

2418A UNFAIR TRADE PRACTICE: UNTRUE, DECEPTIVE, OR MISLEADING REPRESENTATION: WIS. STAT. § 100.18(11)(b)2 [FOR CLAIMS BROUGHT BY PRIVATE PARTIES]¹

To constitute an untrue, deceptive, or misleading representation in this case, there are three elements² which must be proved by (plaintiff).

First, (defendant) made, published, or placed before one or more members of the public an advertisement, announcement, statement, or representation concerning the (sale) (hire) (use) (lease) (distribution) of _____ [**Note:** indicate nature of the sales promotion]. An advertisement, announcement, statement, or representation can be oral or written. It can appear in a newspaper, magazine, or other publication or it can be made by telephone or over radio or television. It may take the form of a notice, handbill, circular, pamphlet, letter, or any other means of (publishing) (disseminating) (circulating) it. [It may also take the form of a face-to-face communication.]

Second, the advertisement or announcement contained a(n) (assertion) (representation) (statement) that was untrue, deceptive, or misleading. A(n) (assertion) (representation) (statement) is untrue if it is false, erroneous, or does not state or represent things as they are. A(n) (assertion) (representation) (statement) is deceptive or misleading if it causes a reader or listener to believe something other than what is in fact true or leads to a wrong belief. The (assertion) (representation) (statement) need not be made with knowledge as to its falsity or with an intent to defraud or deceive so long as it was made with the intent to (sell)

(distribute) the _____ [product or item] or with the intent to induce the (purchase) (use) of the _____ [product or item].

Third, (plaintiff) sustained a monetary loss as a result of the (assertion) (representation) (statement). In determining whether (plaintiff)'s loss was caused by the (assertion) (representation) (statement), the test is whether (plaintiff) would have acted in its absence. Although the (assertion) (representation) (statement) need not be the sole or only motivation for (plaintiff)'s decision to (buy) (rent) (use) the _____ [product or item], it must have been a material inducement. That is, the (assertion) (representation) (statement) must have been a significant factor contributing to (plaintiff)'s decision. [You may consider the reasonableness of (plaintiff)'s reliance on the (assertion) (representation) (statement) by (defendant) in determining whether the (assertion) (representation) (statement) materially induced (plaintiff) to sustain a monetary loss.]

(Give Wis JI-Civil 200.)

NOTES

1. The bracketed language "FOR CLAIMS BROUGHT BY PRIVATE PARTIES" is included in the title to inform the user that this instruction addresses claims that differ from those brought by the State under Wis. Stat. § 100.18(1). The Committee recommends that this bracketed language not be included in the written instructions provided to the jury.

2. This instruction is specifically drafted for private party lawsuits brought under Wis. Stat. §

100.18(11)(b)2, which require three elements: (1) the defendant made a representation to the public with the intent to induce an obligation, (2) the representation was “untrue, deceptive, or misleading,” and (3) the representation materially induced (caused) a pecuniary loss to the plaintiff.

In contrast, actions brought by the State under Wis. Stat. § 100.18(1) and (10r) do not require proof of monetary loss due to the misleading representation. For claims under § 100.18(1) and (10r), see Wis JI-Civil 2418B.

COMMENT

This instruction and comment were approved by the Committee in September 2024.

Elements. There are two elements to a claim made under § 100.18(1) and 100.18(10r): (1) the defendant made a representation to the public with the intent to induce an obligation, and (2) the representation was “untrue, deceptive or misleading.” A third element requiring that the representation materially induced (caused) a pecuniary loss to the plaintiff is necessary in actions brought under Wis. Stat. § 100.18(11)(b)2. K&S Tool & Die Corp. v. Perfection Mach. Sales, Inc., 2007 WI 70, 301 Wis.2d 109, 732 N.W.2d 792 & 49.

Reliance; Cause. In Novell v. Migliaccio, 2008 WI 44, 309 Wis.2d 132, 749 N.W.2d 544, the supreme court held that a plaintiff is not required to prove reasonable reliance as an element of a § 100.18 claim. However, the court said “reasonableness of a plaintiff’s reliance may be relevant in considering whether the misrepresentation materially induced (caused) the plaintiff to sustain a loss.” See also K&S Tool & Die Corp. v. Perfection Mach. Sales, Inc., 2007 WI 70, 301 Wis.2d 109, 732 N.W.2d 792.

In K&S Tool & Die Corp., the court contrasted § 100.18 claims with common law misrepresentation claims and concluded that unlike common law causes of action for misrepresentation, reasonable reliance is not the standard for a § 100.18 claim because the legislature created a distinct cause of action.

The reasonableness of a person’s actions in relying on representations is a “defense” and may be considered by a jury in determining cause. Novell, *supra*, ¶49. A jury may consider the reasonableness of a person’s reliance on a representation in determining whether there had been a material inducement. Novell, *supra*, ¶ 50; K & S Tool & Die, *supra*, ¶36.

Economic Loss Doctrine. In Below v. Norton, 2008 WI 77, 310 Wis.2d 713, 751 N.W.2d 351, the supreme court held that the economic loss doctrine bars common law claims for “intentional misrepresentation” in residential real estate transactions. It also held that a plaintiff in such a transaction would still have “statutory and contractual remedies,” noting in particular that the plaintiffs § 100.18 claim was still viable because it had been remanded to the trial court. See also Hinrichs v. DOW Chemical Co., 2020 WI 2, ¶6, 389 Wis. 2d 669, 937 N.W.2d 37 (concluding “that the economic loss doctrine does not serve as a bar to claims made under Wis. Stat. § 100.18”).

Burden of Proof Under Wis. Stat. § 100.20 (5). In Benkoski v. Flood, 2001 WI App 84, ¶17, 242 Wis.2d 652, 626 N.W.2d 851, the court said the application of the ordinary civil burden of proof fosters the remedial purposes and policies underlying § 100.20(5).

Pecuniary Loss in Wis. Stat. § 100.20(5). The court of appeals has said that the “pecuniary loss” concept set out in Wis. Stat. § 100.20(5) is similar to the concept explained in JI-Civil 3735, Damages: Loss of

Expectation. Benkoski v. Flood, 2001 WI App 84, ¶32, 242 Wis.2d 652, 626 N.W.2d 851. See also Mueller v. Harry Kaufmann Motorcars, Inc., 2015 WI App 8, 359 Wis.2d 597, 859 N.W.2d 451, where the court of appeals discusses this instruction.

Silence. A non-disclosure does not constitute an “assertion, representation or statement of fact” under Wis. Stat. § 100.18(1). Tietsworth v. Harley-Davidson, Inc., 2004 WI 32, 270 Wis.2d 146, 677 N.W.2d 233, ¶4, 39, and 40. Silence is insufficient to support a claim.

Members of the Public. When there is an issue whether the plaintiff was a “member of the public” under § 100.18, see K & S Tool & Die Corp., 2007 WI 70, 301 Wis.2d 109, 732 N.W.2d 792 and State v. Automatic Merchandisers of America, Inc., 64 Wis.2d 659, 221 N.W.2d 683 (1974). Whether the plaintiff is a member of the public presents a question of fact. K & S Tool & Die Corp., *supra*. See also Hinrichs v. DOW Chemical Co., 2020 WI 2, ¶¶64–71, 389 Wis. 2d 669, 937 N.W.2d 37 (declining to overrule Automatic Merchandisers and noting cases subsequent to Automatic Merchandisers “consistently and coherently followed it”).

Puffery. See United Concrete & Construction v. Red-D-Mix Concrete, Inc., 2013 WI 72, 833 N.W.2d 714.

Advertisements. The court of appeals has held that the plain language of Wis. Stat. § 100.18 “shows that statements or representations may be actionable even when contained in bills or other documents not traditionally considered ‘advertisements.’” MBS-Certified Public Accountants, LLC v. Wisconsin Bell, Inc., 2013 WI App 14, 346 Wis.2d 173, 828 N.W.2d 575. Applying this holding to the facts of the case, the court concluded that phone bills and representations in the bills that induced the plaintiff to pay for services it did not authorize are among the kind of misleading representations that Wis. Stat. § 100.18 prohibits.

Voluntary Payment Doctrine. The court in MBS, *supra*, also held that the voluntary payment doctrine does not apply to claims under Wis. Stat. § 100.18, 100.207, or the Wisconsin Organized Crime Control Act (Wis. Stat. §§ 946.80-946.88).

Under the common law voluntary payment doctrine, a party cannot bring an action to recover payments that were paid voluntarily with full knowledge of the material facts, and absent fraud or wrongful conduct inducing payment. See MBS-Certified Public Accountants, LLC v. Wisconsin Bell, Inc., 2012 WI 15, 338 Wis.2d 647, 809 N.W.2d 857.

Rescission. In 2014, the court of appeals held that Wis. Stat. § 100.18 permits plaintiffs, in some instances, to recover a refund of the purchase price. However, the statute which permits recovery only for “pecuniary loss,” does not permit rescission as a remedy. A plaintiff can receive rescission as a remedy for intentional misrepresentation when the misrepresentation is material. Mueller v. Harry Kaufmann Motorcars, Inc., 2015 WI App 8, 359 Wis.2d 597, 859 N.W.2d 451; see Wis JI-Civil 2405.

As-Is Clause. In Fricano v. Bank of America, 2016 WI App 11, 366 Wis.2d 748, 875 N.W.2d 143, the court said an “as is” and exculpatory clauses in the parties’ contract did not relieve the bank/seller of liability under Wis. Stat. § 100.18 for its deceptive representation in the contract which induced agreement to such terms. The trial court in Fricano, instructed the jury on the “as is” clause as follows:

An ‘as is’ clause does not relieve the defendant, Bank of America, from a duty to disclose a material adverse fact about the property.

The buyer still has the burden of proof to prove that Bank of America had knowledge of the condition of the property and failed to disclose it. The buyer is entitled to rely upon a statement by the defendant, Bank of America, that it has no knowledge about the property. Bank of America may not use an as-is clause to relieve the bank of its responsibility to disclose conditions about the condition of the property. In these situations, the exculpatory clause still may have evidentiary value for the purpose of showing that no representations were relied upon.