

800.00

FRAUD AND DECEIT

800.01 Fraud and Deceit--Fraudulent Misrepresentation--Issues Made by the Pleadings--Fraud--One Defendant

The plaintiff claims that the defendant made the following statement[s]:

[Here insert or paraphrase the allegedly fraudulent statement or statements that the defendant is claimed to have made.]

The plaintiff further claims that the statement[s] [was a] [were] false statement[s] of material fact[s].

The plaintiff further claims that the defendant [knew the statement(s) (was) (were) false] [or] [believed the statement(s) to be false] [or] [made the statement(s) in reckless disregard of whether (it was) (they were) true or false].

The plaintiff further claims that the defendant made the statement[s] with the intent to induce the plaintiff to [act] [describe what the plaintiff did, e.g., “buy the farm”].

The plaintiff further claims that he reasonably believed the statement[s] and [acted] [describe what the plaintiff did, e.g., “bought the farm”] in justifiable reliance on the truth of the statement[s].

The plaintiff further claims that he sustained damages as the result of his reliance.

The defendant [denies that he made (a) false statement(s) of (a) fact(s),] [denies that any (claimed) statement(s) (was) (were) material,] [denies that he (knew) (or) (believed) the (claimed) statement(s) to be false,] [denies that any (claimed) statement(s) (was) (were) made in reckless disregard of the statement(s) (s') truth or falsity,] [denies that he intended to induce the plaintiff to act ([describe what the plaintiff did, e.g., “buy the farm”]),] [denies that the plaintiff reasonably believed the claimed) statement(s) or (acted) ([describe what the plaintiff did, e.g., “bought the farm”] in justifiable reliance on the truth of the statement(s),] [and] [denies that damage resulted to the plaintiff from his reliance].

Notes on Use

This instruction must be modified to fit the allegations of the complaint and answer. The bracketed materials cover various contingencies that may be required by the pleadings. The pertinent phrases in brackets should be used only if they fit the particular case.

Where multiple plaintiffs allege different acts of misconduct, the instruction must be modified to set forth separately the allegations by each plaintiff.

If the defendant allegedly concealed or withheld facts, use IPI 800.08 instead of this

instruction.

Comment

An issues instruction must meet the standards of *Signa v. Alluri*, 351 Ill.App. 11, 113 N.E.2d 475 (1st Dist.1953), that the issues made by the pleadings be concisely stated without characterization and undue emphasis.

The elements of the tort of fraudulent misrepresentation are stated in *Gerill Corp. v. Jack L. Hargrove Builders*, 128 Ill.2d 179, 538 N.E.2d 530, 536; 131 Ill.Dec. 155, 161 (1989), *cert. denied*, 493 U.S. 894, 110 S.Ct. 243, 107 L.Ed.2d 193 (1989).

Fraud may be established where a party acted in culpable ignorance as to the truth or falsity of the assertion. *Perlman v. Time, Inc.*, 64 Ill.App.3d 190, 380 N.E.2d 1040, 1045; 20 Ill.Dec. 831, 836 (1st Dist.1978).

Justifiable reliance is an element of the tort of fraud and deceit. *Gerill v. Jack L. Hargrove Builders*, 128 Ill.2d 179, 538 N.E.2d 530, 536; 131 Ill.Dec. 155, 161 (1989). The expression “justifiable reliance” is thought to be synonymous with the expression “reasonable reliance,” and in fact some courts use each expression in the same opinion. *Central States Joint Board v. Continental Assurance Co.*, 117 Ill.App.3d 600, 453 N.E.2d 932, 935-937, 73 Ill.Dec. 107, 110-112 (1st Dist.1983); *Warner v. Lucas*, 185 Ill.App.3d 351, 541 N.E.2d 705, 706; 133 Ill.Dec. 494, 495 (5th Dist.1989) (reasonably believed and justifiably relied upon).

Sometimes a court speaks only of “reliance” when discussing elements of fraudulent misrepresentation, but typically “justifiable reliance” will be found in the opinion. *Soules v. General Motors Corp.*, 79 Ill.2d 282, 402 N.E.2d 599, 601; 37 Ill.Dec. 597, 599 (1980).

There is an excellent discussion of the development of the law of fraud and deceit in the case of *Mother Earth, Ltd. v. Strawberry Camel, Ltd.*, 72 Ill.App.3d 37, 390 N.E.2d 393, 28 Ill.Dec. 226 (1st Dist.1979).

800.02A Fraud and Deceit--Burden of Proof on the Issues--Alternative One--Fraudulent Misrepresentation--One Plaintiff and One Defendant--Clear and Convincing Evidence Only as to Certain Elements

The plaintiff has the burden of proving each of the following propositions by clear and convincing evidence:

First, the defendant made [a] false statement[s] of [a] material fact[s];

Second, [the defendant (knew) (or) (believed) the statement(s) (was) (were) false] [or] [the defendant made the statement(s) in reckless disregard of whether (it was) (they were) true or false].

The plaintiff has the burden of proving that each of the following propositions is more probably true than not true:

Third, the defendant made the statement[s] with the intent to induce the plaintiff to [act] [describe what the plaintiff did, e.g., “buy the farm”];

Fourth, the plaintiff reasonably believed the statement[s] and [acted] [describe what the plaintiff did, e.g., “bought the farm”] in justifiable reliance on the truth of the statement[s];

Fifth, the plaintiff's damages resulted from his reliance.

If you find from your consideration of all the evidence that propositions First and Second have been proved by clear and convincing evidence and that propositions Third, Fourth, and Fifth are more probably true than not true, then your verdict should be for the plaintiff.

On the other hand, if you find from your consideration of all the evidence that any of these propositions has not been proved as required in this instruction, then your verdict should be for the defendant.

Notes on Use

This instruction should be given when the court has ruled that only the first two elements of the cause must be proved by clear and convincing evidence. If the court requires all elements to be proved by clear and convincing evidence, then use IPI 800.02B. The committee makes no recommendation with respect to which burden of proof instruction should be given.

IPI 21.01 (meaning of burden of proof) should not be given with this instruction; it is already included in it. No definition of “clear and convincing” has been prepared by the committee. *See* IPI 800.03.

This instruction should not be used where fraud is asserted as a defense to a contract action. In that case, use IPI 700.03.

Comment

In *Parsons v. Winter*, 142 Ill.App.3d 354, 491 N.E.2d 1236, 1240; 96 Ill.Dec. 776, 780 (1st Dist.1986), the court held that a plaintiff must prove by clear and convincing evidence that the defendant made a statement of a material nature (as opposed to opinion); that the statement was untrue; and that the statement was known or believed to be untrue by the person making it, or made in culpable ignorance of its truth or falsity. To the same effect is *Gordon v. Dolin*, 105 Ill.App.3d 319, 434 N.E.2d 341, 345; 61 Ill.Dec. 188, 192 (1st Dist.1982). The court did not suggest an enhanced burden of proof with regard to the other elements.

A different result was reached in *Cole v. Ignatius*, 114 Ill.App.3d 66, 448 N.E.2d 538, 542; 69 Ill.Dec. 820, 826 (1st Dist.1983). There, the court held that proof of each element in an action for fraud must be by clear and convincing evidence. The same result was reached in *National Republic Bank v. National Homes Const. Corp.*, 63 Ill.App.3d 920, 381 N.E.2d 15, 18; 21 Ill.Dec. 80, 83 (1st Dist.1978).

For this reason, the committee has prepared two burden of proof instructions. IPI 800.02A was prepared for use in those cases where the trial court rules that only the first and second propositions of IPI 800.02A must be proved by clear and convincing evidence and the remaining elements require only proof by a preponderance or greater weight of the evidence.

IPI 800.02B has been prepared for use in those cases where the trial court rules that each element of the case must be proved by clear and convincing evidence.

800.02B Fraud and Deceit--Burden of Proof on the Issues--Alternative Two--Fraudulent Misrepresentation--One Plaintiff and One Defendant--Clear and Convincing Evidence

The plaintiff has the burden of proving each of the following propositions by clear and convincing evidence:

First, the defendant made [a] false statement[s] of [a] material fact[s];

Second, [the defendant (knew) (or) (believed) the statement(s) (was) (were) false] [or] [the defendant made the statement(s) in reckless disregard of whether (it was) (they were) true or false];

Third, the defendant made the statement[s] with the intent to induce the plaintiff to [act] [describe what the plaintiff did, e.g., “buy the farm”];

Fourth, the plaintiff reasonably believed the statement[s] and [acted] [describe what the plaintiff did, e.g., “bought the farm”] in justifiable reliance on the truth of the statement[s];

Fifth, the plaintiff's damages resulted from his reliance.

If you find from your consideration of all the evidence that each of these propositions has been proved by clear and convincing evidence, then your verdict should be for the plaintiff. On the other hand, if you find from your consideration of all the evidence that any of these propositions has not been proved by clear and convincing evidence, then your verdict should be for the defendant.

Notes on Use

This instruction should be given when the court has ruled that each element of the case must be proved by clear and convincing evidence. If the court rules that only the first two elements of the cause must be proved by clear and convincing evidence, then use IPI 800.02A. The committee makes no recommendation with respect to which burden of proof instruction should be given.

This instruction should not be used when fraud is asserted as a defense to a contract action. In that case, use IPI 700.03.

Comment

See the comment to IPI 800.02A.

800.03 Fraud and Deceit--Clear and Convincing Evidence--Definition

The committee recommends that no definition of “clear and convincing evidence” be given.

Comment

The expression “clear and convincing” has sometimes been defined in terms of “reasonable doubt.” However, such a definition seems to lack clarity and could easily be confused with criminal matters in the minds of a jury. Definitions are discussed in the case of *Parsons v. Winter*, 142 Ill.App.3d 354, 491 N.E.2d 1236, 1240; 96 Ill.Dec. 776, 780 (1st Dist.1986). That court, after discussing a definition of “clear and convincing” which included the words “reasonable doubt,” concluded that “highly probably true” would be a clearer statement of the concept. The court also relied on *In re Estate of Ragen*, 79 Ill.App.3d 8, 13-14; 398 N.E.2d 198, 202-203; 34 Ill.Dec. 523, 527-528 (1st Dist.1979).

The committee considered both the terms “reasonable doubt” and “highly probably true.” The conclusion the committee reached is that the expression “clear and convincing” is more understandable than any definition that could be framed using “reasonable doubt” or “highly probably true.” The expression “clear and convincing” contains terms which are readily understandable and in common every day usage, and an effort to define those terms might very well create confusion and misunderstanding.

800.04 Fraud and Deceit--Material Fact--Definition

When I use the word “material” I mean the [misrepresented] [concealed] [withheld] fact[s] must have been an essential element to the transaction, and had the plaintiff been aware of the truth, he would have acted differently.

Notes on Use

This instruction should be used in every case of fraudulent misrepresentation or fraudulent concealment.

Comment

The Illinois Supreme Court has not defined the term “material.” In *Foster v. Oberreich*, 230 Ill. 525, 82 N.E. 858 (1907), the court stated that the representation must be “calculated and intended to influence the plaintiff.”

To be “material” the representation must relate to a matter upon which the plaintiff could be expected to rely in determining to engage in the conduct in question. *McPherson v. Hewitt*, 32 Ill.App.3d 435, 443; 335 N.E.2d 606, 612 (2d Dist.1975). It may not be an opinion (*Davis v. Nehf*, 14 Ill.App.3d 318, 302 N.E.2d 382 (1st Dist.1973)), nor a promise of future action (*Polivka v. Worth Dairy, Inc.*, 26 Ill.App.3d 961, 328 N.E.2d 350 (1st Dist.1974)). It may be actionable even if the misrepresentation was not the sole inducement (*Hicks v. Stevens*, 121 Ill. 186, 11 N.E. 241 (1887)). A misrepresentation is “material” and therefore actionable if it is such that had the other party been aware of it, the party would have acted differently. *Perlman v. Time, Inc.*, 64 Ill.App.3d 190, 197; 380 N.E.2d 1040, 1045; 20 Ill.Dec. 831, 836 (1st Dist.1978). The misrepresented condition must be an essential element to the transaction between the parties. *Mack v. Plaza Dewitt Limited Partnership*, 137 Ill.App.3d 343, 484 N.E.2d 900, 906; 92 Ill.Dec. 169, 175 (1st Dist.1985).

For a discussion of the development of the requirement that the misrepresentation be of a “material fact,” see *Mother Earth, Ltd. v. Strawberry Camel, Ltd.*, 72 Ill.App.3d 37, 390 N.E.2d 393, 403; 28 Ill.Dec. 226, 236 (1st Dist.1979).

800.05 Fraud and Deceit--Measure of Damages

If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate him for any of the following elements of damages proved by the evidence to have resulted from the conduct of the defendant.

[Here insert the elements of recoverable damages which have a basis in the evidence.]

Whether any of these elements of damages has been proved by the evidence is for you to determine.

Comment

Damages are determined by assessing the difference between the actual value of the property and the value the property would have had if the representations had been true. *Gerill Corp. v. Jack L. Hargrove Builders*, 128 Ill.2d 179, 538 N.E.2d 530, 537-538; 131 Ill.Dec. 155, 162-163 (1989), *cert. denied*, 493 U.S. 894, 110 S.Ct. 243, 107 L.Ed.2d 193 (1989).

In addition to actual damages, certain consequential damages proximately resulting from the fraud are recoverable. *Home Savings & Loan Association v. Schneider*, 127 Ill.App.3d 689, 469 N.E.2d 585, 589; 82 Ill.Dec. 941, 945 (3d Dist.1984), *aff'd in part & rev'd in part on other grounds*, 108 Ill.2d 277, 483 N.E.2d 1225, 91 Ill.Dec. 590 (1985); *Tan v. Boyke*, 156 Ill.App.3d 49, 508 N.E.2d 390, 394; 108 Ill.Dec. 229, 233 (2d Dist.1987); Restatement (Second) of Torts § 549 (1977) (in a business transaction, additional damages to give plaintiff the benefit of his or her bargain may be recovered if properly proved).

See also Restatement (Second) of Torts § 549(1) (b) (1977) (expenses incurred in preparing to use property in a manner the defendant has represented as appropriate are recoverable).

800.06 Fraud and Deceit--Punitive/Exemplary Damages--Willful and Wanton Conduct--Malicious and Willful Conduct--Violation of Trust and Confidence

If you find for the plaintiff and if you find the defendant's conduct was [willful and wanton] [malicious and willful] [a violation of trust or confidence] and caused damage to the plaintiff, and if you believe that justice and the public good require it, you may, in addition to any other damages to which you find the plaintiff entitled, award an amount which will serve to punish the defendant and to deter the defendant and others from similar conduct.

Notes on Use

This instruction should be given where punitive damages are sought in an action for fraud.

If the phrase “willful and wanton” is used in the instruction, also give IPI 14.01.

Comment

In a fraud action, it is error to give a version of IPI 35.01 which substitutes the words “fraud and deceit” for the words “willful and wanton.” *Home Savings & Loan Association v. Schneider*, 108 Ill.2d 277, 483 N.E.2d 1225, 1228; 91 Ill.Dec. 590, 593 (1985). Punitive damages may not be awarded solely upon a finding of fraud without requiring willful and wanton conduct. *Id.* The court in *Schneider* relied on *Laughlin v. Hopkinson*, 292 Ill. 80, 89; 126 N.E. 591, 594 (1920), which held that in a deceit action, punitive damages may be allowed where the wrong involves some violation of duty springing from a relationship of trust or confidence, or where the fraud is gross, or the case presents other extraordinary or exceptional circumstances clearly showing malice and willfulness.

Whether the circumstances in a particular case may justify an award of punitive damages is a question of law for the court. *J. I. Case Co. v. McCartin-McAuliffe Plumbing & Heating, Inc.*, 118 Ill.2d 447, 453; 516 N.E.2d 260, 263; 114 Ill.Dec. 105, 108 (1987).

The purpose of punitive damages is not to compensate the plaintiff but rather to punish the defendant and to serve as a deterrent. Punitive damages can only be awarded for conduct involving some element of outrage similar to that usually found in crime. *Loitz v. Remington Arms Co.*, 138 Ill.2d 404, 563 N.E.2d 397, 401; 150 Ill.Dec. 510, 514 (1990).

800.07 Fraud and Deceit--Punitive/Exemplary Damages--Liability of Corporate Principal for the Act of an Agent

The defendant [name of corporate defendant] is a corporation and can act only through its officers and employees. As to plaintiff's claim for compensatory damages against [name of corporate defendant], any act or omission of an officer or employee within the scope of his employment is the action or omission of the defendant [name of corporate defendant].

As to plaintiff's claim for punitive damages against [name of corporate defendant], a different rule applies. Punitive damages may be awarded against [name of corporate defendant] only if (1) you find in favor of the plaintiff and against [name of corporate defendant] under Count ____ of the complaint, and (2) you find the officer's or employee's conduct was [willful and wanton] [malicious and willful] [a violation of trust or confidence], and (3) you find that, as to the act(s) or omission(s) giving rise to liability under Count ____, [state condition (a), (b), (c), or (d)] [one or more of] [both of] the following condition[s] [is] [are] met:

[(a)] [The corporation, through its management, authorized the doing and the manner of the act or omission] [; or]

[(b)] [The employee responsible for the act or omission was unfit, and the corporation was reckless in employing him] [; or]

[(c)] [The act or omission was that of a managerial employee who was acting in the scope of his employment] [; or]

[(d)] [The corporation, through its management or a managerial employee, ratified or approved the act or omission].

If you find for the plaintiff and against the defendant under Count ____ of the complaint, and if you further find that the officer's or employee's conduct was [willful and wanton] [malicious and willful] [a violation of trust or confidence], and if you further find that [restate condition (a), (b), (c), or (d)] [one or (more) (both) of these conditions (is) (are) met], and if you further believe that justice and the public good require it, you may, in addition to any other damages to which you find the plaintiff entitled, award an amount which will serve to punish [name of corporate defendant] and to deter [name of corporate defendant] and others from similar conduct.

Notes on Use

This instruction must be given in lieu of IPI 800.06 and IPI 50.11 in any case in which the trial court rules that a submissible case has been made on the issue of punitive damages and such damages are sought against a corporate defendant based on the fraudulent conduct of its employee(s).

If only one of the four conditions is claimed, it should be inserted in the second and last paragraphs where indicated, and the other conditions omitted. If more than one condition is claimed, use the appropriate subparagraphs ((a), (b), (c), or (d)) and number or letter them consecutively for reference. A condition should be included only if the court rules that it is

supported by evidence sufficient to support a jury finding of that condition.

Additional agency instructions should be used as appropriate. *See* IPI Chapter 50.

Comment

As to the award of punitive damages against a corporation for the tort of one of its employees, Illinois has adopted the requirements of the Restatement (Second) of Torts § 909 and the Restatement (Second) of Agency § 217C. *Mattyasovszky v. West Towns Bus Co.*, 61 Ill.2d 31, 330 N.E.2d 509, 512 (1975); *Deal v. Byford*, 127 Ill.2d 192, 537 N.E.2d 267, 130 Ill.Dec. 200 (1989); *Kennan v. Checker Taxi Co.*, 250 Ill.App.3d 155, 620 N.E.2d 1208, 1212; 189 Ill.Dec. 891, 895 (1st Dist.1993) (citing cases); *Kemner v. Monsanto Co.*, 217 Ill.App.3d 188, 576 N.E.2d 1146, 1156-1157; 160 Ill.Dec. 192, 202-203 (5th Dist.1991).

See Comment to IPI 800.06.

800.08 Fraud and Deceit--Fraudulent Concealment--Issues Made by the Pleadings--One Defendant

The plaintiff claims that the defendant knowingly [concealed from] [withheld from] the plaintiff the following fact[s]:

[Here insert or paraphrase the alleged fact(s) claimed to have been concealed or withheld.]

The plaintiff further claims that the fact[s] [concealed] [withheld] [was] [were] [a] material fact[s].

The plaintiff further claims that the defendant [concealed] [withheld] the fact[s] with the intent to deceive the plaintiff and to induce the plaintiff to [act] [describe what the plaintiff did, e.g., “buy the farm”].

The plaintiff further claims that he [acted] [describe what the plaintiff did, e.g., “bought the farm”] in justifiable reliance on the facts as he knew them.

The plaintiff further claims that he sustained damages as a result of the [concealment] [withholding] of [a] material fact[s] by the defendant.

The defendant [denies that he knowingly (concealed) (withheld) any material fact(s) from the plaintiff,] [denies that he (concealed) (withheld) any fact(s) with the intent to deceive the plaintiff or to induce the plaintiff to (act) ([describe what the plaintiff did, e.g., “buy the farm”]),] [denies that the plaintiff (acted) ([describe what the plaintiff did, e.g., “bought the farm”]) in justifiable reliance on the facts as he knew them,] [and] [denies that damage resulted to the plaintiff from his reliance on the facts as he knew them].

Notes on Use

This instruction should be used where the plaintiff's complaint is based upon fraudulent concealment or silence. Before this instruction can be given, the court must determine that the defendant had a duty to the plaintiff to disclose the fact(s) allegedly concealed or withheld.

Comment

Illinois courts have consistently held that the elements of a claim for fraudulent concealment are the same as the elements for a claim of fraudulent misrepresentation. Intentional concealment is said to be the equivalent of a false statement of material fact. *Zimmerman v. Northfield Real Estate, Inc.*, 156 Ill.App.3d 154, 510 N.E.2d 409, 413; 109 Ill.Dec. 541, 545 (1st Dist.1986).

To assist the practitioner, the elements have been restated in this instruction to accommodate the complaint of concealment as distinguished from misrepresentation.

“Fraud may consist in the concealment of what is true as well as the assertion of what is false where the concealment is shown to have been done with the intention to deceive under

circumstances creating an opportunity and duty to speak.” *In re Marriage of Richardson*, 237 Ill.App.3d 1067, 606 N.E.2d 56, 67; 179 Ill.Dec. 224, 235 (1st Dist.1992). Concealment of an existing material fact is actionable where employed as a device to mislead. *Chapman v. Hosek*, 131 Ill.App.3d 180, 475 N.E.2d 593, 598; 86 Ill.Dec. 379, 384 (1st Dist.1985). Fraud is the intentional misrepresentation of a material fact or the concealment of a fact which induces a party to rely on that misrepresentation to his or her detriment. *In re Marriage of Gurin*, 212 Ill.App.3d 806, 571 N.E.2d 857, 862; 156 Ill.Dec. 877, 882 (1st Dist.1991).

Silence alone does not generally constitute a misrepresentation. *Russow v. Bobola*, 2 Ill.App.3d 837, 277 N.E.2d 769 (2d Dist.1972). However, when the opportunity and duty to speak exists, deceptive conduct or the suppression of material facts is involved, and the injured party would have acted differently absent the other party's silence, such silence may constitute either misrepresentation or concealment. *Heider v. Leewards Creative Crafts, Inc.*, 245 Ill.App.3d 258, 613 N.E.2d 805, 184 Ill.Dec. 488 (2d Dist.1993); *In re Marriage of Richardson*, 237 Ill.App.3d 1067, 606 N.E.2d 56, 179 Ill.Dec. 224 (1st Dist.1992). In cases involving such fraudulent behavior, the distinction between concealment and affirmative misrepresentation is tenuous. *Lindsey v. Edgar*, 129 Ill.App.3d 718, 473 N.E.2d 92, 84 Ill.Dec. 876 (4th Dist.1984).

800.09A Fraud and Deceit--Burden of Proof on the Issues--Alternative One--Fraudulent Concealment--One Plaintiff and One Defendant--Clear And Convincing Evidence Only as to Certain Elements

The plaintiff has the burden of proving each of the following propositions by clear and convincing evidence:

First, the defendant knowingly [concealed] [withheld] from the plaintiff [a] material fact[s];

Second, that the defendant [concealed] [withheld] the fact[s] with the intent to deceive the plaintiff and induce the plaintiff to [act] [describe what the plaintiff did, e.g., “buy the farm”].

The plaintiff has the burden of proving each of the following propositions is more probably true than not true:

Third, the plaintiff [acted] [describe what the plaintiff did, e.g., “bought the farm”] in justifiable reliance on the facts as he knew them;

Fourth, the plaintiff's damages resulted from the [concealment] [withholding] of [a] material fact[s] by the defendant.

If you find from your consideration of all the evidence that propositions First and Second have been proved by clear and convincing evidence and that propositions Third and Fourth are more probably true than not true, then your verdict should be for the plaintiff. On the other hand, if you find from your consideration of all the evidence that any of these propositions has not been proved as required in this instruction, then your verdict should be for the defendant.

Notes on Use

This instruction should be given when the court has ruled that only the first two elements of the cause must be proved by clear and convincing evidence. If the court requires all elements to be proved by clear and convincing evidence, then use IPI 800.09B. The committee makes no recommendation with respect to which burden of proof instruction should be given.

IPI 20.01 (meaning of burden of proof) should not be given with this instruction; it is already included. No definition of “clear and convincing” has been prepared by the committee. *See* comment to IPI 800.03.

This instruction should not be used where fraudulent concealment is asserted as a defense to a contract action. In that case, use IPI 700.03.

Comment

The elements for a claim of fraudulent concealment and fraudulent misrepresentation have been held to be the same. Intentional concealment is said to be the equivalent of a false statement of material fact. *Zimmerman v. Northfield Real Estate, Inc.*, 156 Ill.App.3d 154, 510

N.E.2d 409, 413; 109 Ill.Dec. 541, 545 (1st Dist.1986). For this reason, the burden of proof in a case of fraudulent concealment is essentially the same as the burden of proof in fraudulent misrepresentation. For a discussion of the alternative burden of proof instructions *see* the comment to 800.02A.

800.09B Fraud and Deceit--Burden of Proof on the Issues--Alternative Two--Fraudulent Concealment--One Plaintiff and One Defendant--Clear and Convincing Evidence

The plaintiff has the burden of proving each of the following propositions by clear and convincing evidence:

First, the defendant knowingly [concealed] [withheld] from the plaintiff [a] material fact[s];

Second, that the defendant [concealed] [withheld] the fact[s] with the intent to deceive the plaintiff and induce the plaintiff to [act] [describe what the plaintiff did, e.g., “buy the farm”];

Third, the plaintiff [acted] [describe what the plaintiff did, e.g., “bought the farm”] in justifiable reliance on the facts as he knew them;

Fourth, the plaintiff’s damages resulted from the [concealment] [withholding] of [a] material fact[s] by the defendant.

If you find from your consideration of all the evidence that each of these propositions has been proved by clear and convincing evidence, then your verdict should be for the plaintiff. On the other hand, if you find from your consideration of all the evidence that any of these propositions has not been proved by clear and convincing evidence, then your verdict should be for the defendant.

Notes on Use

This instruction should be given when the court has ruled that each element of the case must be proved by clear and convincing evidence. If the court rules that only the first two elements of the cause must be proved by clear and convincing evidence, then use IPI 800.09A. The committee makes no recommendation with respect to which burden of proof instruction should be given.

This instruction should not be used when fraudulent concealment is asserted as a defense to a contract action. In that case use IPI 700.03.

Comment

See the comment to IPI 800.09A and IPI 800.02A.