asked to answer the following question in the Verdict Form:

**Was the wrongful conduct of Abbott relating to the
“product defect” claim in question directed specifically
at JMK?**

The wrongful conduct was not “directed specifically at” JMK, if Abbott’s conduct would have been the same if a different plaintiff were involved.

You need not be concerned with the effect of your determination on this question, because the effect of your determination on this question is for me to decide.

⁸³ See Defendant’s Proposed Jury Instruction No. 16; my instruction used in *Kuiper v. Givaudan Flavors Corp.*, No. C 06-4009-MWB (N.D. Iowa Feb. 17, 2009); Iowa Civil Jury Instruction 1000.11 (2002) (superseded). I reject the Conservator’s argument that a “state of the art” defense is contrary to “Iowa law,” when the defense is recognized by statute, IOWA CODE § 668.12. I also reject the notion that a “state of the art” defense is necessarily subsumed as an element of a plaintiff’s product liability claim. See Iowa Civil Jury Instruction No. 1000.11 (2012) (explaining why the affirmative defense instruction has been withdrawn). Indeed, § 668.12(1) expressly

Abbott's first specific defense is that its Similac Neosure PIF was "state of the art" at the time that it was designed, manufactured, and labeled. The "state of the art" is the safest and most advanced technology and the most current scientific knowledge that reasonably could have been used in the design of PIF at the time that Abbott's Similac Neosure PIF was designed, manufactured, and labeled. The Conservator denies that the PIF was "state of the art."

To prove its "state of the art" defense, Abbott must prove the following by the greater weight of the evidence:

Abbott's Similac Neosure PIF was the best that feasibly could be done to design, manufacture, or label PIF to prevent JMK's injuries at the time it was designed, manufactured, or labeled.⁸⁴

places the burden of proof on the "state of the art" defense on the person against whom the product defect claim is brought. Although the elements of the plaintiff's case and the "state of the art" defense may overlap, they are not necessarily coterminous. *See, e.g.,* RESTATEMENT (THIRD) § 2, cmt. *d.* Rather, as the Iowa Supreme Court has explained, "[W]hen a defect is proved to exist but is consistent with the state of the art, there is no liability.'" *Falada v. Trinity Indus., Inc.*, 642 N.W.2d 247, 250 (Iowa 2002) (citing *Hilrichs v. Avco Corp.*, 478 N.W.2d 70, 76 (Iowa 1991), *abrogated on other grounds by Reed v. Chrysler Corp.*, 494 N.W.2d 224, 230 (Iowa 1992)). The viability of the "state of the art" defense was not at issue in *Wright v. Brooke Group, Ltd.*, 652 N.W.2d 159 (Iowa 2002), on which the Conservator and the Iowa Civil Jury Instruction Committee relied.

⁸⁴ The parties dispute whether the PIF must have been "state of the art" at the time it was designed (the Conservator) or at the time it was designed, manufactured, and labeled (Abbott). This specific argument goes, in part, to the parties' dispute about whether "state of the art" is a complete defense or even a partial defense to all of the "defect" claims at issue here. That is a problem that I can solve on post-trial motions, particularly when the jurors are specifically instructed that they need not be concerned

For a product to meet this requirement, it must have been all of the following:

- technologically possible
 - something was “technologically possible,” if
 - it was based on the latest scientific knowledge, and
 - it was based on the latest discoveries in the field
- practical
 - something was “practical,” if
 - it met the user’s needs, and
 - it was economically reasonable
 - not every alternate design or safety procedure for which technology exists is necessarily practical
 - You may consider whether the design, manufacture, and labeling of the product met the custom in the industry, *but*
 - custom in the industry is only what was being done

with the effect of their determination on this defense, because I will decide the effect. For present purposes, suffice it to say that § 668.12(1) it is a defense to claims of “alleged defect in the design, . . . manufacturing, . . . packaging, warning, or labeling of a product . . . if . . . the product conformed to the state of the art in existence at the time the product was designed, . . . manufactured, . . . packaged, provided with a warning, or labeled.”

- it may be something less than the best that feasibly could be done⁸⁵
- You may consider whether the design, manufacture, and labeling of the product complied with applicable laws or regulations, *but*
 - laws and regulations may set only minimum requirements

You will be asked to indicate in the Verdict Form whether Abbott has proved by the greater weight of the evidence that its Similac Neosure PIF was “state of the art” in design, manufacture, or labeling. You need not be concerned with the effect of this determination; I will determine the effect of this specific defense, if you find that Abbott has proved it.

⁸⁵ This bullet and the next one are based on Iowa Civil Jury Instruction No. 1000.11 (2002) (explaining that “[c]ustom in the industry is not necessarily state of the art, nor is every [alternate design] [safety device] for which technology exists necessarily feasible”); *and compare* Joint Proposed Jury Instruction No. 11 (concerning evidence regarding the custom and practice of infant formula manufacturers, the Infant Formula Act, and the Code of Federal Regulations, as they pertain to “reasonableness” of Abbott’s conduct). Joint Proposed Jury Instruction No. 11 is something of an “orphan,” because it is not clear to what claim(s) or defense(s) it relates. Various elements of various claims require that something be reasonable, but none require that Abbott *acted* “reasonably,” with the exception of the “state of the art” defense, concerning what “reasonably” could be done, and the “intermediary” defense, which asks whether Abbott could reasonably have relied on an intermediary to give JMK adequate and appropriate warnings. The reference to customs, laws, and regulations is inapposite to the latter defense.

**No. 33 — ABBOTT’S “INTERMEDIARY” SPECIFIC
DEFENSE⁸⁶**

Abbott’s second specific defense is a defense to the Conservator’s “warning defect” claim. Abbott contends that the medical staff of JMK’s birth hospital, including the doctor who prescribed Similac Neosure PIF to JMK and the nurse who provided JMK’s mother with the Similac Neosure PIF, were “intermediaries” who were responsible for providing warnings about safe usage of the Similac Neosure PIF to JMK’s caregivers. The Conservator denies that Abbott could rely on such “intermediaries” to provide appropriate instructions and warnings.

To prove its “intermediary” defense, Abbott must prove the following by the greater weight of the evidence:

One, the medical providers who prescribed or provided Similac Neosure PIF to JMK’s caregivers knew or should have known that the presence of *E. sak* bacteria in PIF, creating a potential for bacterial infection

⁸⁶ See Defendant’s Proposed Jury Instruction No. 17 (relying on the “sophisticated user” defense instruction in *Kuiper*); RESTATEMENT (THIRD) § 2, cmt. *i*. I do not find that the “sophisticated user” defense, based on RESTATEMENT (SECOND) OF TORTS, § 388, is necessarily analogous to an “intermediary” defense, as described in RESTATEMENT (THIRD) § 2, cmt. *i*. **In its response to the 12/31/03 Version, the Conservator argues that this instruction should not be submitted. Because I have instructed the jurors that they need not concern themselves with the effect of this defense, because I will determine its effect, submitting this instruction preserves the issue of the availability of the defense in this case for post-trial consideration. I note, however, that RESTATEMENT (THIRD) § 2, cmt. *i*, does not appear to limit the defense in the ways that the Conservator argues other courts have.**

in newborn or low birth weight babies, was a foreseeable risk of harm posed by the Similac Neosure PIF.⁸⁷

In deciding whether the medical providers knew or reasonably should have known about the foreseeable risk of harm from the PIF, you may consider the following:

- whether Abbott provided medical providers with information about the foreseeable risk of harm from PIF⁸⁸
- whether the medical providers had access to other sources of information about the foreseeable risk of harm from PIF

***Two*, Abbott reasonably relied on the medical providers who prescribed or provided Similac Nesoure PIF to provide JMK’s caregivers**

⁸⁷ RESTATEMENT (THIRD) § 2, cmt. *i*, does not expressly refer to the intermediary having knowledge of the foreseeable risk of harm in question. Nevertheless, it is plain that an “intermediary” cannot provide adequate warnings, and cannot reasonably be relied upon to provide adequate warnings, if the intermediary neither knew nor should have known about the foreseeable risk of harm in question.

⁸⁸ RESTATEMENT (THIRD), § 2, cmt. *i*, notes that “[d]epending on the circumstances, Subsection (c) may require that instructions and warnings be given not only to purchasers, users, and consumers, but also to others who a reasonable seller should know will be in a position to reduce or avoid the risk of harm.” Although this comment does not elucidate what those “circumstances” might be, it seems reasonably likely that one such circumstance would be where a medical provider had access to information about the foreseeable risk of harm from something they were prescribing or providing to a consumer from some source other than the manufacturer. Indeed, in many jurisdictions, the “intermediary” defense is limited to “learned intermediaries” who provide prescription medications. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 6(d) & cmt. *e*, at 145, 148 (1998) (“learned intermediary rule” concerning liability of commercial sellers or distributors of defective prescription drugs and medical devices).

with instructions and warnings about the risk of the presence of *E. sak* bacteria in PIF and its potential for bacterial infection in newborn or low birth weight babies.

In deciding whether Abbott reasonably relied on the medical providers to provide JMK's caregivers with instructions and warnings, you may consider the following:

- whether the medical providers were in a better position than Abbott to provide adequate and effective warnings⁸⁹
- the severity of the risks posed by the product
- the likelihood that the medical providers would convey the information to the ultimate caregiver
- the practicality, reasonableness, and effectiveness of Abbott giving a warning directly to the ultimate caregiver⁹⁰

You will be asked to indicate in the Verdict Form whether Abbott has proved its “intermediary” defense to the “warning defect” claim by the greater weight of the evidence. You need not be concerned with the effect of this

⁸⁹ Abbott states this as the second element of its “intermediary” defense, but it seems to me to go to “the reasonableness in the circumstances” of relying on an intermediary, which is the standard for reliance on an intermediary in RESTATEMENT (THIRD), § 2, cmt. *i*.

⁹⁰ The last three bullets are specifically identified as “factors to be considered” in deciding whether reliance on an intermediary was reasonable in RESTATEMENT (THIRD), § 2, cmt. *i*.

determination; I will determine the effect of this specific defense, if you find that Abbott has proved it.

No. 34 — OUTLINE OF THE TRIAL⁹¹

I will now explain how the trial will proceed.

After I have read all but the last Instruction,

- The lawyers may make opening statements
 - An opening statement is not evidence
 - It is simply a summary of what the lawyer expects the evidence to be
- The Conservator will present evidence and call witnesses and the lawyer for Abbott may cross-examine them
- Abbott may present evidence and call witnesses, and the lawyer for the Conservator may cross-examine those witnesses
- The parties will make their closing arguments
 - Closing arguments summarize and interpret the evidence for you
 - Like opening statements, closing arguments are not evidence
- I will give you the last Instruction, on “deliberations”
- You will retire to deliberate on your verdict
- You will indicate your verdict on the Conservator’s claims in a Verdict Form, a copy of which is attached to these Instructions

⁹¹ My “stock” Jury Instructions. *Compare* 8th Cir. Model 1.02, numbered ¶ 3; Joint Proposed Jury Instruction No. 18.

- A Verdict Form is simply a written notice of your decision
- When you have reached a unanimous verdict, your foreperson will complete one copy of the Verdict Form by marking the appropriate blank or blanks for each question
- You will all sign that copy to indicate that you agree with the verdict and that it is unanimous
- Your foreperson will then bring the signed Verdict Form to the courtroom when it is time to announce your verdict

No. 35 — OBJECTIONS⁹²

The lawyers may make objections and motions during the trial that I must rule upon.

- If I sustain an objection to a question before it is answered, do not draw any inferences or conclusions from the question itself
- Do not hold it against a lawyer or a party that a lawyer has made an objection, because lawyers have a duty to object to testimony or other evidence that they believe is not properly admissible

⁹² My “stock” Jury Instructions. *Compare* 8th Cir. Model 1.02, numbered ¶ 3; Joint Proposed Jury Instruction No. 19.

No. 36 — BENCH CONFERENCES⁹³

During the trial, it may be necessary for me to talk with the lawyers out of your hearing.

- I may hold a bench conference while you are in the courtroom or call a recess
- Please be patient, because these conferences are
 - to decide how certain evidence is to be treated
 - to avoid confusion and error, and
 - to save your valuable time
- We will do our best to keep such conferences short and infrequent

⁹³ My “stock” Jury Instructions. *Compare* 8th Cir. Model 1.03; Joint Proposed Jury Instruction No. 20.

No. 37 — NOTE-TAKING⁹⁴

You are allowed to take notes during the trial if you want to.

- Be sure that your note-taking does not interfere with listening to and considering all the evidence
- Your notes are not necessarily more reliable than your memory or another juror's notes or memory
- Do not discuss your notes with anyone before you begin your deliberations
- Leave your notes on your chair during recesses and at the end of the day
- At the end of trial, you may take your notes with you or leave them to be destroyed
- No one else will ever be allowed to read your notes, unless you let them

If you choose not to take notes, remember that it is your own individual responsibility to listen carefully to the evidence.

An official court reporter is making a record of the trial, but her transcripts will not be available for your use during your deliberations.

⁹⁴ My “stock” Jury Instructions. *Compare* 8th Cir. Model 1.05; Joint Proposed Jury Instruction No. 21.

No. 38 — CONDUCT OF JURORS DURING TRIAL⁹⁵

You must decide this case *solely* on the evidence and your own observations, experiences, reason, common sense, and the law in these Instructions. You must also keep to yourself any information that you learn in court until it is time to discuss this case with your fellow jurors during deliberations.

To ensure fairness, you must obey the following rules:

- Do not talk among yourselves about this case, or about anyone involved with it, until you go to the jury room to decide on your verdict.
- Do not talk with anyone else about this case, or about anyone involved with it, until the trial is over.
- When you are outside the courtroom, do not let anyone ask you about or tell you anything about this case, anyone involved with it, any news story, rumor, or gossip about it, until the trial is over. If someone should try to talk to you about this case during the trial, please report it to me.
- During the trial, you should not talk to any of the parties, lawyers, or witnesses—even to pass the time of day—so that there is no

⁹⁵ My “stock” Jury Instructions. Compare 8th Cir. Model 1.05; Joint Proposed Jury Instruction No. 22.

reason to be suspicious about your fairness. The lawyers, parties, and witnesses are not supposed to talk to you, either.

- You may need to tell your family, friends, teachers, co-workers, or employer about your participation in this trial, so that you can tell them when you must be in court and warn them not to ask you or talk to you about the case. However, do not provide any information to anyone by any means about this case until after I have accepted your verdict. That means do not talk face-to-face or use any electronic device or media, such as the telephone, a cell or smart phone, a Blackberry, a PDA, a computer, the Internet, any Internet service, any text or instant messaging service, any Internet chat room, any blog, or any website such as Facebook, MySpace, YouTube, or Twitter, to communicate to anyone any information about this case until I accept your verdict.
- Do not do any research—on the Internet, in libraries, in the newspapers, in dictionaries or other reference books, or in any other way—or make any investigation about this case, the law, or the people involved on your own.
- Do not visit or view any place discussed in this case and do not use Internet maps or Google Earth or any other program or device to search for or to view any place discussed in the testimony.
- Do not read any news stories or articles, in print, on the Internet, or in any “blog,” about this case, or about anyone involved with it, or listen to any radio or television reports about it or about anyone

involved with it, or let anyone tell you anything about any such news reports. I assure you that when you have heard all the evidence, you will know more about this case than anyone will learn through the news media—and it will be more accurate.

- Do not make up your mind during the trial about what the verdict should be. Keep an open mind until you have had a chance to discuss the evidence with other jurors during deliberations.
- Do not decide the case based on biases. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.
- If, at any time during the trial, you have a problem that you would like to bring to my attention, or if you feel ill or need to go to the restroom, please send a note to the Court Security Officer (CSO), who will give it to me. I want you to be comfortable, so please do not hesitate to tell us about any problem.

I will read the remaining Instruction at the end of the evidence.

No. 39 — DELIBERATIONS⁹⁶

In conducting your deliberations and returning your verdict, there are certain rules that you must follow.

- When you go to the jury room, select one of your members as your foreperson to preside over your discussions and to speak for you here in court
- Discuss this case with one another in the jury room to try to reach agreement on the verdict, if you can do so consistent with individual judgment
 - Nevertheless, each of you must make your own conscientious decision, after considering all the evidence, discussing it fully with your fellow jurors, and listening to the views of your fellow jurors
- Do not be afraid to change your opinions if the discussion with other jurors persuades you that you should, but do not come to a decision simply because other jurors think it is right, or simply to reach a verdict
- Remember that you are not advocates, but judges—judges of the facts

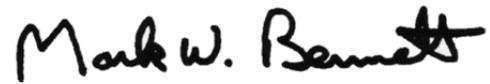
⁹⁶ My “stock” Jury Instructions. *Compare* 8th Cir. Model 3.06 & 3.07; Joint Proposed Jury Instruction No. 23.

- Your sole interest is to seek the truth from the evidence in the case.
- If you need to communicate with me during your deliberations, you may send a note to me through the Court Security Officer (CSO), signed by one or more jurors
 - I will respond as soon as possible, either in writing or orally in open court
 - Remember that you should not tell anyone—including me—how your votes stand numerically
- Base your verdict solely on the evidence and on the law as I have given it to you in my Instructions
 - Nothing I have said or done is intended to suggest what your verdict should be—that is entirely for you to decide
- Your verdict on each question submitted must be unanimous
- Complete and sign one copy of the Verdict Form
 - The foreperson must bring the signed Verdict Form to the courtroom when it is time to announce your verdict
- When you have reached a verdict, the foreperson will advise the Court Security Officer that you are ready to return to the courtroom.

Good luck with your deliberations.

IT IS SO ORDERED.

DATED this 6th day of January, 2014.

Handwritten signature of Mark W. Bennett in black ink.

MARK W. BENNETT
U.S. DISTRICT COURT JUDGE
NORTHERN DISTRICT OF IOWA

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

SECURITY NATIONAL BANK, as
Conservator for JMK, a minor child,

Plaintiff,

vs.

ABBOTT LABORATORIES,

Defendant.

No. C 11-4017-MWB

**COURT'S PROPOSED
VERDICT FORM
(12/31/13 VERSION)**

On the Conservator's claims and Abbott's specific defenses, we, the Jury,
find as follows:

I. THE CONSERVATOR'S CLAIMS			
Step 1: Verdicts	On each of the Conservator's claims, in whose favor do you find? <i>(If you find in favor of Abbott on all claims, then do not answer any further questions in Part I of the Verdict Form. Instead, go on to consider your verdict on Abbott's specific defenses in Part II.)</i>		
(a)	The "design defect" claim, explained in Instruction No. 6	___ The Conservator	___ Abbott
(b)	The "manufacturing defect" claim, explained in Instruction No. 7	___ The Conservator	___ Abbott
(c)	The "warning defect" claim, explained in Instruction No. 8	___ The Conservator	___ Abbott
	<i>If you found in favor of the Conservator on the "warning defect" claim in Step 1(c), which one or more of the following warnings do you find would have reasonably reduced the foreseeable risk of harm?</i>		
	___ a warning about the risk of <i>E. sak</i> bacterial infection in newborn or low birth weight babies		
	___ a warning about the potential harm resulting from <i>E. sak</i> bacterial infection		

	___ a warning about the availability in the marketplace of alternative, sterile liquid infant formulas	
Step 2: Compensatory Damages	<i>If you found that the Conservator won on one or more of the claims in Step 1, what amounts, if any, do you award for each of the following items of compensatory damages, as compensatory damages are explained in Instruction No. 10?</i>	
	Past medical expenses:	\$ _____
	The present value of future medical expenses:	\$ _____
	Past loss of full mind and body:	\$ _____
	The present value of future loss of full mind and body:	\$ _____
	Past pain and suffering:	\$ _____
	The present value of future pain and suffering:	\$ _____
	The present value of the loss of future earning capacity:	\$ _____
	Total Compensatory Damages	\$ _____
Step 3: Punitive Damages	<i>If you found in favor of the Conservator on the “design defect” claim in Step 1(a) and/or the “warning defect” claim in Step 1(c), and you awarded compensatory damages in Step 2, what amount, if any, do you award for “punitive damages” on that claim or those claims, as such damages are explained in Instruction No. 11? (“Punitive damages” are not available on the “manufacturing defect” claim.)</i>	
(a)	\$ _____ for punitive damages for a “design defect”	
(b)	\$ _____ for punitive damages for a “warning defect”	

II. ABBOTT’S SPECIFIC DEFENSES		
“State Of The Art” Specific Defense		
(a)	Has Abbot proved that the design of its Similac Neosure PIF was state of the art, as this defense is explained in Instruction No. 12?	___ Yes ___ No
(b)	Has Abbot proved that the manufacture of its Similac Neosure PIF was state of the art, as this defense is explained in Instruction No. 12?	___ Yes ___ No

(c)	Has Abbot proved that its warnings on its Similac Neosure PIF were state of the art, as this defense is explained in Instruction No. 12?	<input type="checkbox"/> Yes <input type="checkbox"/> No
“Intermediary” Specific Defense		
	Has Abbott proved its “intermediary” specific defense as to the Conservator’s “warning defect” claim, as this defense is explained in Instruction No. 13?	<input type="checkbox"/> Yes <input type="checkbox"/> No

_____ Date

Foreperson	Juror
Juror	Juror
Juror	Juror
Juror	Juror