

LIABILITY FOR NONDISCLOSURE

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I. Section 551 of the Restatement (2nd) of Torts provides general principles for nondisclosure liability. That section provides in its entirety:

- (1) One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.
- (2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,
 - a) matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them; and
 - b) matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading; and
 - c) subsequently acquired information that he knows will make untrue or misleading a previous representation that when made was true or believed to be so; and
 - d) the falsity of a representation not made with the expectation that it would be acted upon if he subsequently learns that the other is about to act in reliance upon it in a transaction with him; and
 - e) facts basic to the transaction if he knows that the other is about to enter into it under a mistake as to them and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

II. Relations of Trust and Confidence.

- A) These relations include those of executor of an estate and its beneficiary, a bank and investing depositor, and those of physician and patient, attorney and client, priest and parishioner, partners, tenants in common, and guardian and ward. In addition, certain types of contracts, such as those of suretyship, or guarantee, insurance, and joint venture, are recognized as creating in themselves a confidential relation and hence as requiring the utmost good faith and full and fair disclosure of all material facts. (Comment f).

- B) Examples of cases where a cause of action against an insurer who has failed to disclose information to the detriment of the insured include Davis v. Blue Cross of Northern California, 600 P.2d 1060 (Cal 1979); Dercoli v. Pennsylvania National Mutual Insurance Company, 554 A.2d 906 (Pa. 1989); Weber v. State Farm Mutual Automobile Insurance Company, 873 F.Supp 201 (S. Dist. Iowa 1994).

III. Partial or Ambiguous Statement.

- A) A statement that is partial or incomplete may be a misrepresentation because it is misleading when it purports to tell the whole truth and does not.
- B) So also may a statement be made so ambiguously that it may have two interpretations, one of which is false. When such a statement has been made, there is a duty to disclose the additional information necessary to prevent it from misleading the recipient. In this case there may be recovery either on the basis of the original misleading statement or the nondisclosure of the additional facts. (Comment g).

IV. Subsequently Acquired Information.

- A) One who, having made a representation which when made was true or believed to be so, remains silent after he has learned that it is untrue and that the person to whom it is made is relying upon it in the transaction with him, is morally and legally in the same position as if he knew that his statement was false when made.
- B) An example of this would be if a person makes a true statement of his financial position to a credit rating company intending the substance of that statement to be published to its subscribers. The person's financial position becomes seriously impaired but he/she does not inform the credit rating company of this fact. If in fact the person receives goods on credit from a person who is a subscriber of the rating company who, when the goods were bought relied on the credit rating, the person is subject to liability (Comment c).

V. Facts Basic to the Transaction.

- A) A basic fact is a fact that is assumed by the parties as a basis for the transaction itself. It is a fact that goes to the essence of the transaction such as disclosure of termite infestation in the sale of the house. (Comment j).
- B) When a plaintiff has equal opportunity for obtaining information that he may be expected to utilize if he cares to do so, or when the defendant has no reason to think that the plaintiff is acting under a misapprehension, there is no obligation to give aid to bargaining an antagonist by disclosing what the defendant has himself discovered. To a considerable extent, sanctioned by the customs and

mores of the community, superior information and better business acts are legitimate advantages which lead to no liability. The defendant may reasonably expect the plaintiff to make his own investigation, draw his own conclusions and protect himself; and if the plaintiff is inexperienced or ignorant or his judgment is bad, or he does not have access to adequate information, the defendant is under no obligation to make good his deficiencies. (Comment k).

- C) On the other hand, there are situations in which the defendant not only knows that his bargaining adversary is acting under a mistake basic to the transaction, but also knows that the adversary, by reason of the relation between them, custom of the trade, or other objective circumstances, is reasonably relying upon a disclosure of the unrevealed fact if it exists. In this type of case, good faith and fair dealing will require disclosure. In general, the cases which have applied such a duty have been those in which the advantage taken of the plaintiff's ignorance is so shocking to the ethical sense of the community and is so extreme and unfair as to amount to a form of swindling, in which the plaintiff is led by appearances into a bargain that is a trap, of whose essence and substance he is unaware. (Comment e).

V. Court and Jury Functions.

- A) Whether there is a duty to the other to disclose the fact in question is always a matter for the determination of the court.
- B) If there are disputed facts bearing upon the existence of the duty, as, for example, the defendant's knowledge of the fact, the other's ignorance of it or his opportunity to ascertain it, the customs of the particular trade, or the defendant's knowledge that the plaintiff reasonably expects him to make the disclosure, they are to be determined by the jury under appropriate instructions as to the existence of the duty.