

**2419 PROPERTY LOSS THROUGH FRAUDULENT MISREPRESENTATION:  
WIS. STAT. § 895.446 (Based on Conduct (Fraud) Prohibited by Wis. Stat.  
§ 943.20)**

To recover for a fraudulent misrepresentation, (plaintiff) must prove by evidence that satisfies you to a reasonable certainty by the greater weight of the credible evidence that the following six elements were present:

First, that (defendant) made a representation to (plaintiff).

Second, that (defendant) knew that the representation was false.

Third, that (defendant) made the representation with intent to deceive and to defraud (plaintiff).

Fourth, that (plaintiff) was deceived by the representation.

Fifth, that (plaintiff) was defrauded by the representation.

Sixth, that (defendant) obtained money through the sale of property to (plaintiff).

The first element requires that (defendant) made a false representation to (plaintiff). This requires that the false representation be one of fact. It does not include expressions of opinions or representations of law.

The second element requires that (defendant) knew or believed that the representation was untrue.

The third element requires that (defendant) made the representation with intent to deceive and defraud (plaintiff). This element requires that (defendant) intended to deceive and defraud (plaintiff) or that (defendant) believed that (his) (her) representation would deceive and defraud (plaintiff).

You cannot look into a person's mind to find out (his) (her) intent. You may determine intent directly or indirectly from all the facts in evidence. You may consider any statement or conduct of (defendant) that indicates (his) (her) state of mind.

The fourth element requires that (plaintiff) must have been misled by (defendant)'s false representation.

The fifth element requires that (plaintiff) was defrauded by the representation. This requires that (plaintiff) did in fact part with money in reliance (at least in part) on the false representation.

The sixth element requires that (defendant) obtained money through the sale of property by making a false representation.

[Burden of Proof: Give Wis JI-Civil 200.]

## COMMENT

This instruction and comment were approved in 2000. The instruction was revised in 2018. The comment was updated in 2009. The statutory reference in the title was revised in 2009.

The instruction is based on a claim based on theft by fraud in violation of Wis. Stat. § 943.20. Other types of criminal conduct, such as retail theft, worthless checks, fraud on innkeeper, and theft by contractor (see Tri-Tech Corp. v. Americomp Serv., 2002 WI 88, 254 Wis.2d 418, 646 N.W.2d 822), also serve as a possible basis for a claim under Wis. Stat. § 895.446. If one of these other grounds of liability is claimed, this instruction must be adapted to the elements of the particular criminal statute.

The burden of proof is the ordinary burden. See Wis. Stat. § 895.446(2).

**Economic Loss Doctrine.** In Below v. Norton, 2008 WI 77, 310 Wis.2d 713, 751 N.W.2d 351, the Wisconsin Supreme Court ruled that the Economic Loss Doctrine (ELD) bars common law claims for intentional misrepresentation in real estate transactions. It, nevertheless, noted that the plaintiff still had available "statutory and contractual remedies." The court noted "the issue of whether the ELD bars claims under Wis. Stat. § 895.446 (formerly Wis. Stat. § 895.80) for a violation of Wis. Stat. § 943.20(1)(d) also was presented for our review. However, we decline to address that issue . . ." The claim was remanded for development of the record. See 2008 WI 77, ¶ 7.