

**2405.5 STRICT RESPONSIBILITY: MEASURE OF DAMAGES IN ACTIONS INVOLVING SALE [EXCHANGE] OF PROPERTY (BENEFIT OF THE BARGAIN)**

Question \_\_\_ asks: What sum of money will fairly and reasonably compensate plaintiff for (his) (her) loss of the bargain?

In determining (plaintiff)'s loss of the bargain, you should determine the amount of money, if any, which represents [either:]

the difference between the fair market value of the property in its condition when purchased by \_\_\_\_\_ and the fair market value of the property if it had been as it was represented to be by (\_\_\_\_\_) [or the reasonable cost of placing the property in the condition in which it was represented to be].

"Fair market value" of property is the price paid by a willing buyer and accepted by a willing seller, neither of whom is then under obligation or force to buy or sell.

[For consequential damages, See Wis JI-Civil 3710.]

**COMMENT**

This instruction and comment were approved by the Committee in 1992 and reviewed without change in 2018.

In cases of fraudulent misrepresentation, the measure of damages adopted in Wisconsin is the "benefit-of-the-bargain" rule. Anderson v. Tri-State Home Improvement Co., 268 Wis. 455, 464, 67 N.W.2d 705 (1955); Ollerman v. O'Rourke Co., Inc., 94 Wis.2d 17, 288 N. W.2d 95 (1980). Gyldenvand v. Schroeder, 90 Wis.2d 690-97, 280 N.W.2d 235 (1979).

Benefit-of-the-bargain damages may be measured in two ways:

1. The difference between the value of the property as represented and its actual value as purchased. Ollerman, supra.

2. The reasonable cost of placing the property received in the condition in which it was represented to be. Ollerman, supra; Vandehey v. City of Appleton, 146 Wis.2d 411, 431 N.W.2d 679 (Ct. App. 1988).

Consequential damages, such as loss of profits, expense of adapting other property for use with the property plaintiff has been induced to buy from the defendant, travel expenses necessitated because of the purchase, may also be awarded if such damages do not duplicate the recovery gained under the award of benefit-of-the-bargain damages. Ollerman, supra, at 53; Gyldenvand, supra. See Dobbs, Remedies (Hornbook series, 1973), at 598.

For indirect or consequential damages for breach of contract, see Wis JI-Civil 3710.

In some cases, evidence will be introduced relating only to one of the alternative tests for benefit-of-the-bargain damages. In such a case, the instruction should be revised by eliminating the appropriate alternative measure.

In negligent misrepresentation cases, damages are determined by applying the "out-of-pocket" rule. See Wis JI-Civil 2406.

For fair market value, see Wis JI-Civil 8100.