

Judicial Council Of California Civil Jury Instruction 1924

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

1924 Damages—“Benefit of the Bargain” 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 determine the amount of damages, you must:

1. Determine the fair market value that *[name of plaintiff]* would have received if the representations made by *[name of defendant]* had been true; and
2. Subtract the fair market value of what *[he/she/nonbinary pronoun/it]* did receive.
The resulting amount is *[name of plaintiff]*'s damages. “Fair market value” is the highest price that a willing buyer would have paid 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.
Fair market value must be determined as of the date that *[name of plaintiff]* discovered *[name of defendant]*'s *[false representation/failure to disclose]*.

[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

There is a split of authority regarding whether benefit-of-the-bargain damages can ever be recovered for intentional misrepresentation in the sale or exchange of property. It is settled that in a nonfiduciary relationship, damages are limited to the out-of-pocket measure, even if the misrepresentation is intentional. (See [Alliance Mortgage Co. v. Rothwell \(1995\) 10 Cal.4th 1226, 1240 \[44 Cal.Rptr.2d 352, 900 P.2d 601\]](#); Civ. Code, § 3343.) However, there is disagreement on the proper measure if there is a fiduciary relationship.

Some courts have held that benefit-of-the-bargain damages are available if there is both a fiduciary relationship and intentional misrepresentation. (See *Fragale v. Faulkner* (2003) 110 Cal.App.4th 229, 235–239 [1 Cal.Rptr.3d 616]; *Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555, 564 [29 Cal.Rptr.2d 463]; see also *Alfaro v. Community Housing Improvement System & Planning Assn., Inc.* (2009) 171 Cal.App.4th 1356, 1383 [89 Cal.Rptr.3d 659].) At least one court has held to the contrary, that only out-of-pocket losses may be recovered. (See *Hensley v. McSweeney* (2001) 90 Cal.App.4th 1081, 1086 [109 Cal.Rptr.2d 489].)

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].)

Sources and Authority

- Damages for Fraud. [Civil Code section 1709](#).
- Measure of Damages in Tort. [Civil Code section 3333](#).
- “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., supra*, 10 Cal.4th at p. 1240, 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].)
- “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.)
- “The measure of damages for a real estate broker’s intentional misrepresentation to a buyer for whom he acts as agent is not limited to the out-of-pocket losses suffered by the buyer. Because the broker is a fiduciary, damages for intentional fraud may be measured by the broader benefit-of-the-bargain rule.” (*Fragale, supra*, 110 Cal.App.4th at p. 232.)
- “[T]he measure of damages for fraud by a fiduciary is out-of-pocket damages, not the benefit of the bargain computation normally applicable to contract causes of action.” (*Hensley, supra*, 90 Cal.App.4th at p. 1085.)
- “Recognizing a split of authority on the matter, we follow those cases adopting the broader measure of damages under [sections 1709](#) and [3333](#), a course that is not only consonant with the position we have taken in the past but just. This division has consistently applied the broader measure of damages for fiduciary fraud, refusing to limit damages to the ‘out of pocket’ measure.” (*Salahutdin, supra*, 24 Cal.App.4th at pp. 566–567.)
- “Unlike the ‘out of pocket’ measure of damages, which are usually calculated at the time of the transaction, ‘benefit of the bargain’ damages may appropriately be calculated as of the date of discovery of the fraud.” (*Salahutdin, supra*, 24 Cal.App.4th at p. 568.)
- “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.)
- “[O]ne may recover compensation for time and effort expended in reliance on a defendant’s misrepresentation.” (*Block v. Tobin* (1975) 45 Cal.App.3d 214, 220 [119 Cal.Rptr. 288], 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

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*, § 105.131 et seq. (Matthew Bender)

WEST'S EDITORIAL REFERENCES

Direct References:

- See [BAJI 12.57](#)

Related References:

- [BAJI 12.31](#), [12.56](#)

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(2), 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.