

Judicial Council Of California Civil Jury Instruction 1923

Judicial Council Of California Civil Jury Instructions | July 2023 Update
By the Judicial Council of California Advisory Committee on Civil Jury Instructions

Fraud or Deceit

1923 Damages—“Out of Pocket” Rule

If you decide that *[name of plaintiff]* has proved *[his/her/nonbinary pronoun/its]* claim against *[name of defendant]*, you also must decide how much money will reasonably compensate *[name of plaintiff]* for the harm. This compensation is called “damages.”

The amount of damages must include an award for all harm that *[name of defendant]* was a substantial factor in causing, even if the particular harm could not have been anticipated.

[Name of plaintiff] must prove the amount of *[his/her/nonbinary pronoun/its]* damages. However, *[name of plaintiff]* does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. You must not speculate or guess in awarding damages.

To decide the amount of damages you must determine the *[fair market]* value of what *[name of plaintiff]* gave and subtract from that amount the *[fair market]* value of what *[he/she/nonbinary pronoun/it]* received.

“Fair market value” is the highest price that a willing buyer would have paid on the date of the transaction to a willing seller, assuming:

1. That there is no pressure on either one to buy or sell; and
2. That the buyer and seller know all the uses and purposes for which the *[insert item]* is reasonably capable of being used.] *[Name of plaintiff]* may also recover amounts that *[he/she/nonbinary pronoun/it]* reasonably spent in reliance on *[name of defendant]*'s *[false representation/failure to disclose/false promise]* if those amounts would not otherwise have been spent.

New September 2003; Revised December 2009

Directions for Use

For discussion of damages if there is both a breach of fiduciary duty and intentional misrepresentation, see the Directions for Use to [CACI No. 1924, Damages—“Benefit of the Bargain” Rule](#).

Sources and Authority

- Damages for Fraud. [Civil Code section 1709](#).
- Measure of Damages in Tort. [Civil Code section 3333](#).
- Damages for Fraud in Sale of Property. [Civil Code section 3343](#).
- This instruction should be modified in cases involving promissory fraud: “In cases of promissory fraud, the damages are measured by market value as of the date the promise was breached because that is the date when the damage

occurred.” (Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co. (1977) 66 Cal.App.3d 101, 145–146 [135 Cal.Rptr. 802].)

- “There are two measures of damages for fraud: out of pocket and benefit of the bargain. The ‘out-of-pocket’ measure of damages ‘is directed to restoring the plaintiff to the financial position enjoyed by him prior to the fraudulent transaction, and thus awards the difference in actual value at the time of the transaction between what the plaintiff gave and what he received. The “benefit-of-the-bargain” measure, on the other hand, is concerned with satisfying the expectancy interest of the defrauded plaintiff by putting him in the position he would have enjoyed if the false representation relied upon had been true; it awards the difference in value between what the plaintiff actually received and what he was fraudulently led to believe he would receive.’ ‘In California, a defrauded party is ordinarily limited to recovering his “out-of-pocket” loss’ ” (Alliance Mortgage Co. v. Rothwell (1995) 10 Cal.4th 1226, 1240 [44 Cal.Rptr.2d 352, 900 P.2d 601], internal citations omitted.)
- “Of the two measures the ‘out-of-pocket’ rule has been termed more consistent with the logic and purpose of the tort form of action (i.e., compensation for loss sustained rather than satisfaction of contractual expectations) while the ‘benefit-of-the-bargain’ rule has been observed to be a more effective deterrent (in that it contemplates an award even when the property received has a value equal to what was given for it).” (Stout v. Turney (1978) 22 Cal.3d 718, 725 [150 Cal.Rptr. 637, 586 P.2d 1228].)
- “In fraud cases involving the ‘purchase, sale or exchange of property,’ the Legislature has expressly provided that the ‘out-of-pocket’ rather than the ‘benefit-of-the-bargain’ measure of damages should apply. Civil Code section 3343 provides the exclusive measure of damages for fraud in such cases.” (Fragale v. Faulkner (2003) 110 Cal.App.4th 229, 236 [1 Cal.Rptr.3d 616].)
- “Civil Code section 3343 does not apply, however, ‘when a victim is defrauded by its fiduciaries.’ Instead, in the case of fraud by a fiduciary, ‘the “broader” measure of damages provided by sections 1709 and 3333 applies.’ ... [¶] In the case of a negligent misrepresentation by a fiduciary, ‘a plaintiff is only entitled to its actual or “out-of-pocket” losses suffered because of [the] fiduciary’s negligent misrepresentation under section 3333.’ [¶] The Supreme Court has not decided whether ‘the measure of damages under section 3333 might be greater for a fiduciary’s intentional misrepresentation’ ” (Fragale, *supra*, 110 Cal.App.4th at pp. 236–237, original italics, internal citations omitted.)
- “We have previously held that a plaintiff is only entitled to its actual or ‘out-of-pocket’ losses suffered because of fiduciary’s negligent misrepresentation under section 3333. While the measure of damages under section 3333 might be greater for a fiduciary’s intentional misrepresentation, we need not address that issue here.” (Alliance Mortgage Co., *supra*, 10 Cal.4th at pp. 1249–1250.)
- “To recover damages for fraud, a plaintiff must have sustained damages proximately caused by the misrepresentation. A damage award for fraud will be reversed where the injury is not related to the misrepresentation.” (Las Palmas Associates v. Las Palmas Center Associates (1991) 235 Cal.App.3d 1220, 1252 [1 Cal.Rptr.2d 301], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1893-1900

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.23 (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* § 269.27 (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit* § 105.252 (Matthew Bender)

WEST'S EDITORIAL REFERENCES

Direct References:

- See [BAJI 12.56](#)

Related References:

- [BAJI 12.31, 12.57](#)

Statutory References:

- [Civ. Code, §§ 1709, 3333](#)

Library References:

- [Cal. Jur. 3d, Real Estate §§ 421 to 429](#)

Research References:

- West's Key Number Digest, [Fraud](#)  59(1) to 62, 65(1)

© 2023 by the Judicial Council of California. All rights reserved. See front matter for a listing of Judicial Council Task Force and Advisory Committee members who have contributed to these jury instructions.

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.