

COMMERCIAL TORTS INSTRUCTIONS

Introduction

These instructions are intended to apply to cases involving fiduciary duties. The instructions contained herein are not materially changed from RAJI (CIVIL) 3RD. In RAJI (CIVIL) 4TH, however, the Committee slightly modified the text of Commercial Torts 23 (Negligent Misrepresentation) and added a footnote to Commercial Torts 24 (Common Law Fraud) to explain the consequences of failure to disclose material information. This does not reflect a change in the law since the publication of RAJI 2ND, but merely serve as a clarification of the instructions to reflect long-standing Arizona law. In RAJI (CIVIL) 5TH, the Committee modified the text of Commercial Torts 11 and 12 by adding “business expectancy” to the instructions. In RAJI (Civil) 6TH, the Committee modified the language of Commercial Torts 21 and 22: First, the Committee included “unfair” practices in the prohibited conduct section in Commercial Torts 21. This was a substantive change made by the legislature in 2013 to the Consumer Fraud Act. Second, in order to avoid confusion and a misreading of the law concerning the requirements of the Consumer Fraud Act in actions brought by the State and private plaintiffs, several revisions were made to clarify the consumer fraud RAJI. Third, actions brought by the Attorney General may seek civil penalties under A.R.S. § 44-1531, which should be distinguished from the punitive damages available to private plaintiffs under Commercial Torts 22.

Fiduciary duty cases turn on the question whether a fiduciary relationship existed between plaintiff and defendant. That relationship may arise from either (1) a relationship of the parties that imposes a fiduciary duty upon the defendant as a matter of law; or (2) a relationship of the parties that imposes a fiduciary duty upon the defendant as a matter of fact.

In the first type of case, in which the fiduciary duty will be decided as a matter of law (e.g., in cases involving an escrow agent and client, attorney and client, or trustee and beneficiary), the court should instruct the jury on the existence and scope of the defendant’s fiduciary duty by giving Commercial Torts 1A–1D (Fiduciary Duty – Plaintiff’s Burden of Proof). That instruction would be followed by Commercial Torts 2 (Fiduciary Duty – Causation) and 3 (Fiduciary Duty – Damages).

The following fiduciary duty instructions, however, do *not* deal with the second type of case, in which a fiduciary duty arises as a matter of fact. In those cases, the parties will undoubtedly contest the existence of a fiduciary duty. In the view of the Committee, those cases present a fact-intensive question for which a standard jury instruction is not feasible.

The question whether a fiduciary duty exists in this second type of case may turn on several factors. These may, depending on the circumstances, include the health, age, and relative sophistication of the parties; the length and nature of the relationship between the parties; the subject of the parties’ dealings with one another; and the degree of influence by one party over the other. Courts have stated broad guidelines for the determination whether a fiduciary relationship exists in these cases, but have not specifically enumerated the factors.

E.g., Eagerton v. Fleming, 145 Ariz. 289, 292 (App. 1985) (a fiduciary relationship exists wherever trust and confidence is reposed by one person in the integrity and fidelity of another); *see also* RESTATEMENT (SECOND) OF TORTS § 874 comment a (1979) (“A fiduciary relation exists between two persons when one of them is under a duty to act or to give advice for the benefit of another upon matters within the scope of the relation.”). Because these statements give little guidance in fashioning an instructive standard instruction, the burden of proof instructions (Commercial Torts 1A–1D) deal with only those cases in which a fiduciary duty arises as a matter of law. Thus, in cases involving allegations of fiduciary duty arising out of the facts of a specific relationship, the court should fashion instructions on the existence of and duties arising out of the specific relationship at issue. The instructions on causation (Commercial Torts 2) and damages (Commercial Torts 3) should follow.

COMMERCIAL TORTS 1A

Fiduciary Duty—Plaintiff's Burden of Proof (Escrow Agent)

[*Name of defendant*] is an escrow agent. An escrow agent owes a special duty to the parties in a transaction, which is called a fiduciary duty. This duty requires an escrow agent to [conduct the transaction with scrupulous care, honesty, and diligence] [disclose information known to the escrow agent that presented evidence of a fraud].

[*Name of plaintiff*] claims that [*name of defendant*] breached this fiduciary duty. To establish this claim, [*name of plaintiff*] must prove:

1. [*Name of defendant*] breached this duty;
2. [*Name of defendant*]'s breach was a cause of [*name of plaintiff*]'s damages; and
3. [*Name of plaintiff*]'s damages.

SOURCE: *Berry v. McLeod*, 124 Ariz. 346, 352 (1979); *Burkons v. Ticor Title Ins. Co.*, 165 Ariz. 299, 307-08 (App. 1989), *rev'd on other grounds*, 168 Ariz. 345 (1991).

USE NOTE: This instruction is used in cases involving an escrow agent's alleged breach of fiduciary duty. The "law is well settled that escrow agents owe a fiduciary duty to their clients." *Burkons*, 165 Ariz. at 303. This instruction does not concern any separate breach of contract claim against the escrow agent. Use of the bracketed language will depend upon whether the escrow agent's failure to disclose information about a fraud is at issue.

COMMERCIAL TORTS 1B

Fiduciary Duty—Plaintiff’s Burden of Proof (Trustee)

[*Name of defendant*] is a trustee. Trustees owe a special duty to [the parties to] [the beneficiaries of] trusts, which is called a fiduciary duty. This duty requires trustees to [act as reasonable persons] [use their special skills or expertise] in dealing with the property of others.

[*Name of plaintiff*] claims that [*name of defendant*] breached this fiduciary duty. To establish this claim, [*name of plaintiff*] must prove:

1. [*Name of defendant*] breached this duty;
2. [*Name of defendant*]’s breach was a cause of [*name of plaintiff*]’s damages; and
3. [*Name of plaintiff*]’s damages.

SOURCE: See A.R.S. § 14-10801 *et seq.* and § 14-11001 *et seq.* (decedent’s estates); *Lane Title & Trust Co. v. Brannan*, 103 Ariz. 272, 278 (1968) (trustee owes the beneficiary a duty of undivided loyalty); RESTATEMENT (SECOND) OF TRUSTS §§ 169–184; *see also Gardiner v. United States*, 458 F.2d 1265, 1267 (1972) (this general axiom does not override a specific grant of authority.)

USE NOTE: 1. This instruction is used in cases involving a trustee’s alleged breach of fiduciary duty. It does not concern any separate claim for breach of a trust agreement or other instrument.

2. In general, a trustee owes one of two duties. *See, e.g.*, A.R.S. § 14-10804 (trusts – trustee’s standard of care and performance). Use of the bracketed language will turn on whether the trustee has special skills or expertise or was named trustee on the basis of representations concerning special skills or expertise. *See, e.g., In re Estate of Estes*, 134 Ariz. 70 (App. 1982) (bank serving as executor). If so, the latter phrase (“use their special skills or expertise”) should be given. If not, then the former phrase (“act as a reasonable person”) should be given.

COMMERCIAL TORTS 1C
Fiduciary Duty—Plaintiff's Burden of Proof
(Attorney)

[*Name of defendant*] is an attorney. Attorneys owe a special duty to their clients, which is called a fiduciary duty. This duty requires attorneys to represent clients¹ with strictest loyalty and act with the highest and utmost good faith.

[*Name of plaintiff*] claims that [*name of defendant*] breached this fiduciary duty. To establish this claim, [*name of plaintiff*] must prove:

1. [*Name of defendant*] breached this duty;
2. [*Name of defendant*]'s breach was a cause of [*name of plaintiff*]'s damages; and
3. [*Name of plaintiff*]'s damages.

SOURCE: *Talbot v. Schroeder*, 13 Ariz. App. 230, 231 (1970).

USE NOTE: This instruction is used in cases involving an attorney's alleged breach of fiduciary duty. The particular duties flowing from the attorney-client relationship may require further instruction in each case.

¹ In some cases, plaintiff may claim that defendant breached a fiduciary duty even though plaintiff was not defendant's client. *See, e.g., Fickett v. Superior Court*, 27 Ariz. App. 793 (1976). In those cases, this instruction must be revised to reflect the circumstances.

COMMERCIAL TORTS 1D

Fiduciary Duty—Plaintiff's Burden of Proof (Partner)

[Name of defendant] was [name of plaintiff]'s partner [in _].¹ Partners owe a special duty to one another, which is called a fiduciary duty. This duty requires partners to [deal in utmost good faith with one another] [fully disclose to one another all material facts relating to partnership affairs within their knowledge].

[Name of plaintiff] claims that [name of defendant] breached this fiduciary duty. To establish this claim, [name of plaintiff] must prove:

1. [Name of defendant] breached this duty;
2. [Name of defendant]'s breach was a cause of [name of plaintiff]'s damages; and
3. [Name of plaintiff]'s damages.

SOURCE: *Hurst v. Hurst*, 1 Ariz. App. 603, 607 (1965); *Obaco Sheep Co. v. Heirs of Mike Obaco*, 148 Ariz. 142, 145 (App. 1986) (fiduciary duty of full disclosure of all material facts within each partner's knowledge relating to partnership affairs applies where one partner sells his or her interest in the partnership to another partner); *Jerman v. O'Leary*, 145 Ariz. 397, 402 (App. 1985) (general partner stands in fiduciary relationship to limited partner).

USE NOTE: This instruction is used in cases involving a partner's alleged breach of fiduciary duty. In the case of a limited partnership, the second sentence should read as follows: "General partners owe a special duty to limited partners, which is called a fiduciary duty." See *Jerman v. O'Leary*, *supra*. Use of the bracketed language will depend upon the facts and circumstances of the case.

¹ Insert the name of the partnership.

COMMERCIAL TORTS 2

Fiduciary Duty

(Causation)

Before you can find [*name of defendant*] liable [on the breach of fiduciary duty claim], you must find that [*name of defendant*]'s breach of fiduciary duty was a cause of [*name of plaintiff*]'s damages.

A breach of fiduciary duty is a cause of damages if it helps produce the damages and if the damages would not have occurred without the breach.

SOURCE: RAJI (CIVIL) 6TH Fault 2.

USE NOTE: Use the bracketed phrase if the case includes claims in addition to the breach of fiduciary duty claim.

COMMERCIAL TORTS 3
Fiduciary Duty
(Measure of Damages)

If you find that [name of defendant] is liable to [name of plaintiff] [on the breach of fiduciary duty claim],¹ you must then decide the full amount of money that will reasonably and fairly compensate [name of plaintiff] for any of the following elements² of damage proved by the evidence to have resulted from [name of defendant]'s breach of this duty:

1. Loss of money or other property;
2. The profit or proceeds that [name of plaintiff] would have received had [name of defendant] performed his duties;
3. Money or property³ that is unjust for [name of defendant] to keep;
4. Bodily harm; and⁴
5. Emotional distress

SOURCE: RESTATEMENT (SECOND) OF TORTS § 874 comment b and § 924; RESTATEMENT (SECOND) OF AGENCY §§ 403, 404, 404A; RAJI (CIVIL) 6TH Bad Faith 7, 12, and Contract 17.

USE NOTE: ¹ Use the bracketed phrase if the case includes claims in addition to the fiduciary duty claim. This instruction should be modified as appropriate to the facts and claims presented.

² Instruct on only those elements of damages for which there is proof.

³ Use another word or phrase if necessary.

⁴ In cases involving bodily harm resulting from the breach of fiduciary duty, see Personal Injury Damages Instruction 1 for more complete instructions on the measure of damages.

Elements of Damages: There may be special cases in which more particular instructions on damages are warranted. For example, if a trustee breaches a trust, the trustee is chargeable with the loss or depreciation in value of the trust estate resulting from the breach, or the profit made by the trustee through the breach, or the profit that would have accrued to the trust estate if there had been no breach. *See, e.g.,* RESTATEMENT (SECOND) OF TRUSTS §§ 204, 205. In those cases, additional or different instructions from the parties will be appropriate.

Continued

COMMERCIAL TORTS 3

Fiduciary Duty (Measure of Damages)

Continued

COMMENT: 1. A breach of fiduciary duty is a tort. A tortfeasor is liable for all damages that occur as a result of the commission of the tort. *Elliott v. Videan*, 164 Ariz. 113, 119 (1990). A person who knowingly assists a fiduciary in committing a breach of trust may also be guilty of tortious conduct and subject to liability for the harm thereby caused. RESTATEMENT (SECOND) OF TORTS § 874 comment b. The measure of liability, however, may be different than that of the fiduciary, since the one who knowingly assists the fiduciary is responsible only for harm caused or profits that he or she has made from the transaction, and is not necessarily liable for the profits that the fiduciary has made or that the trust should have made. *Id*

2. Punitive damages may be awarded for a breach of fiduciary duty “in a proper case.” *Jerman v. O’Leary*, 145 Ariz. 397, 402 (App. 1985). See Personal Injury Damages Instruction 4 for guidance in fashioning such an instruction.

COMMERCIAL TORTS 4-10 — RESERVED

COMMERCIAL TORTS 11

Interference With Contract or Business Expectancy (Elements)

[Name of plaintiff] claims that [name of defendant] improperly interfered with [name of plaintiff]'s contract with _____.¹

To establish this claim, [name of plaintiff] must prove:

1. [Name of plaintiff] had a [contract]² or [business expectancy]³ with _____;
2. [Name of defendant] knew about the [contract] or [business expectancy];
3. [Name of defendant] intentionally interfered with the [name of plaintiff]'s [contractual relationship] or [business expectancy] with _____ which caused a breach or termination of that [relationship] or [expectancy to be realized];
4. [Name of defendant]'s conduct was improper; and
5. [Name of plaintiff] suffered damage caused by the breach or termination of [name of plaintiff]'s [contractual relationship] or [the business expectancy to be realized] with _____.

SOURCE: *Wagenseller v. Scottsdale Memorial Hosp.*, 147 Ariz. 370, 386-87 (1985); *Snow v. Western Sav. & Loan Ass'n*, 152 Ariz. 27, 34 (1986); RESTATEMENT (SECOND) OF TORTS § 766.

USE NOTE: ¹ Insert the name of the other party to plaintiff's contract in the blanks in the instruction.

² The issue whether a valid contract existed between the plaintiff and a third party may require further instructions. *See* Contract Instructions.

³ "...[S]omeone who interferes with the prospective contractual rights of another 'for a legitimate competitive reason does not become a tort-feasor simply because he may also bear ill will toward his competitor.'" *Hill v. Peterson*, 201 Ariz. 363, 366 (App. 1002); *Bar J Bar Cattle Co., Inc. v. Pace*, 158 Ariz. 481, 485 (App. 1988). A claim for tortious interference with a business expectancy is insufficient unless the plaintiff alleges facts showing that the expectancy constitutes more than a mere "hope." *Dube v. Likins*, 216 Ariz. 406, 412 (App.2007).

COMMENT: Defining Improper Conduct. In the *Wagenseller* case, the supreme court ruled that improper conduct was an element of interference with contract cases. In its discussion, the court outlined the seven factors listed in RESTATEMENT (SECOND) OF TORTS § 767. The Committee felt that these "factors" are merely categories of considerations that are relevant in analyzing what constitutes improper conduct. While these categories may be helpful to court and counsel in deciding what evidence is admissible on the issue of improper conduct, the Committee concluded that a jury instruction based on these "factors" would not be helpful to the jury and that such factors are better left to argument by counsel. If the court concludes that further instructions are appropriate on the issue of what constitutes improper conduct, the Committee recommends that the court refer to the extensive comments following § 767 of the RESTATEMENT.

COMMERCIAL TORTS 12

Interference With Contract or Business Expectancy (Damages)

If you find that [*name of defendant*] improperly interfered with [*name of plaintiff*]'s [*contract*] or [*business expectancy*] with _____,¹ you must then decide the full amount of money that will reasonably and fairly compensate [*name of plaintiff*] for each of the following elements of damages proved by the evidence to have resulted from the interference with the [*contract*] or [*business expectancy*].²

1. The net [profit] [benefit]³ that [*name of plaintiff*] would have received had [*the contract been performed*] or [*the business expectancy realized*];⁴
2. Damage to [*name of plaintiff*]'s reputation; and
3. Any emotional suffering sustained by [*name of plaintiff*].

¹ **SOURCE:** RESTATEMENT (SECOND) OF TORTS § 774A.

USE NOTE: ¹ Insert the name of the other party to plaintiff's contract in the blank.

² Instruct only on those elements for which there is proof.

³ Use the bracketed word that is most appropriate to the facts of the case.

⁴ In some cases, a different measure of contract damages may be appropriate. *See* Contract Instruction 17 (Measure of Direct Damages—Breach of Contract).

COMMENT: While interference cases generally involve contracts, nevertheless interference with contract is a tort. Accordingly, the measure of damages is not limited to those allowed in contract actions. Under appropriate circumstances, the plaintiff may recover damages for emotional distress, injury to reputation, or other consequential damages. *See* RESTATEMENT (SECOND) OF TORTS § 774A cmt. d.

COMMERCIAL TORTS 13–20 — RESERVED

COMMERCIAL TORTS 21
Consumer Fraud
(Elements of Claim)

[*Name of plaintiff*] claims that [*name of defendant*] committed consumer fraud. On this claim, [*name of plaintiff*] must prove:

- 1(a). [*Name of defendant*] [used deception,] [used a deceptive or unfair act or practice,] [used fraud,] [used false pretense,] [made a false promise,] [made a misrepresentation]; [and/or]
- 1(b). [*Name of defendant*] [concealed, suppressed, or omitted a material fact]; and in the case of a [concealment, suppression, or omission] intended that others rely on the [concealment, suppression, or omission];
2. in connection with the sale or advertisement of merchandise; and
3. [*Name of plaintiff*] suffered damages as result of reliance on [*name of defendant*]'s [deception,] [deceptive or unfair act or practice,] [fraud,] [false pretense,] [false promise,] [misrepresentation,] [concealment, suppression, or omission of a material fact]; and
4. [*Name of plaintiff*]'s damages.

Continued

SOURCE: A.R.S. § 44-1521 *et seq.* *State ex rel. Horne v. Autozone, Inc.*, 227 Ariz. 471 (App. 2011) (vacated in part on other grounds); *Powers v. Guar. RV, Inc.*, 229 Ariz. 555 (App. 2012).

USE NOTES: 1. Use the applicable bracketed words or phrases.

2. Burden of Proof: The burden of proof for consumer fraud is preponderance of the evidence. *Dunlap v. Jimmy GMC of Tucson, Inc.*, 136 Ariz. 338, 344, 666 P.2d 83, 89 (App. 1983). Give Standard Instruction 2 (Burden of Proof—More Probably True) with this instruction.

3. Definition of Terms: In some cases, definitions of “sale,” “advertisement,” and/or “merchandise” may be needed. If so, the following additional instructions should be given:

“Sale” means any sale, offer for sale, or attempt to sell any merchandise for any consideration, including sales, leases and rentals of any real estate subject to any form of deed restriction imposed as part of a previous sale.

A.R.S. § 44-1521(7).

“Advertisement” includes the attempt by publication, dissemination, solicitation or circulation, oral or written, to induce directly or indirectly any person to enter into any obligation or acquire any title or interest in any merchandise.

A.R.S. § 44-1521(1).

Continued

COMMERCIAL TORTS 21

Consumer Fraud (Elements of Claim)

Continued

“Merchandise” means any objects, wares, goods, commodities, intangibles, real estate, or services.

A.R.S. § 44-1521(5).

4. Attorney General as Plaintiff: In an action brought by the attorney general, only elements (1) and (2) must be proven. *People ex rel. Babbitt v. Green Acres Trust*, 127 Ariz. 160, 168 (App. 1980) (“reliance” or actual deception or damage is not a prerequisite to a consumer fraud action brought by the attorney general). On the other hand, before a private party may assert a claim under the Consumer Fraud Act, he or she must have been damaged by the prohibited practice. A prerequisite to such damages is reliance on unlawful acts. *Peery v. Hansen*, 120 Ariz. 266, 269 (App. 1978). See also comment 1, below, regarding reasonableness of plaintiff’s reliance. In an action brought by the Attorney General seeking civil penalties under A.R.S. § 44-1531, a separate instruction may be needed to address whether a violation is willful. A violation is “willful” if the “party committing the violation knew or should have known” that the conduct was of the nature prohibited by the Consumer Fraud Act. A.R.S. § 44-1531. Other remedies under A.R.S. § 44-1528, including restitution, disgorgement, and injunctive relief, do not require a finding of willfulness.

5. Act or Omission: Generally, under A.R.S. § 44-1521 *et seq.*, consumer fraud may be predicated on an “act” or “omission.” In the case of an alleged act, the statute only requires the “intent to do the act involved,” but not the intent to deceive. *State ex rel. Horne v. AutoZone, Inc.*, 227 Ariz. 471, 485, ¶ 48 (App. 2011) (vacated in part on other grounds). See Elements of Claim 1(a) above. In the case of an alleged omission, the statute requires the intent that others rely on the alleged omission, but not the intent to deceive. *Id.* at 227 Ariz. 471, 478, ¶ 15. See Elements of Claim 1(b) above. A person or entity need not intend to deceive to violate the statute. *Powers v. Guar. RV, Inc.*, 229 Ariz. 555, 560, ¶ 17 (App. 2012).

6. Omission as a Practice: A pattern or practice of concealment, suppression, or omission may be construed as an act or practice. Whether a pattern or practice of concealment, suppression, or omission constitutes an act may require a separate instruction. *State ex rel. Horne v. AutoZone, Inc.*, 229 Ariz. 358, 361-62, ¶ 14 (2012).

COMMENT: 1. Distinguish Fraud and Consumer Fraud Claims: If the case includes claims of both common law fraud and consumer fraud, an instruction regarding the differences between the two actions should also be given. Consumer fraud differs from common law fraud in two ways. First, in a consumer fraud action, it is not necessary to show the defendant’s intention to deceive the plaintiff. *Flagstaff Med. Ctr., Inc. v. Sullivan*, 773 F. Supp. 1325 (D. Ariz. 1991), *aff’d in part, rev’d in part on other grounds*, 962 F.2d 879 (9th Cir. 1992). Second, if plaintiff was harmed as a result of reliance on any false statement or misrepresentation made by the defendant, the reasonableness of plaintiff’s reliance is not an element of the consumer fraud claim. *Parks v. Macro-Dynamics, Inc.*, 121 Ariz. 517, 520 (App. 1979), *appeal after remand*, 134 Ariz. 495 (App. 1982).

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COMMERCIAL TORTS 21

Consumer Fraud (Elements of Claim)

2. Misleading Nature of Representation: In determining whether a representation is misleading under the Consumer Fraud Act, A.R.S. § 44-1521 *et seq.*, meaning and impression ought to be taken from all that is reasonably implied, not just from what is said. *Madsen v. Western Am. Mortgage Co.*, 143 Ariz. 614 (App. 1985). In evaluating the representations, the test is whether the least sophisticated reader would be misled; technical correctness of the representation is irrelevant if the capacity to mislead is found. *Id.*

COMMERCIAL TORTS 22

Consumer Fraud

(Measure of Damages; Private Cause of Action¹)

If you find that [name of defendant] is liable to [name of plaintiff] [on the consumer fraud claim],² you must then decide the full amount of money that will reasonably and fairly compensate [name of plaintiff] for damages³ proved by the evidence to have resulted from [name of defendant]'s [deception,] [deceptive or unfair act or practice,] [fraud,] [false pretense,] [false promise,] [misrepresentation,] [concealment, suppression, or omission of a material fact].⁴

Use Notes:¹ This instruction does not apply to actions brought by the Attorney General. *Dunlap v. Jimmy GMC of Tucson, Inc.*, 136 Ariz. 338 (App. 1983). The remedies available to the Attorney General are set forth in A.R.S. §§ 44-1528, 44-1531, and 44-1534.

² Use the bracketed phrase if the case includes claims in addition to the consumer fraud claim.

³ Plaintiff is entitled to recovery of “actual damages,” which includes consideration paid in the contract and out-of-pocket expenses. *Holeman v. Neils*, 803 F. Supp. 237 (D. Ariz. 1992) (citing *Parks v. Macro-Dynamics, Inc.*, 121 Ariz. 517, 521 (App. 1979)).

⁴ Use the applicable bracketed words or phrases.

COMMENT: Punitive damages may be awarded to private litigants for violations of the Arizona Consumer Fraud Act where the defendant’s conduct is wanton or reckless, shows spite or ill will, or where the conduct demonstrates a reckless indifference to the interests of others. *Holeman v. Neils*, *supra*. See Personal Injury Damages Instruction 4 (Punitive Damages) for guidance applicable to such an instruction.

COMMERCIAL TORTS 23

Negligent Misrepresentation

[*Name of plaintiff*] claims that [*name of defendant*] is liable to [*name of plaintiff*] for negligent misrepresentation. On this claim, [*name of plaintiff*] must prove:

1. [*Name of defendant*] either provided [*name of plaintiff*] [others] with false or incorrect information, or omitted or failed to disclose material information;
2. [*Name of defendant*] intended that [*name of plaintiff*] [others] rely on information provided and [*name of defendant*] provided it for that purpose;
3. [*Name of defendant*] failed to exercise reasonable care [or competence] in obtaining or communicating the information;
4. [*Name of Plaintiff*] relied on the information;
5. [*Name of plaintiff*]'s reliance was justified; and
6. As a result, [*name of plaintiff*] was damaged.

SOURCE: *McAlister v. Citibank*, 171 Ariz. 207 (App. 1992); *Murray Mgmt. Corp. v. Founders Title Co.*, 169 Ariz. 417 (App. 1991); *St. Joseph's Hosp. & Med. Ctr. v. Reserve Life Ins. Co.*, 154 Ariz. 307 (1987); *Van Buren v. Pima Community College Dist. Bd.*, 113 Ariz. 85 (1976); RESTATEMENT (SECOND) OF TORTS § 552(1) (1977); *Alaface v. Nat'l Inv. Co.*, 181 Ariz. 586 (App. 1994).

USE NOTE: The bracketed [others] may be used when the information was not provided directly to the plaintiff, but the plaintiff is within the group of reasonably foreseeable users of the information.

COMMENT: Arizona has approved the RESTATEMENT (SECOND) OF TORTS § 552(1) definition of the tort of negligent misrepresentation:

- (1) One who, in the course of his business, profession, or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

St. Joseph's Hosp., 154 Ariz. at 312, quoting RESTATEMENT (SECOND) OF TORTS § 552(1).

Note that: “Liability for negligent misrepresentation is narrow in scope because it is premised on the reasonable expectations of a foreseeable user of information supplied in connection with commercial transactions.” *Id.* “The provider of information is bound to exercise care only when he is aware of the intended use of the information and then only if he intended to supply it for that purpose.” *Murray*, 169 Ariz. at 423, 819 P.2d at 1009. Furthermore, “A promise of future conduct is not a statement of fact capable of supporting a claim of negligent misrepresentation.” *McAlister*, 171 Ariz. at 215, 829 P.2d at 1261.

COMMERCIAL TORTS 24

Common Law Fraud

[Name of plaintiff] claims that [name of defendant] defrauded [name of plaintiff]. To establish this claim, [name of plaintiff] must prove by clear and convincing evidence:

1. [Name of defendant] made a representation to [name of plaintiff]¹;
2. The representation was false;
3. The representation was material, which means that it was sufficiently important to influence [name of plaintiff]'s [a reasonable person's]² actions;
4. [Name of defendant] knew that the representation was false;
5. [Name of defendant] intended that [name of plaintiff] would act upon the representation in the manner reasonably contemplated by [name of defendant];
6. [Name of plaintiff] did not know that the representation was false;
7. [Name of plaintiff] relied on the truth of the representation;
8. [Name of plaintiff]'s reliance was reasonable and justified under the circumstances; and
9. As a result, [name of plaintiff] was damaged.

SOURCE: *Echols v. Beauty Built Homes, Inc.*, 132 Ariz. 498, 647 P.2d 629 (1982); *Stabeli v. Kauffman*, 122 Ariz. 380, 595 P.2d 172 (1979).

USE NOTE: Burden of Proof: The burden of proof for common law fraud is clear and convincing evidence. *Dunlap v. Jimmy GMC of Tucson, Inc.*, 136 Ariz. 338, 666 P.2d 83 (App. 1983). Give RAJI (CIVIL) 6TH Standard 3 (Burden of Proof—Clear and Convincing) with this instruction.

¹ When the defendant has an obligation to reveal material information, the failure to do so is equivalent to a misrepresentation and may therefore support a claim of actionable fraud. *Haisch v. Allstate Ins. Co.*, 197 Ariz. 606, 5 P.3d 940 (App. 2000).

² The law in Arizona seems to be unclear as to whether materiality is determined by an objective or subjective standard, and thus the use of the alternative bracketed phrases in element (3) will need to be determined by the court.

COMMENT: Consequential damages is a proper measure of damages in a fraud action, and the defrauding party may not limit proof of damages to the benefit of the bargain. *Ashley v. Kramer*, 8 Ariz. App. 27, 442 P.2d 564 (1968); *Bechtel v. Liberty Nat'l Bank*, 534 F.2d 1335 (9th Cir. 1976). Although not every fraud case will support punitive damages, they may be recovered where a proper basis under Arizona law is established. *Echols, supra*.

COMMERCIAL TORTS 25–30 — RESERVED

COMMERCIAL TORTS 31

Racketeering

(Elements)

[*Name of plaintiff*] claims that [*name of defendant*] engaged in a pattern of unlawful activity and that, as a result of such activity, [*name of plaintiff*] was damaged.

To establish this claim, [*name of plaintiff*] must prove:

1. [*Name of defendant*] engaged in a pattern of unlawful activity for the purpose of financial gain;
2. [*Name of defendant*]'s pattern of unlawful activity caused [*name of plaintiff*]'s damages; and
3. [*Name of plaintiff*]'s damages were a reasonably foreseeable result of [*name of defendant*]'s pattern of unlawful activity.

SOURCE: A.R.S. § 13-2314.04(A).

USE NOTE: 1. These instructions are for use only with cases filed on or after July 17, 1993. A.R.S. § 13-2301.

2. Use with Standard Instruction 2 (Burden of Proof—More Probably True).

COMMERCIAL TORTS 32

Racketeering

(Unlawful Activity Defined)

“Unlawful activity” means any crime committed for financial gain which is punishable by imprisonment for more than one year, regardless of whether the defendant was actually charged or indicted.

In this case, [*name of plaintiff*] claims that the “unlawful activity” is [name of applicable predicate act], which is a crime punishable by imprisonment for more than one year.

To establish that [*name of defendant*] committed [name of applicable predicate act], [*name of plaintiff*] must prove [elements of applicable predicate act].

USE NOTE: Provide elements of predicate act by referring to A.R.S. Title 13. The Committee notes that it is unclear whether the predicate act must be proved by a preponderance of the evidence or beyond a reasonable doubt.

COMMERCIAL TORTS 33
Racketeering
(Pattern of Unlawful Activity Defined)

To establish that [*name of defendant*] engaged in a “pattern of unlawful activity,” [*name of plaintiff*] must prove:

1. At least two acts involving [applicable predicate act or acts defined in Use Note], the last act of which must have occurred within five years of the prior act;
2. The acts were related to each other; and
3. The acts amounted to or posed a threat of continued unlawful activity.¹

Acts are “related” if they have the same or similar purposes, results, participants, victims, or methods of commission, or have other similar characteristics.

SOURCE: A.R.S. § 13-2314.04(S)(3)(a); *see also* 18 U.S.C. § 1961(5), Racketeer Influenced and Corrupt Organizations (RICO); *H.J., Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 109 S. Ct. 2893 (1989); Antitrust Law Section, Private Antitrust Litigation Committee, Civil RICO Subcommittee, American Bar Association, *Sample Jury Instructions in Civil RICO Jury Antitrust Cases*.

¹ In *H.J., Inc. v. Nw. Bell Tel. Co.*, the United States Supreme Court held that, under federal RICO, the “continuity” requirement can be demonstrated by proving either “a series of related predicate acts extending over a substantial period of time” or “past conduct that by its nature projects into the future with a threat of repetition.” 492 U.S. at 241-42. The Court also stated that “[p]redicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy the [continuity] requirement.” *Id.* at 242. *See also Religious Tech. Ctr. v. Wollersheim*, 971 F.2d 364, 365-67 (9th Cir. 1992) (acts occurring over span of six months insufficient to establish threat of continuity); *River City Markets, Inc. v. Fleming Foods West, Inc.*, 960 F.2d 1458, 1464 (9th Cir. 1992) (misrepresentations occurring over a one-month period insufficient to establish threat of continuity).

USE NOTE: For use only with predicate acts defined in A.R.S. § 13-2301(D)(4)(d)-(j), (m), (o)-(t), (x), or (z).

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Racketeering

(Damages)

If you find that [*name of plaintiff*] sustained reasonably foreseeable damages by reason of [*name of defendant*]'s pattern of unlawful activity, you must decide the full amount of money that will reasonably and fairly compensate [*name of plaintiff*].

SOURCE: A.R.S. § 13-2134.04(A).

COMMENT: Civil actions under this section are intended to be remedial. Consequently, neither punitive damages nor emotional distress damages are recoverable unless there has been bodily injury. A.R.S. § 13-2314.04(K). Moreover, although a plaintiff may recover up to treble damages for the injuries sustained as a result of a defendant's pattern of unlawful activity, the award of such damages is within the court's discretion. A.R.S. § 13-2134.04(A), (D)(4). Prejudgment interest, however, is not subject to treble damages. A.R.S. § 13-2134.04(D)(5).