REST 2d TORTS S 551
Restatement (Second) of Torts § 551 (1977)
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Restatement of the Law -- Torts
Restatement (Second) of Torts
Current through April 2004

Division 4. Misrepresentation
Chapter 22. Misrepresentation And Nondisclosure Causing Pecuniary Loss
Topic 2. Concealment And Nondisclosure

§ 551. Liability For Nondisclosure

Link to Case Citations

(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.

Comment on Subsection (1):

a. Unless he is under some one of the duties of disclosure stated in Subsection (2), one party to a business transaction is not liable to the other for harm caused by his failure to disclose to the other facts of which he knows the other is ignorant and which he further knows the other, if he knew of them, would regard as material in determining his course of action in the transaction in question. The interest in knowing those facts that are important in determining the advisability of a course of action in a financial or commercial matter is given less protection by the rule stated in this Subsection than is given to the interest in knowing facts that are important in determining the recipient's course of action in regard to matters that involve the security of the person, land or chattels of himself or a third person.

b. The conditions under which liability is imposed for nondisclosure in an action for deceit differ in one particular from those under which a similar nondisclosure may confer a right to rescind the transaction or to recover back money paid or the value of other benefits conferred. In the absence of a duty of disclosure, under the rule stated in Subsection (2) of this Section, one who is negotiating a business transaction is not liable in deceit because of his failure to disclose a fact that he knows his adversary would regard as material. On the other hand, as is stated in Restatement, Second, Contracts § 303(b) the other is entitled to rescind the transaction if the undisclosed fact is basic; and under Restatement of Restitution, § 8, Comment e, and § 28, he would be entitled to recover back any money paid or benefit conferred in consummation of the transaction.

Comment on Subsection (2):

c. A person under the duty stated in this Subsection is required to disclose only those matters that he has reason to know will be regarded by the other as important in determining his course of action in the transaction in hand. He is therefore under no duty to disclose matter that the ordinary man would regard as unimportant unless he knows of some peculiarity of the other that is likely to lead him to attach importance to matters that are usually regarded as of no moment.

d. Under the rule stated in this Subsection the person under a duty of disclosure is not subject to liability merely because he has failed to bring the required information home to the person entitled to it. His duty is to exercise reasonable care to do so. If reasonable care is exercised, the fact that the information does not reach the person entitled to it does not subject him to liability. Thus a trustee whose distant cestui que trust is contemplating a sale of part of his interest in the trust res to a third person and who writes to his cestui que trust communicating certain information which it is material for the latter to know in the transaction in question, is not subject to liability in an action of deceit, if the letter goes astray and therefore does not reach the cestui until the sale is made. On the other hand, if the trustee knows that the consummation of the transaction is immediately imminent, it may not be reasonable for him to communicate by mail rather than by telegraph. However, in the great majority of cases the person owing the duty has so available an opportunity to make the required disclosure that it is rare that the failure to give it can be other than intentional or negligent.

Comment on Clause (a):

e. On the duty of a trustee to disclose all material matters to his beneficiary with whom he is dealing on the trustee's own account, see Restatement, Second, Trusts § 170(2). On the duty of a trustee to disclose to his beneficiary matters important for the beneficiary to know in dealing with third persons, see Restatement, Second, Trusts § 173, Comment d. On the duty of an agent to disclose to his principal matters important for the principal to know in dealing with the agent or a third person and the similar duty of the principal to the agent, see Restatement, Second, Agency §§ 381 and 435. It is not within the scope of this Restatement to state the rules that determine the duty of disclosure which under the law of business associations the directors of a company owe to its shareholders.

f. Other relations of trust and confidence include those of the executor of an estate and its beneficiary, a bank and an investing depositor, and those of physician and patient, attorney and client, priest and parishioner, partners, tenants in common and guardian and ward. Members of the same family normally stand in a fiduciary relation to one another, although it is of course obvious that the fact that two men are brothers does not establish relation of trust and confidence when they have become estranged and have not spoken to one another for many years. In addition, certain types of contracts, such as those of suretyship or guaranty, insurance and joint adventure, 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 on Clause (b):

g. 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. (See § 529). So also may a statement made so ambiguously that it may have two interpretations, one of which is false. (See §§ 527, 528). 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 of the nondisclosure of the additional facts.

Comment on Clause (c):

h. 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 a transaction with him, is morally and legally in the same position as if he knew that his statement was false when made.

Illustrations:

1. A, a stock breeder, tells B, a prospective buyer, that a thoroughbred mare is in foal to a well-known stallion. The mare miscarries. Immediately afterwards B offers $500 for the mare relying, as A knows, upon his statement. A does not inform B of the mare's miscarriage. A is subject to liability to B for the loss that he suffers because the mare is not in foal as originally represented.
2. A, the president of a mercantile corporation, makes a true statement of its financial position to a credit rating company, intending the substance to be published by it to its subscribers. The corporation's financial position becomes seriously impaired, but A does not inform the credit rating company of this fact. The corporation receives goods on credit from B, a subscriber of the rating company, who when the goods are bought is relying, as A knows, on the credit rating based on his statements to the rating

company. A is subject to liability in deceit to B.

Comment on Clause (d):

i. One who knowingly makes a misrepresentation without any expectation that the recipient will act upon it may subsequently discover that the other is relying upon it in a transaction then pending between them. If, in this case, he does not exercise reasonable care to inform the other that his misrepresentation is untrue, he is under the same liability as though he had then made it for the purpose of influencing the other's conduct in the transaction in hand.

The rule stated in Clause (d) is not necessarily limited to "a transaction with him." When, for example, the defendant makes a statement to the plaintiff concerning the credit of a third person not expecting it to be acted upon and then discovers that the plaintiff is about to lend money to the third person in reliance upon the statement, it would appear that the duty of disclosure would arise.

Comment on Clause (e):

j. "Facts basic to the transaction." The word "basic" is used in this Clause in the same sense in which it is used in Comment c under § 16 of the Restatement of Restitution. 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 basis, or essence, of the transaction, and is an important part of the substance of what is bargained for or dealt with. Other facts may serve as important and persuasive inducements to enter into the transaction, but not go to its essence. These facts may be material, but they are not basic. If the parties expressly or impliedly place the risk as to the existence of a fact on one party or if the law places it there by custom or otherwise the other party has no duty of disclosure. (Compare Restatement, Second, Contracts § 296).

Illustrations:

3. A sells to B a dwelling house, without disclosing to B the fact that the house is riddled with termites. This is a fact basic to the transaction.
4. A sells to B a dwelling house, knowing that B is acting in the mistaken belief that a highway is planned that will pass near the land and enhance its value. A does not disclose to B the fact that no highway is actually planned. This is not a fact basic to the transaction.
5. Having purchased a certain tract of land for $25,000, A hears that B may have a claim to it. He goes to B and offers to purchase B's interest. B does not believe he has a valid legal claim but agrees to give A a quit-claim deed for $250. B's lack of a valid legal claim is not a fact that he is under a duty to disclose.

Comment:

k. Nondisclosure of basic facts. The rule stated in Subsection (1) reflects the traditional ethics of bargaining between adversaries, in the absence of any special reason for the application of a different rule. When the facts are patent, or when the 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 a bargaining 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 acumen 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 indolent, 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. This is true, in general, when it is the buyer of land or chattels who has the better information and fails to disclose it. Somewhat less frequently, it may be true of the seller.

Illustrations:

6. A is a violin expert. He pays a casual visit to B's shop, where second-hand musical instruments are sold. He finds a violin which, by reason of his expert knowledge and experience, he immediately recognizes as a genuine Stradivarius, in good condition and worth at least $50,000. The violin is priced for sale at $100. Without disclosing his information or his identity, A buys the violin from B for $100. A is not liable to B.
7. The same facts as in Illustration 6, except that the violin is sold at auction and A bids it in for $100. The same conclusion.
8. B has a shop in which he sells second-hand musical instruments. In it he offers for sale for $100 a violin, which he knows to be an imitation Stradivarius and worth at most $50. A enters the shop, looks at the violin and is overheard by B to say to his companion that he is sure that the instrument is a genuine Stradivarius. B says nothing, and A buys the violin for $100. B is not

liable to A.

l. The continuing development of modern business ethics has, however, limited to some extent this privilege to take advantage of ignorance. 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, the customs 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 may require a disclosure.

It is extremely difficult to be specific as to the factors that give rise to this known, and reasonable, expectation of disclosure. In general, the cases in which the rule stated in Clause (e) has been applied 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. In such a case, even in a tort action for deceit, the plaintiff is entitled to be compensated for the loss that he has sustained. Thus a seller who knows that his cattle are infected with tick fever or contagious abortion is not free to unload them on the buyer and take his money, when he knows that the buyer is unaware of the fact, could not easily discover it, would not dream of entering into the bargain if he knew and is relying upon the seller's good faith and common honesty to disclose any such fact if it is true.

There are indications, also, that with changing ethical attitudes in many fields of modern business, the concept of facts basic to the transaction may be expanding and the duty to use reasonable care to disclose the facts may be increasing somewhat. This Subsection is not intended to impede that development.

Illustrations:

9. A sells B a dwelling house, without disclosing the fact that drain tile under the house is so constructed that at periodic intervals water accumulates under the house. A knows that B is not aware of this fact, that he could not discover it by an ordinary inspection, and that he would not make the purchase if he knew it. A knows also that B regards him as an honest and fair man and one who would disclose any such fact if he knew it. A is subject to liability to B for his pecuniary loss in an action of deceit.
10. A is engaged in the business of removing gravel from the bed of a navigable stream. He is notified by the United States government that the removal is affecting the channel of the stream, and ordered to stop it under threat of legal proceedings to compel him to do so. Knowing that B is unaware of this notice, could not reasonably be expected to discover it and would not buy if he knew, A sells the business to B without disclosing the fact. A is subject to liability to B for his pecuniary loss in an action of deceit.
11. A, who owns an amusement center, sells it to B without disclosing the fact that it has just been raided by the police, and that A is being prosecuted for maintaining prostitution and the sale of marijuana on the premises. These facts have seriously affected the reputation and patronage of the center, and greatly reduced its monthly income. A knows that B is unaware of these facts, could not be expected to discover them by ordinary investigation and would not buy if he knew them. He also knows that B believes A to be a man of high character, who would disclose any serious defects in the business. A is subject to liability to B for his pecuniary loss in an action of deceit.
12. A sells a summer resort to B, without disclosing the fact that a substantial part of it encroaches on the public highway. A knows that B is unaware of the fact and could not be expected to discover it by ordinary inquiry, and that B trusts him to disclose any such facts. A is subject to liability to B for his pecuniary loss in an action of deceit.

m. Court and jury. Whether there is a duty to the other to disclose the fact in question is always a matter for the determination of the court. 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.

Case Citations

Reporter's Notes, Case Citations & Cross References Through December 1977

Case Citations 1978 -- June 1987

Case Citations July 1991 -- June 1998

Case Citations July 1998 -- June 2003

Case Citations July 2003 -- November 2003

Reporter's Notes, Case Citations & Cross References Through December 1977:

REPORTER'S NOTE

This Section has been changed by expanding Subsection (2) to include Clauses (b) and (c).

Comment (a): No duty to disclose except as indicated in Subsection (1):

See e.g., Vaught v. Satterfield, 260 Ark. 544, 542 S.W.2d 502 (1976); Windram Mfg. Co. v. Boston Blacking Co., 239 Mass. 123, 131 N.E. 454 (1921); Crowell v. Jackson, 53 N.J.L. 656, 23 A. 426 (1891); Klott v. Associates Real Estate, 41 Ohio App.2d 118, 322 N.E.2d 690 (1974); Goerke v. Vojvodich, 67 Wis.2d 102, 226 N.W.2d 211 (1975).

Comment f: This is supported by the following cases:

Principal and agent: McDonough v. Williams, 77 Ark. 261, 92 S.W. 783 (1905).

Prospective partner: Wolf v. Brungardt, 215 Kan. 272, 524 P.2d 726 (1974).

Executor and beneficiary of an estate: Murphy v. Cartwright, 202 F.2d 71 (5 Cir.1953); Foreman v. Henry, 87 Okl. 272, 210 P. 1026 (1922).

Bank and investing depositor: Brasher v. First Nat. Bank, 232 Ala. 340, 168 So. 42 (1936); cf. Boonstra v. Stevens-Norton, Inc., 64 Wash.2d 621, 393 P.2d 287 (1964) (loan broker); Tcherepnin v. Franz, 393 F.Supp. 1197 (N.D.Ill.1975).

Majority and minority stockholders: Speed v. Transamerica Corp., 99 F.Supp. 808 (D.Del.1951) supplemented, 100 F.Supp. 461, petition denied, 100 F.Supp. 463; Manning v. Dial, 271 S.C. 79, 245 S.E.2d 120 (1978).

Old friends: Feist v. Roesler, 86 S.W.2d 787 (Tex.Civ.App.1935).

Cf. In re Estate of Enyart, 100 Neb. 337, 160 N.W. 120 (1916), overruled in part, in Kingsley v. Noble, 129 Neb. 808, 263 N.W. 222 (1935) (affianced).

Contra: Eaton v. Sontag, 387 A.2d 33 (Me.1978).

Contracts of suretyship or guaranty: Cf. Connecticut Gen. Life Ins. Co v. Chase, 72 Vt. 176, 47 A. 825 (1900); Atlantic Trust & Deposit Co. v. Union Trust & Title Corp., 110 Va. 286, 67 S.E. 182 (1909).

Insurance: State Farm Mutual Ins. Co. v. Ling, 348 So.2d 472 (Ala.1977).

See, generally, Edward Barron Estate Co. v. Woodruff Co., 163 Cal. 561, 126 P. 351 (1912) (attempting a list of similar relations).

Comment g:

See Dyke v. Zaiser, 80 Cal.App.2d 639, 182 P.2d 344 (1947); Tucker v. Beazley, 57 A.2d 191 (Mun.App.D.C.1948); St. Joseph Hospital v. Corbetta Constr. Co., 21 Ill.App.3d 925, 316 N.E.2d 51 (1974); Dennis v. Thomson, 240 Ky. 727, 43 S.W.2d 18 (1931); Kidney v. Stoddard, 48 Mass. (7 Metc.) 252 (1843); Consolidated Foods Corp. v. Pearson, 287 Minn. 305, 178 N.W.2d 223 (1970); Smith v. Pope, 103 N.H. 555, 176 A.2d 321 (1961); Junius Const. Co. v. Cohen, 257 N.Y. 393, 178 N.E. 672 (1931); Noved Realty Corp. v. A.A.P. Co., 250 App.Div. 1, 293 N.Y.S. 336 (1937); Berry v. Stevens, 168 Okl. 124, 31 P.2d 950 (1934); Palmiter v. Hackett, 95 Or. 12, 185 P. 1105 (1919), modified, 95 Or. 12, 186 P. 581.

Otherwise if the statement does not purport to tell the whole truth. Potts v. Chapin, 133 Mass. 276 (1882).

Comment h: This is supported by With v. O'Flanagan, [1936] 1 Ch. 575; Loewer v. Harris, 57 F. 368 (2 Cir.1893); Fischer v. Kletz, 266 F.Supp. 180 (S.D.N.Y.1967); Morykwas v. McKnight, 37 Mich.App. 304, 194 N.W.2d 522 (1971); cf. Equitable Life Ins. Co. of Iowa v. Halsey, Stuart & Co., 312 U.S. 410, 61 S.Ct. 623, 85 L.Ed. 920 (1941); Fox v. Kane-Miller Corp., 542

F.2d 915 (4 Cir.1976); Hush v. Reaugh, 23 F.Supp. 646 (E.D.Ill.1938); Fruit Dispatch Co. v. Wolman, 124 Me. 355, 128 A. 740 (1925); Bergeron v. Dupont, 116 N.H. 373, 359 A.2d 627 (1976); Bursey v. Clement, 118 N.H. 412, 387 A.2d 346 (1978); Holt v. King, 54 W.Va. 441, 47 S.E. 362 (1903).

Comment i: This is supported by Pilmore v. Hood, 5 Bing.N.C. 97, 132 Eng.Rep. 1042 (1838).

See also the cases cited in the preceding paragraph.

Comment k: Undisclosed fact known or patent: Schnader v. Brooks, 150 Md. 52, 132 A. 381 (1926); Riley v. White, 231 S.W.2d 291 (Mo.App.1950).

Cf. Kapiloff v. Abington Plaza Corp., 59 A.2d 516 (Mun.App.D.C.1948) (act of Congress); Gibson v. Mendenhall, 203 Okl. 558, 224 P.2d 251 (1950) (generally known).

Plaintiff has equal opportunity to obtain information: Phillips v. Homestake Consol. Placer Mines Co., 51 Nev. 226, 273 P. 657 (1929); Oates v. Taylor, 31 Wash.2d 898, 199 P.2d 924 (1948).

No reason to believe plaintiff acting under misapprehension: Blair v. National Security Ins. Co., 126 F.2d 955 (3 Cir.1942); Haddad v. Clark, 132 Conn. 229, 43 A.2d 221 (1945); Egan v. Hudson Nut Products, Inc., 142 Conn. 344, 114 A.2d 213 (1955); Industrial Bank of Commerce v. Selling, 203 Misc. 154, 116 N.Y.S.2d 274 (1952); Cf. Lindquist v. Dilkes, 127 F.2d 21 (3 Cir.1942).

Illustrations 6-8: See generally Laidlaw v. Organ, 15 U.S. (2 Wheat.) 178, 4 L.Ed. 214 (1817); Pratt Land & Imp. Co. v. McClain, 135 Ala. 452, 33 So. 185 (1902); Hays v. Meyers, 139 Ky. 440, 107 S.W. 287 (1908); Neill v. Shamburg, 158 Pa. 263, 27 A. 992 (1893); Holly Hill Lumber Co. v. McCoy, 201 S.C. 427, 23 S.E.2d 372 (1942); James v. Anderson, 149 Va. 113, 140 S.E. 264 (1927); cf. Guyer v. Cities Service Oil Co., 440 F.Supp. 630 (E.D.Wis.1977).

Comment l: Illustration 9 is taken from Kaze v. Compton, 283 S.W.2d 204 (Ky.1955).

See also Herzog v. Capital Co., 27 Cal.2d 349, 164 P.2d 8 (1945) (leaky house); Wilhite v. Mays, 140 Ga.App. 816, 232 S.E.2d 141 (1976) (defective septic system); Loghry v. Capel, 257 Iowa 285, 132 N.W.2d 417 (1965) (filled ground); Griffith v. Byers Constr. Co., 212 Kan. 65, 510 P.2d 198 (1973) (landfill in former saltwater reservoir); Weikel v. Sterns, 142 Ky. 513, 134 S.W. 908 (1911) (concealed cesspool); Cutter v. Hamlen, 147 Mass. 471, 18 N.E. 397 (1888) (premises infected with disease); Sullivan v. Ulrich, 326 Mich. 218, 40 N.W.2d 126 (1949) (termites); Mincy v. Crisler, 132 Miss. 223, 96 So. 162 (1923); Dargue v. Chaput, 166 Neb. 69, 88 N.W.2d 148 (1958) (drainage); Neveroski v. Blair, 141 N.J.Super. 365, 358 A.2d 473 (1976) (termites); Brooks v. Ervin Const. Co., 253 N.C. 214, 116 S.E.2d 454 (1960) (house built on filled ground); Crum v. McCoy, 41 Ohio Misc. 34, 322 N.E.2d 161 (1974); Obde v. Schlemeyer, 56 Wash.2d 449, 353 P.2d 672 (1960) (termites); Sorrell v. Young, 6 Wash.App. 220, 491 P.2d 1312 (1971) (landfill);

Illustration 10 is taken from Musgrave v. Lucas, 193 Or. 401, 238 P.2d 780 (1951).

See also McNeill v. Allen, 35 Colo.App. 317, 534 P.2d 813 (1975) (house could not possibly be built at expected price); Edward Malley Co. v. Button, 77 Conn. 571, 60 A. 125 (1905) (married woman obtaining credit when separated from her husband); Fuller v. De Paul University, 293 Ill.App. 261, 12 N.E.2d 213 (1938) (married apostate priest employed at Catholic institution); Highland Motor Transfer Co. v. Heyburn Bldg. Co., 237 Ky. 337, 35 S.W.2d 521 (1931) (swimming pool not disclosed to contractor); Neuman v. Corn Exchange Nat. Bank & Trust Co., 356 Pa. 442, 51 A.2d 759 (1947), supplemented, 52 A.2d 177 (tie-in agreement affecting value of shares sold); Chandler v. Butler, 284 S.W.2d 388 (Tex.Civ.App.1955) (numerous facts affecting market value of stock); cf. Jewish Center v. Whale, 165 N.J.Super. 84, 397 A.2d 712 (1978) (rabbi with criminal record and disbarment).

Illustration 11 is taken from Dyke v. Zaiser, 80 Cal.App.2d 639, 182 P.2d 344 (1947); cf. Boonstra v. Stevens-Norton, Inc., 64 Wash.2d 621, 393 P.2d 287 (1964).

Illustration 12 is taken from Kallgren v. Steele, 131 Cal.App.2d 43, 279 P.2d 1027 (1955).

See also Service Oil Co. v. White, 218 Kan. 87, 542 P.2d 652 (1975).

See also, as to defects in the title of land sold: Corry v. Sylvia y Cia, 192 Ala. 550, 68 So. 891 (1915); Hall v. Carter, 324

S.W.2d 410 (Ky.1959); Dirks Trust & Title Co. v. Koch, 32 S.D. 551, 143 N.W. 952 (1913); Newell Bros. v. Hanson, 97 Vt. 297, 123 A. 208 (1924); cf. Curran v. Heslop, 115 Cal.App.2d 476, 252 P.2d 378 (1953) (violation of building code).

As to sale of chattels without disclosure of defects, see French v. Vining, 102 Mass. 132, 3 Am.Rep. 440 (1869) (poisoned hay); Marsh v. Webber, 13 Minn. 109 (1868) (diseased sheep); Grigsby v. Stapleton, 94 Mo. 423, 7 S.W. 421 (1888) (cattle infected with Texas fever); Puls v. Hornbeck, 24 Okl. 288, 103 P. 665 (1909) (diseased cattle); Morriss-Buick Co. v. Huss, 84 S.W.2d 264 (Tex.Civ.App.1935) reversed, 113 S.W.2d 891 (wrecked and repaired automobile); Downing v. Wimble, 97 Vt. 390, 123 A. 433 (1924) (diseased cow).

Law Reviews: Keeton, Fraud--Concealment and Non-Disclosure, 15 Tex.L.Rev. 1 (1936); Berger & Hirsch, Pennsylvania Tort Liability for Concealment and Nondisclosure in Business Transactions, 21 Temple L.Q. 368 (1948); Goldfarb, Fraud and Nondisclosure in the Vendor-Purchaser Relation, 8 West.Res.L.Rev. (1956); Note, 22 B.U.L.Rev. 607 (1942).

COURT CITATIONS TO RESTATEMENT, SECOND

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C.A.2, 1964. Subsec. (2)(a) cit. in diss. op. A master found that the directors of an airline corporation had violated a fiduciary duty by selling to themselves at a grossly inadequate price a portfolio of stocks belonging to the airline. The master approved a settlement in the suit of $100,000.00 in lieu of the claimed liability of 4 1/2 million. The court held that the failure of one of the directors to provide information demanded under Rule 37 was not fraudulent and the referee's approval could not therefore be rescinded. Judge Friendly, dissenting, said that the director should have been aware of the existence of the information so that his failure to produce it was fraudulent. Alleghany Corp. v. Kirby, 333 F.2d 327, 342, same result reached on reargument, 340 F.2d 311, certiorari dismissed, 384 U.S. 28, 86 S.Ct. 1250, 16 L.Ed.2d 335, rehearing denied, 384 U.S. 967, 86 S.Ct. 1583, 16 L.Ed.2d 680.

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Hawaii, 1969. Cit. in sup. Defendant-vendor, sold certain property to plaintiffs and promised to be lenient as to its demands for payment. Defendants represented that they would cooperate in any attempt to resolve any problems which might develop in this regard. Defendants transferred the mortgage on the property among themselves, without disclosing to plaintiffs who held it at any given time. Certain of the defendants threatened foreclosure and finally did foreclose on the mortgage. In such a case plaintiffs could not recover for mental anguish and humiliation not intentionally inflicted. There could be no such special damages on a claim based upon deceit. Plaintiffs suffered no legal injury because they were induced by false representations to do an act which it was their legal duty to do. The majority of plaintiffs' claims were compulsory counterclaims in the foreclosure suit and were barred in this later suit. Since there was no cause of action against defendant-principals, defendant-agents could not be sued independently. The court held, that plaintiffs were not entitled to relief, except on the cause of action alleging fraudulent representations to the court in the foreclosure action. Plaintiffs were allowed to amend their complaint to properly allege such cause of action. Ellis v. Crockett, 51 Hawaii 45, 451 P.2d 814, 820, 821.

Mass.1969. Cit. but not fol. A Bill in Equity was filed to rescind the purchase of a multi-family apartment building on the basis of fraud, misrepresentation and concealment of certain facts. A demurrer to the action was overruled by the trial court. The properties sold were converted single houses in violation of zoning provisions. The vendors represented the properties to be good investments as multi-family real estate. Vendors could have looked at the zoning ordinances but failed to do so until notified by the Building Commission of the violations. When property was sold to the vendees, it was being rented as apartments and the rental income was stated as an inducement to purchase the properties. Where there is no duty upon one party to a transaction to speak for the information of the other, if he does give certain information he must divulge all material facts within his knowledge. Held: vendors's conduct entitled the vendees to rescind the contract of sale as much more than bare nondisclosure was involved here. Judgment for plaintiff affirmed. Kannavos v. Annino, 356 Mass. 42, 247 N.E.2d 708, 711.

Mich.1976. Quot. in ftn. in conc. op. in sup. Defendant was convicted of selling heroin. The court affirmed the conviction, holding, inter alia, that the prosecutor was not required to disclose to the jury the possibility of future favorable treatment for the addict-informer who testified against defendant. The concurring justice indicated that a statement by an accomplice-informer that no promise has been made to him is misleading although no promise has been made "if he has a reasonable expectation of leniency or other reward . . ., and that failure to disclose a material fact necessary to prevent a false impression is as much a fraud as positive misrepresentations." The concurring justice stated that if there is an agreement with a prosecutor it must be disclosed to the jury, since failure to do so is likely to create a false impression which may mislead the jury. People v. Atkins, 397 Mich. 163, 243 N.W.2d 292, 300.

C.A.2, 1968. Quot. in sup. Defendants represented a company that was selling stock to the public. The company planned to invest in three mining ventures. The company issued press releases to the public that indicated the mining would commence shortly and that there was evidence of a large deposit of ore. These claims were unfounded. Defendant issued a report to the SEC that was later corrected because it was obviously false. The company also agreed to purchase other property, and made statements to the public about them. The company did not reveal to the public the large amount of money that was to go to the finders of the property. The SEC claimed this would have a direct effect on anyone wishing to buy the stock. The SEC requested injunctive relief against the fraudulent press releases, and suspended trading of the stock. The court refused the relief and the SEC appealed. The court on appeal ordered the temporary injunction to be issued. The court held that the omissions were material facts that were required to be revealed by defendants and they were violating 10b-5 by not disclosing them. The public was being misinformed as to the investment's profitability and defendant was obligated to reveal the additional facts that would have made the statement clear and not misleading. SEC v. Great American Industries, 407 F.2d 453, 461, certiorari denied, 395 U.S. 920, 89 S.Ct. 1770, 23 L.Ed.2d 237.

C.A.2, 1975. Subsec. (2)(b) cit. but dist. The plaintiff corporate stockholder had lent two thousand shares of its stock in the defendant telephone company to the son-in-law of its owners, to be used as a capital contribution to a securities partnership. After the fortunes of the partnership began to falter, the plaintiff brought this action against the telephone company to require it to issue a two thousand share certificate in its name, claiming that it was fraudulently induced to transfer its stock to the partnership. The trial court dismissed the claim, and the plaintiff appealed. The court held that although the partnership was required to disclose to the son-in-law such additional matters known to it at the time that he proposed to become a partner, so as to prevent its partial statement of the facts from being misleading, the plaintiff could recover only if it had relied on the partnership's misrepresentations to its detriment, and if the partnership had intended that the misrepresentations be conveyed to it. Since the plaintiff could prove neither reliance nor an intention on the part of the partnership to deceive it, the plaintiff was not entitled to reclaim the stock. The court went on to hold that the plaintiff had no right to reclaim the shares, in any case, since the securities which were originally loaned to the son-in-law had been sold on the open market. Peerless Mills, Inc. v. American Tel. & Tel. Co., 527 F.2d 445, 449.

U.S.Ct.Cl.1972. Cit. and quot. and com. I cit. and quot. in part in ftn. in sup. Plaintiff bought a shipbuilding company and assumed the company's contract with the government to complete two vessels. Plaintiff contended that the government failed to disclose various items of information to plaintiff which indicated that the contract would not be profitable. The court refused to find the government liable and noted that even if this were indisputably a tort case alone, there could be no recovery for the nondisclosure of such information because the government did not actually "know" that the items were important to plaintiff or that plaintiff would be misled, and because there was no such relationship as called upon the government to volunteer the particular items plaintiff mentioned. Aerojet-General Corporation v. United States, 467 F.2d 1293, 1301, 1302.

Idaho, 1966. Sec., com. (m) and illus. (9) quot. in sup. The plaintiffs, purchasers of a home, sought damages from the defendant-contractor for fraud and implied warranty and sought rescission of the purchase contract as well as restitution of the price paid. The court reversed a verdict for the defendant and remanded for reconsideration on the areas of fraud and implied warranty in light of the major construction defects within the house which were known to the defendant-builder but not disclosed to the plaintiff-purchasers. Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698, 702, 703.

Kan.1973. Subsec. (1) quot., subsec. (2) clause (e) quot. in sup. Homeowners brought an action against a developer for breach of implied warranty and for fraudulent concealment. The trial court rendered summary judgment in favor of the developer, and the court reversed, holding, inter alia, that a purchaser may recover on the theory of fraud from a developer of residential lots where the developer has knowledge of and fails to disclose a defect in the property which is not within the reasonable reach of the purchaser and which he could not discover by the exercise of reasonable diligence. Where the developer knew, or should have known, of a saline condition of the soil which made it difficult or impossible to landscape the homesites, and where, after grading, the condition became latent, the developer would be liable to the purchasers for fraudulent concealment on a showing that the concealment was material to the transactions. Griffith v. Byers Construction Co. of Kansas, Inc., 212 Kan. 65, 510 P.2d 198, 203.

Miss.1967. Cit. in sup. While in the process of buying houses from the defendant developer, the plaintiffs were told that restrictive covenants would be filed limiting the area to houses, but immediately preceding the sale the defendants filed such covenants only as to some of the lots, saying nothing to the purchasers of the modification filed. In an action for equitable relief, it was held that the vendor's silence amounted to an affirmation of a state of affairs which did not exist and was in effect fraud, which entitled the purchasers to an injunction forbidding the construction of apartment buildings and to the issuance of the original restrictive covenants covering all lots. Guastella v. Wardell, 198 So.2d 227, 230.

N.J.1974. Cit. in sup. Vendor and vendees entered into an agreement for the sale of a home. Vendees submitted a deposit to be held in escrow pending the closing of the transaction. After the contract was executed, vendees visited the unoccupied house and when they turned on the lights, they found it to be infested with cockroaches. Their previous inspections had occurred when the house was already illuminated. When the vendees sought rescission of the agreement, the vendor brought this action for damages in the amount of the deposit. Summary judgment was granted to plaintiff below. The court held that summary judgment was improper where there were issues of fact as to whether the vendor's action constituted deliberate concealment, making equitable rescission appropriate. Weintraub v. Krobatsch, 64 N.J. 445, 317 A.2d 68, 72.

Cross References to

1. Digest System Key Numbers

Fraud k 17

2. A.L.R. Annotation

Practices forbidden by state deceptive trade practice and consumer protection acts. 89 A.L.R.3d 449.

Scope and exemptions of state deceptive trade practice and consumer protection acts. 89 A.L.R.3d 399.

Right to private action under state consumer protection act. 62 A.L.R.3d 169.

Liability of vendor's real-estate broker or agent to purchaser for misrepresentations as to, or nondisclosure of, physical defects of property sold. 8 A.L.R.3d 550.

Liability of real-estate broker or agent to principal for concealing or failing to disclose offer. 7 A.L.R.3d 693.

Duty of real-estate broker to disclose identity of purchaser or lessee. 2 A.L.R.3d 1119.

Duty of real-estate broker to disclose that prospective purchaser is a relative. 26 A.L.R.2d 1307.

Civil remedies of consumer for violations of Truth in Lending Act (15 U.S.C. §§ 1601-1644, 1661-1665). 11 A.L.R.Fed. 815.

Case Citations 1978 -- June 1987:

U.S.1980. Subsec. (2)(a) cit. in ftn. in disc. and subsec. (e), com. (1) cit. in diss. op. The United States brought an action against a printer alleging violations of Section 10(b) of the Securities Exchange Act of 1934. The printer was employed by a financial printing firm and was able to deduce the identities of two acquiring companies and the companies targeted for takeover even though measures had been taken to keep the information secret until the day before publication. The printer did not disclose the information and purchased stock in the targeted companies and then sold his shares for a profit after the takeover was made public. The District Court found that the printer violated the securities laws and the Circuit Court of Appeals affirmed, stating that anyone--corporate insider or not--who regularly receives material nonpublic information may not use that information to trade in securities without incurring an affirmative duty to disclose. On certiorari, the United States Supreme Court reversed, stating that while silence in connection with the purchase or sale of securities could operate as a fraud actionable under Section 10(b), such liability had to be premised upon a duty to disclose arising from a relationship of trust and confidence between parties to a transaction. The Court concluded that the printer was not a corporate insider or a fiduciary, but merely a stranger who dealt with the sellers only through impersonal market transactions. Accordingly, the Court held that the printer did not possess an obligation to disclose. In a dissenting opinion, Chief Justice Burger argued that because the record disclosed that the printer misused confidential information entrusted to him, the manner in which he acquired his information was a material circumstance which violated Section 10(b). Justice Blackmun, joined by Justice Marshall, argued in dissent that the Court's approach had unduly minimized the importance of the printer's access to confidential information that the honest investor, no matter how diligent, could not have legally procured. Justice Blackmun concluded that this access was generally prohibited by the Securities Exchange Act. Chiarella v. United States, 445 U.S. 222, 100 S.Ct. 1108, 1124, 63 L.Ed.2d 348.

C.A.1, 1985. Cit. in sup., subsec. (2)(b) cit. in sup. Purchaser of a used bulk storage petroleum facility sued vendor after discovering a problem with oil seepages, alleging breach of contract, misrepresentation, and violation of a state statute prohibiting deception in business dealing. The district court dismissed the action for failure to state a claim; the court of appeals affirmed the district court's dismissal of the contract claim but reversed and remanded on the fraud counts. Where the vendor affirmatively

disclosed one oil leak but failed to disclose others and failed to acknowledge a Coast Guard investigation of oil seepages, the purchaser stated a claim for common law misrepresentation and violation of the state statute. Because the vendor partially disclosed misleading information, it had a duty to reveal all material facts. V.S.H. Realty, Inc. v. Texaco, Inc., 757 F.2d 411, 414, 417.

C.A.2, 1984. Cit. in disc. Insurer of shipper sued carrier to recover the value of 36 kegs of silver flakes lost during shipment. The trial court granted defendant's motion for summary judgment on the ground that the shipper had failed to give timely notice of loss as required by Article 26 of the Warsaw Convention. On appeal, summary judgment was reversed and the case remanded for determination of factual issues concerning, inter alia, the application of the fraud exception to Article 26. The court noted that the fraud exception includes any intentional acts by the carrier or its agents which significantly decrease the likelihood of the shipper giving timely notice. Denby v. Seaboard World Airlines, Inc., 737 F.2d 172, 183.

C.A.3, 1984. Cit. in sup. Plaintiff sued defendant bank alleging that worthless checks drawn by a car dealer and presented by plaintiff for payment were not dishonored within 24 hours of presentment as required by the U.C.C. Plaintiff also contended that defendant engaged in conversion and fraud when it paid other checks drawn on the dealer's account because it knew or should have known that the dealer was engaged in a check kiting scheme. The federal district court held that the bank failed to timely dishonor the checks, but found in favor of the bank on the fraud and conversion charges. This court affirmed, adopting the lower court's opinion as its own. The bank's failure to disclose the car dealer's poor financial condition was not fraudulent because, since plaintiff and the bank were not involved in a fiduciary relationship or a business transaction, plaintiff was not a party to whom the bank owed a duty of disclosure under Pennsylvania Law. Chrysler Credit Corp. v. First Nat. Bank, 746 F.2d 200, 207.

C.A.4, 1985. Cit. in disc. A former professor at a state-operated medical school claimed that the school and its officials had violated her due process rights by not renewing her contract; she also alleged fraudulent misrepresentation. The lower court granted summary judgment for the school and its officials. On appeal, this court affirmed, holding that the school's practice of uniformly renewing faculty contracts did not support the conclusion, for the purpose of due process protection, that the school had fostered an understanding that it would grant de facto permanent tenure. The court held further that the professor had no entitlement to permanent tenure and no property right to be protected by the due process clause, and the school and its officials were not liable for fraud because of their failure to inform the professor that their tenure policy differed from the prevailing type, since there was no duty to disclose that fact. Sabet v. Eastern Virginia Medical Authority, 775 F.2d 1266, 1270.

C.A.6, 1984. Cit. in disc., subsecs. (1) and (2) cit. in case quot. in disc., com. (h) cit. in case quot. in disc., illus. 1 and 2 cit. in case quot. in disc. An action was brought against a bank for misrepresenting the financial stability of a customer which subsequently declared bankruptcy. The plaintiff alleged that it entered into a sales contract with the bank customer in reliance on the assurances given by the bank. The district court denied the bank's motion for a directed verdict and entered judgment for the plaintiff. In affirming the judgment, this court concluded that the vice-president of the bank had a duty to disclose information in his possession about the true financial condition of the customer because this information would reasonably be considered material to the purchasing decision he knew the plaintiff was about to make. Cent. States Stamping v. Terminal Equip. Co., 727 F.2d 1405, 1408, 1409.

C.A.6, 1987. Cit. in ftn. but dist. Stock purchasers brought a class action against sellers of securities, their officers, salesmen, and the attorney who prepared the offering circular for making false representations in the offering circular. The trial court entered judgment in favor of the plaintiffs. Reversing on the issue of the attorney's participation in the fraud, this court held that the evidence indicated that the attorney did not intend to commit fraud; therefore, an essential element of fraud was absent. Moore v. Fenex, Inc., 809 F.2d 297, 303.

C.A.8, 1981. Cit. in disc. The plaintiff entered into a contract with the defendant railroad for alteration of a bridge. The contract was not completed within the time period specified and the defendant claimed liquidated damages. The plaintiff brought suit against the railroad for damages arising out of delays allegedly caused by the defendant. It was contended that the railroad was acting as an agent of the government, and that the government knew of a restriction causing a construction delay. Because this restriction was not communicated to the plaintiff, the plaintiff argued that the defendant should be liable for the non-disclosure. The court held that the railroad was not an agent of the government simply because it had a contract with the government to build a bridge. Even if it were, the government's failure to disclose the restriction to the defendant was not a basis for liability of the defendant to the plaintiff. The plaintiff also argued that the defendant interfered with the plaintiff's performance by delaying in forwarding a set of plans, for additional approval. As to this issue, the court held that the railroad's delay precluded its recovery of liquidated damages for this time period. S.O.G., Etc. v. Missouri Pac. R. Co., 658 F.2d 562, 567.

C.A.8, 1983. Subsec. (2)(a) quot. in case quot. in disc. The plaintiff was the purchaser of call options that gave him the right to purchase 1000 shares of common stock of the defendant corporation from October 1978 to February 1979. Without disclosing

a pending declaration of a cash dividend, the defendant purchased 157,500 shares of its own common stock on the open market in December 1978. In January 1979, the corporation declared a cash dividend and a stock split. The plaintiff filed a class action on behalf of all persons who sold call options or other securities of the defendant between December 1978 and January 1979, claiming that the defendant improperly traded stock on undisclosed material inside information in violation of § 10(b) of the Securities Exchange Act of 1934. The trial court dismissed the complaint and the plaintiff appealed. The issue on appeal was whether the plaintiff had standing to sue the corporation. This court stated that one who failed to disclose material information prior to the consummation of a transaction committed fraud only when he was under a duty to do so, and the duty to disclose arose when one party had information that the other was entitled to know because of a fiduciary or similar relation of trust and confidence between them. Here, although it would have appeared that there were sufficient allegations of contemporaneous trading, it was clear that there was only a speculative nexus between the plaintiff, as an options holder, and the corporate insiders dealing with the stock. Regardless of the defendant's nondisclosure and purchase of stock, there was no informational imbalance in the separate transactions performed by the corporation and the plaintiff because they in no way could be said to have been trading with each other. To urge, as the plaintiff did, that the value of the stock directly or indirectly influenced the value of his options did not, without some more tangible connection, create an insider's duty beyond the class of investors that § 10(b) and Rule 10b-5 were designed to protect. Judgment affirmed. Laventhall v. General Dynamics Corp., 704 F.2d 407, 411, certiorari denied 464 U.S. 846, 103 S.Ct. 150, 78 L.Ed.2d 140 (1983).

C.A.8, 1984. Cit. in disc., cit. in ftn. in disc., subsec. (2) cit. in disc. The owner of a building and a contractor brought an action against the manufacturer of allegedly defective glass windows. The owner also cross-claimed against the contractor. A jury awarded the owner damages against the manufacturer on breach of warranty claims but not a claim alleging fraud. The contractor was absolved of liability on the ground of lack of foreseeability. On appeal, the owner argued unsuccessfully that the manufacturer's failure to warn it about known defects in the windows constituted fraud. Because the manufacturer had no knowledge of possible defects until after its contract with the owner was consummated by delivery of the windows, this court found that the duty to disclose had expired. Other assignments of error was deemed unpersuasive, and the judgment was affirmed. County of Hennepin v. AFG Industries, Inc., 726 F.2d 149, 153.

C.A.9, 1986. Cit. in ftn. The former employees of an iron company appealed from a trial court's judgment limiting damages for the iron company's misrepresentation of its pension plan to the employees' "out-of-pocket" losses. This court affirmed in part and reversed and remanded in part, holding, inter alia, that the trial court was correct in refusing to award the employees the full value of their pensions or "benefit-of-the-bargain" damages, since the state court would probably accept the proposition that benefit-of-the-bargain damages do not apply when the defendant has had honest intentions but has merely failed to exercise reasonable care in what he says or does. Cunha v. Ward Foods, Inc., 804 F.2d 1418, 1423, 1424.

C.A.D.C.1983. Subsec. (2)(c) cit. in ftn. This civil suit arose out of criminal proceedings brought against the appellants in 1972. The appellants alleged that an attorney with the Department of Justice misrepresented to them in open court that one of their comrades was not a government informant. They claimed that this misrepresentation, which the attorney left uncorrected, violated their Sixth Amendment right to the effective assistance of counsel because it led them to share various aspects of their defense with the informant. They sought both compensatory and punitive damages in a constitutional tort cause of action. The federal district court granted summary judgment in favor of the appellee, holding that he made his representation in good faith. The court of appeals did not agree with the district court's conclusion that the good faith of the appellee presented no genuine issue as to any material fact. This court noted that although common law tort principles of misrepresentation and deceit did not control constitutional torts because such actions were governed by federal common law, traditional common law principles were instructive in defining the requirements of good faith. Those principles imposed a duty on an individual who made a statement to clarify that statement to those justifiably relying on it if he later learned that his original statement was false or misleading. Since the facts necessary to prove the attorney's good faith, and thus to grant the appellee summary judgment, had not been established, this court reversed. Briggs v. Goodwin, 698 F.2d 486, 492, rehearing granted and opinion vacated 712 F.2d 144 (D.C.Cir.1983), certiorari denied 464 U.S. 1040, 104 S.Ct. 704, 79 L.Ed.2d 169 (1984).

C.A.D.C.1983. Subsec. (1) cit. in ftn. The government brought a criminal action for wire fraud against the defendants. The defendants appealed from district court convictions. This court affirmed. In discussing the scope of wire fraud, this court stated that an employee's intentional nondisclosure of a conflict of interest did not constitute sufficient evidence of intent to defraud an employer under the wire fraud statute. There must also be a reasonably foreseeable, identifiable risk of harm to the employer caused by the nondisclosure. The court noted that civil law treatment of nondisclosure was similar in that nondisclosure was material only if it was reasonably likely to affect a party's judgment in a particular transaction. United States v. Lemire, 720 F.2d 1327, 1336, certiorari denied 467 U.S. 1226, 104 S.Ct. 2678, 81 L.Ed.2d 874 (1984).

C.A.Fed.1985. Subsec. (2)(a) quot. in case cit. in sup., subsec. (2)(c) cit. in sup. A bank whose loan to a milk farmer was guaranteed by a federal agency sought recovery when the farmer declared bankruptcy and the agency refused to pay. The federal

agency claimed that the bank negligently administered the loan and breached the contract for guaranty in failing to disclose a reduction in the farm's value. The claims court dismissed the plaintiff's claim, finding that the bank knew of the farm's reduced value before the guaranty was signed. On appeal, the bank argued that the finding was clearly erroneous. This court agreed but nonetheless affirmed, because a contract for guaranty invites the confidence of a fiduciary relationship and because a duty to disclose subsequently acquired information exists when the information affects a previous representation. The court held the failure to disclose was a misrepresentation that voided the guaranty contract. The duty to disclose was limited by the rule of materiality, and the court determined that a reasonable bank would know that the farm's reduced value was material. Everman Nat. Bank v. United States, 756 F.2d 865, 869.

U.S.Cl.Ct.1984. Quot. in part in sup., com. (h) quot. in sup. Plaintiff bank sought to recover under a contract of guarantee issued by the Farmer Home Administration (FmHA) in connection with an emergency livestock loan the bank made to a farmer. The claims court dismissed the complaint, holding that the bank was guilty of a misrepresentation precluding it from recovering under the contract of guarantee because, after the request for the contract of guarantee was made but before the contract was issued, the bank learned that the borrower's Grade A milk permit had been revoked, and failed to so inform the FmHA. Everman Nat. Bank v. United States, 5 Cl.Ct. 118, 121-122, decision affirmed 756 F.2d 865 (Fed.Cir.1985).

N.D.Ill.1981. Cit. in sup. and subsec. (2) cit. and quot. in part in sup. In an action for breach of a license agreement, the defendant moved to dismiss for lack of personal jurisdiction on the ground that the plaintiff fraudulently enticed its representative into the jurisdiction to serve him with process. The court held that the action was subject to dismissal for lack of personal jurisdiction where the plaintiff contributed to the representative's decision to enter the jurisdiction to negotiate a settlement, and the representative entered the jurisdiction for that purpose only. Even if the plaintiff did not decide to file suit until after the parties had agreed to discuss settlement, the plaintiff's failure to notify the defendant of its decision that negotiations were no longer feasible was fraudulent. The defendants' motion to dismiss was granted. E/M Lubricants, Inc. v. Microfral, S.A.R.L., 91 F.R.D. 235, 238.

N.D.Ill.1982. Subsec. (2)(b) cit. in disc., com. (g) cit. in disc. In this securities action, the plaintiff alleged that the defendants had failed to disclose in the defendant company's annual report all information which would likely be material to the decisionmaking process of a reasonable investor under Rule 10b-5 of the securities Exchange Act. In support of a motion for summary judgment, the defendants argued that a showing of the materiality of the omitted loan detail was not enough to establish an affirmative duty to disclose in the annual report under Rule 10b-5. In denying the motion, the court noted that an affirmative duty to disclose existed between those sharing a special relationship. This duty was derived from the law of torts, which provided that when a party made a materially incomplete disclosure, that party had the duty to disclose whatever additional material information was necessary to prevent the partial disclosure from misleading the recipient. Under Rule 10b-5, when a party undertook to disclose anything, it had the duty to speak the full truth. In this case, therefore, to the extent the loan detail at issue was material, the defendants' failure to disclose that detail in the annual reports constituted a potential violation of Rule 10b-5. Issen v. GSC Enterprises, Inc., 538 F.Supp. 745, 751.

N.D.Ill.1986. Cit. in sup. A condominium owner sued a bank and its parent corporation, alleging that, through their involvement in the financing of the condominium, the bank and the corporation fraudulently concealed, and conspired with others to conceal, construction defects in the condominium's common areas. This court granted the bank's motion to dismiss the third count of the plaintiff's complaint, which alleged that the bank knew about the construction defects and failed to disclose the defects to the purchasers. The court reasoned that the bank had no duty to disclose the defects to the purchasers because it was nothing more than a lender to the developers and purchasers. Folsom v. Continental Ill. Nat. Bank & Trust Co., 633 F.Supp. 178, 186.

S.D.Iowa, 1981. Subsec. (1) quot. in disc. and subsec. (2) cit. in ftn. An action was brought to recover amounts owing for services of the plaintiff's offshore drilling rig, whose payment the defendant had personally guaranteed. The defendant filed a counterclaim, alleging that he was induced to join the abortive Middle East oil venture by the fraudulent or negligent misrepresentations of the plaintiff. The principal question was whether the defendant and counterclaim plaintiff, a citizen of Iowa, was induced to join the venture through fraudulent or negligent misrepresentations of certain agents of the plaintiff and counterclaim defendant, a Texas petroleum drilling contractor. The court found that, under Iowa law, the place of the defendant's injury from the abortive Middle East oil venture was Iowa, and his causes of action for fraudulent and negligent misrepresentation "arose within this state" within the meaning of the Iowa borrowing statute. Accordingly, Iowa's five-year limitations period applied whether or not the causes would be fully barred by the laws of Texas, and the defendant's counterclaim was not barred. The court stated that, in an action for fraud, a plaintiff in either Iowa or Texas had a burden or proving by a preponderance of the evidence each of these elements: a material misrepresentation, made knowingly (scienter), with the intent to induce the plaintiff to act or refrain from acting, upon which the plaintiff justifiably relied, with resulting injury and damages. The court found that the evidence established that the counterclaim defendant made false representations with the intent of influencing the counterclaim plaintiff's conduct. Furthermore, even if the counterclaim defendant did not know that the representations were

false, they were made with reckless disregard for their truth or falsity; in view of the special relationship of trust and confidence among the parties and the counterclaim defendant's special knowledge, there was a duty to know the truth or falsity of the representations. Accordingly, the court held that scienter and the closely related element of intent to deceive were clearly proved. The court also held that the record established that the counterclaim plaintiff did in fact rely upon the misrepresentations of the counterclaim defendant, that he was justified in such reliance, and that there was no contributory negligence on his part in so relying. Therefore, the counterclaim plaintiff was entitled to recover on his counterclaim. Sedco Intern., S.A. v. Cory, 522 F.Supp. 254, 323, judgment affirmed 683 F.2d 1201 (8th Cir.1982), certiorari denied 459 U.S. 1017, 103 S.Ct. 379, 74 L.Ed.2d 512 (1982).

D.Md.1986. Cit. in ftn. The purchaser of a defective industrial furnace sued the manufacturer for damages, alleging breach of express and implied warranties. The court found for the plaintiff, noting that the defendant's conduct would have supported a claim for fraud, which the plaintiff had originally asserted but later dismissed, based on the defendant's failure to disclose information about potential defects, as required under these circumstances by the mores of the market place. However, the court stated that it did not exercise its power to amend the pleadings, because the warranty claims provided a sufficient basis for compensation. Wood Products, Inc. v. CMI Corp., 651 F.Supp. 641, 648.

S.D.N.Y.1982. Subsec. (2)(e) cit. in disc. Between the summer of 1979 and early 1980, the price of silver futures rose dramatically. The situation was unprecedented, creating enormous profits for some and enormous losses for others. The plaintiff silver trader alleged that it was induced by its brokers to enter into future contracts for short sales of silver. A short sale was an agreement by someone who did not own (i.e., was short) a commodity to sell it at a certain time and a specified price. These short sales contracts were generally entered into by a trader who anticipated that the market price would be below the contract price at the time specified for closing the sale. The plaintiff alleged that it did not know that the increase in price of silver was not merely the result of other trader's overestimation of world demands, but was rather the consequence of a conspiracy between the defendants to monopolize the silver market. It further alleged that due to the conspiracy, the price of silver did not drop, as the plaintiff alleged it would otherwise have done, but persisted in its steady climb, with the result that the plaintiff was required to "cover" its short positions at a loss of over $80 million. The plaintiff brought this action for fraud against the defendants, who were traders, brokers, and commodity exchanges. The defendants moved to dismiss the eighth claim of the complaint, which alleged that the defendants committed common law fraud in breaching their duty to prevent market manipulation. The court granted the motion of two commodity exchanges and denied the motions of the remaining defendants on the condition that the plaintiff was able to amend its complaint to set forth the role played by each defendant in the alleged fraud. The court concluded that the alleged conspiracy did result in the equivalent of a "price mirage" as claimed by the plaintiff. The court noted in support the increasing tendency of many courts to impose a duty to speak which in an earlier time might have been regarded as "mere silence of the seller," without some act or conduct which deceived. Minpeco, S.A. v. Conticommodity Services, Inc., 552 F.Supp. 332, 338.

S.D.N.Y.1985. Cit. in disc. The plaintiff purchased automobiles from a manufacturer and sold them to an independent franchise dealer. When the dealer converted several automobiles, the plaintiff suspended its financing. Pursuant to its agreement with the plaintiff, the manufacturer repurchased the unsold vehicles, and the dealer was terminated. The plaintiff sued the dealer and the manufacturer. It alleged that the manufacturer had a fiduciary duty to inform the plaintiff that the dealer was planning to terminate his franchise and that the manufacturer was liable for failing to control the dealer. This court granted in part the manufacturer's motion to dismiss, holding that the manufacturer had no duty to disclose information about a third party. The court ruled, however, that questions of material fact precluded dismissing the plaintiff's claim that the manufacturer should have disclosed its premonitions concerning the dealer's conversion. Beneficial Commercial Corp. v. Murray Glick Datsun, 601 F.Supp. 770, 774.

S.D.N.Y.1985. Cit. in disc. A seller's factor sued a department store, alleging that the department store, was liable for goods sold and delivered by the seller to a warehouse. The department store moved for summary judgment, and the factor moved for leave to amend the complaint to add a charge of conspiracy to defraud. The court granted the motion for summary judgment and denied the motion to amend on the ground that the proposed amended complaint failed to plead fraud with particularity. The court noted, however, that the factor's claim for fraudulent nondisclosure could be supported by evidence of a conspiratorial relationship between the defendant and a third party and, further, that the factor could also state a legitimate claim for fraudulent misrepresentation. Sterling Nat. Bank & Trust Co. of New York v. Federated Dept. Stores, Inc., 612 F.Supp. 144, 147.

S.D.N.Y.1985. Subsec. (2)(a) cit. in case quot. in disc. After learning from his father, a corporate director, of a proposed merger, the defendant purchased several shares of stock that later multiplied in value when the merger was announced. The defendant was charged with criminal violations in connection with the purchase and sale of stock call options, wire fraud, and perjury. The indictment alleged that the defendant stood in a relationship of trust and confidence with his father, that in breach of that relationship the defendant had misappropriated the information he had learned, and as a result, that his trades had constituted

securities and wire fraud. The defendant moved to dismiss, arguing that the indictment lacked the allegations necessary to establish a fiduciary relationship. Denying the defendant's motion in part, this court held that it was unwilling to conclude as a matter of law that the allegations contained in the indictment could not support under any circumstances a finding that the defendant and his father enjoyed a confidential relationship that had been breached. United States v. Reed, 601 F.Supp. 685, 696, judgment reversed 773 F.2d 477 (2d Cir.1985).

E.D.Pa.1978. Cit. in disc., quot. in ftn. and subsec. (2) and (2)(e) cit. in ftn. An employee who had resigned sought a declaratory judgment that he was entitled to increased pension benefits under a plan that became effective after his last day of work, but prior to the expiration of his accrued vacation time. The plaintiff claimed that the employer had some duty to advise him of such important information, known to the employer but not to the plaintiff, which would have had a direct bearing on the plaintiff's decision to resign. The court noted that, although the plaintiff had not pointed to any specific theory on which he relied, it appeared that s 551 of the Restatement, which defines the circumstances in which liability for nondisclosure may be imposed, was applicable. Section 551 provides that not only must there be knowledge of, but also a duty to disclose, the information. The court found that the employer had no knowledge of the change of pension plans before the employee made his decision to resign and that none of the conditions for the existence of a duty to disclose existed. The court also held that the plaintiff's employment was not extended beyond the effective date of his resignation by the receipt of accrued vacation pay, and that the plaintiff's eligibility for benefits was to be determined by the plan in effect when his employment ended and not by the plan which became effective thereafter. Accordingly, judgment was entered in favor of the employer. Lehner v. Crane Co., 448 F.Supp. 1127, 1130, 1131.

E.D.Pa.1981. Subsec. (2)(a) quot. in part in case cit. in sup. A class action was brought against a Pennsylvania corporation and various insiders alleging violations of sections of the Securities Exchange Act based upon the defendants failure to disclose a variety of alleged material facts to shareholders in connection with the corporation's tender offer to its shareholders to purchase shares. Upon the motion of the defendants for summary judgment, the court noted that it is well established that before any liability may arise for nondisclosure under these provisions, some relationship must exist between the plaintiff and the defendant which imposes a duty upon the defendant to disclose material information to the plaintiff in connection with his purchase or sale of a security and that the mere possession and nondisclosure of material facts does not confer liability under these rules. The court held, inter alia, that a British corporation, which entered into a merger with the Pennsylvania corporation and which was named in the plaintiff's complaint, was not an insider nor in a confidential or fiduciary relationship with the plaintiffs in this action and, therefore, did not have an affirmative duty of disclosure to the Pennsylvania corporation's shareholders. Accordingly, the court found that the British corporation could not be held liable under the Securities Exchange Act. Staffin v. Greenberg, 509 F.Supp. 825, 832, order affirmed 672 F.2d 1196 (3rd Cir.1982).

W.D.Pa.1983. Cit. in sup., subsec. (2)(a) quot. in part in case quot. in sup. The plaintiff operated a car dealership, set up under a car manufacturer's dealer development program. Under the program, the plaintiff invested money in exchange for stock in the dealership. The dealership lost money and was terminated. The plaintiff then brought this action against the manufacturer, several of its employees, its credit company, and the dealership. The manufacturer, employees, and credit company moved for summary judgment, which this court granted in part and denied in part. In ruling in favor of the credit company on the Securities Exchange Act claim and the fraud claim, this court noted that the credit company had no duty to disclose information about the stock to the plaintiff because there was no relationship of trust between the parties. Cole v. Ford Motor Co., 566 F.Supp. 558, 565, 570.

W.D.Pa.1984. Cit. in sup. An automobile manufacturer deposited ten checks it received from a dealership pursuant to their financing agreement. The dealer's bank initially decided to honor the checks despite uncollected funds recorded on the dealer's account, but reversed its decision the next day and returned the checks to the manufacturer. The manufacturer filed a diversity action against the bank to recover the amount of the checks and to recover damages for conversion and fraud. This court allowed recovery for the amount of the checks, but rejected the manufacturer's conversion and fraud claims, stating that the bank's nondisclosure of the dealer's financial problems did not constitute fraud because the bank owed no duty to make such a disclosure to the manufacturer under Pennsylvania law. Chrysler Credit Corp. v. First Nat. Bank and Trust, 582 F.Supp. 1436, 1442, 1443, judgment affirmed 746 F.2d 200 (3d Cir.1984).

E.D.Tex.1983. Com. (k) quot. in disc. Defendant pipeline company purchased from plaintiffs the right to use a depleted oil field as a storage reservoir for natural gas and the right to withdraw the gas and other materials. The plaintiffs brought this class action alleging, inter alia, fraud and misrepresentation by the defendant in the negotiations. This court entered judgment for the defendant, finding no misrepresentation or omission of a material fact on which the plaintiffs were entitled to rely. The court found the company had no obligation to make predictions or to disclose patent facts or facts which the plaintiffs had an equal opportunity to obtain. The defendant's representations were negotiating ploys which did not amount to fraud. Keasler v. Natural Gas Pipeline Co. of America, 569 F.Supp. 1180, 1186, judgment affirmed 741 F.2d 1380 (5th Cir.1984).

W.D.Wis.Bkrtcy.Ct.1981. Cit. and quot. in disc. but dist. Plaintiff filed a complaint to have the court determine whether the

defendant's actions created a debt to the plaintiff that was nondischargeable under the Bankruptcy Code section which prevents discharge of an individual from any debt "for obtaining money, property, services, or an extension, renewal, or refinance of credit, by--(A) false pretenses, a false representation, or actual fraud." The plaintiff alleged that the defendant allegedly sold crops to the plaintiff and kept the proceeds from the sale without disclosing a prior agreement to pay a third party the proceeds. The third party subsequently brought an action against the plaintiff and the defendant for the proceeds from the sale of the crops. The plaintiff paid the third party an amount in consideration for a release of all claims the third party may have had against the plaintiff as a result of the plaintiff's purchase of the defendant's crops. Prior to that settlement, the plaintiff commenced this action to determine if the defendant owed it a nondischargeable debt. The defendant moved for summary judgment. The court noted that the sale of crops was a sale of goods within the Uniform Commercial Code, and thus Wisconsin statutory law created a warranty that the goods were delivered free of any security interest or encumbrance of which the buyer at the time of contracting had no knowledge. The court held that a dispute regarding material facts existed as to whether an agreement existed between the defendant and the third party regarding the proceeds from the sale of the crops and whether the third party had an enforceable interest in the proceeds from the crops. The court stated that these facts are required in order to determine whether the defendant made a false representation, the first element required in order to commit a fraud, false representation or false pretense pursuant to the Bankruptcy Code. Accordingly, summary judgment was precluded, and the defendant's motion was denied. Matter of Kohl, 11 B.R. 470, 472.

W.D.Wis.1985. Subsec. (2)(e) cit. in disc., com. (j) cit. in disc. The plaintiff contracted with the defendant to invest over $10,000 in the commodity futures market. She brought this action alleging fraud, misrepresentation, and infliction of emotional distress, and asked for punitive damages. The defendant moved for summary judgment and filed a motion in limine. The court held that the defendant was under no duty to disclose to the customer its prior history of litigation and regulation involving fraud, because it was not basic to opening the plaintiff's account and there was no fiduciary relationship until after the account was opened. The court further held that the plaintiff was not entitled to recover for negligent or intentional infliction of emotional distress. Thus, the defendant's motion for summary judgment was granted as to these claims. However, it was denied as to the plaintiff's claim for punitive damages, because Wisconsin law was held to govern, and it would allow recovery of punitive damages under the facts of this case. The court disregarded a provision in the contract that specified that Massachusetts law would govern, because the contract had been drafted by the defendant and because Wisconsin's interest in deterring and punishing wrongdoers was materially greater than Massachusetts' interest in protecting business. The defendant's motion in limine was denied as to prior consent decrees but granted as to evidence of other civil judgments and investors. Anderson v. First Commodity Corp. of Boston, 618 F.Supp. 262, 265.

W.D.Wis.Bkrtcy.Ct.1985. Cit. in case cit. in disc. A tenant granted a security interest in the crops growing on his leased farmland to a credit association. When the tenant defaulted on his rent, the landlords served an eviction notice and obtained a judgment restricting the tenant from picking corn until the debt was paid. The tenant filed for bankruptcy and later harvested and sold the corn form the farmland. The landlords brought this action to avoid the credit association's security interest in the crops. The court dismissed the landlords' complaint, holding that under the doctrine of emblements, corn which the debtor planted prior to his default under the lease was his personal property; thus the landlords had no interest in the corn and could not maintain an avoidance action on their own behalf. A case cited by the court noted that s 551 did not apply because crops were personalty, not realty. Matter of Gorden, 47 B.R. 245, 249.

Alaska, 1985. Quot. in sup. Building purchasers sued the building owner and real estate agency, alleging material misrepresentations of the building's tenant's intentions to negotiate a long-term lease with the new owners in connection with the sale of the building. The trial court granted the defendants' motion for summary judgment, holding that the purchasers did not reasonably rely upon any alleged misrepresentations. This court reversed and remanded, holding that issues of material fact existed regarding whether the owner and the real estate agency breached their duty to disclose information. The court stated that before a transaction is consummated, subsequently acquired information which will make untrue or misleading a previous representation that was true when made must be disclosed. Turnbull v. Larose, 702 P.2d 1331, 1334.

Ariz.App.1981. Subsec. (2)(c) quot. in part in sup. The plaintiffs, buyers of a townhouse, brought this action against the realtors and the construction company building the townhouses for breach of contract, fraud, and negligent misrepresentation. The plaintiffs had purchased the house after reviewing promotional material which showed that the townhouse had 2089 square feet of living area. The defendants discovered shortly after this contract was signed that the promotional material was incorrect and that the house had only 1793 square feet of living space, yet they never informed the plaintiffs. After taking possession of the house, the plaintiffs discovered the error and contacted the defendants, who offered to void the contract. The plaintiffs refused the offer, paid for the townhouse and later sold it at a profit. The trial court directed the verdict in favor of the defendants. This court affirmed in part and reversed in part, holding, inter alia, that (1) the question of liability for fraud and misrepresentation should have gone to the jury because the defendants had a duty to advise the plaintiffs of any negligent misrepresentation they discovered prior to the consummation of the transaction; (2) the plaintiffs' affirmation of the contract after they had knowledge

of the misrepresentation did not remove the action for fraud; (3) it was unnecessary to determine the proper measure of damages for negligent misrepresentation until the trial court found liability; and (4) there could be no recovery for damages resulting from a delay in construction because there was no proof of any actual damage. Mammas v. Oro Valley Townhouses, Inc., 131 Ariz. 121, 638 P.2d 1367, 1369.

Ariz.App.1982. Quot. in disc., cit. in ftn., subsec. (2)(e) cit. in sup., com. (m) quot. in sup. The plaintiff purchaser brought suit against a mortgagee, seeking damages for the mortgagee's alleged misrepresentations and nondisclosure in connection with the sale of land. The defendant moved for a directed verdict and the trial court denied the motion. The jury found for the plaintiff and awarded damages. The trial court then denied the defendant's motion for judgment notwithstanding the verdict, and the defendant appealed. On appeal, the plaintiff argued that the defendant heard other persons make misrepresentations to the plaintiff that the property was ready to be sold, and either deliberately concealed them or was negligent in failing to inform him that the representations were false. This court stated that a party was liable for nondisclosure if he knew that the other party was about the enter into a business transaction under a mistake as to facts basic to the transaction, and that the other party would reasonably expect a disclosure of those facts. The court found that the plaintiff failed to cite any portion of the record which indicated that the defendant had knowledge of the condition of the land. Therefore, the court reversed, holding that the defendant had no duty to inform the plaintiff of the condition of the land. Frazier v. Southwest Sav. & Loan Ass'n., 134 Ariz. 12, 653 P.2d 362, 367, 368.

Ariz.App.1986. Cit. in disc. Buyers sued to rescind an agreement to purchase a residence, alleging that the sellers had made misrepresentations by failing to disclose the existence of termite infestation and damage in the residence. The trial court dismissed the misrepresentation claim and granted summary judgment for the defendants on the concealment claim. Reversing, this court held that the sellers had a duty to disclose to the buyer the existence of termite damage in a residential dwelling which was known to the sellers, but not to the buyer, and which materially affected the value of the property. The court reasoned that disclosure of the termite damage was necessary because it was a material fact that could influence a buyer's decision to purchase, and because nondisclosure was equivalent to the assertion that damage which affected the value of the property did not exist. Hill v. Jones, 151 Ariz. 81, 725 P.2d 1115, 1118.

Cal.1985. Cit. in disc. Employee who developed arsenic poisoning during 11 years of employment sued his employer contending that defendant failed to warn the employee of the risks, failed to inform him that continued exposure would aggravate the disease, and failed to inform him that his symptoms were related to his employment. The trial court sustained the defendant's demurrer on the ground that workers' compensation law barred the claim. The supreme court reversed, stating that an employer had a duty to inform its employee of the fact that he had contracted a disease in the course of employment, and that bare nondisclosure of known facts was sufficient to state a cause of action for "fraudulent concealment" under workers' compensation law; it was not required that the defendant make affirmative misrepresentations. Foster v. Xerox Corp., 40 Cal.3d 306, 219 Cal.Rptr. 485, 486, 707 P.2d 858, 859.

Cal.App.1978. Cit. and quot. in ftn. A creditor, who obtained an assignment of a life insurance policy as security for certain debts, sued the administrator of the debtor's estate and the insurer for fraud and negligence after the debtor died and the creditor was informed that the policy had lapsed. The lower court sustained the insurer's demurrer to the complaint, and the creditor appealed. The court held that, although the insurance company was advised that the insurance policy issued by it had been assigned as security for a loan and acknowledged in writing that it had received a duplicate of such assignment, it was not under any duty to inform the assignee that it had been advised of other assignments of the same policy. However, the court also held that the insurance company was under a duty to inform the assignee that at the time of the assignment the policy had lapsed for nonpayment of premiums. Accordingly, the judgment of the lower court was reversed. Wells v. John Hancock Mut. Life Ins. Co., 85 Cal.App.3d 66, 149 Cal.Rptr. 171, 175.

Cal.App.1983. Cit. in disc., illus. 11 cit. in sup. A purchaser of a house sued a vendor and his real estate agents, seeking rescission of the contract of sale and damages. The lower court granted the vendor's and real estate agents' demurrer to the purchaser's first amended complaint for failure to state a cause of action, and the purchaser appealed. This court held that the purchaser stated a cause of action where the vendor and real estate agents failed to disclose the fact that the house was the site of a decade-old multiple murder, a material fact which, it was alleged, decreased the value of the house at the time of sale. Accordingly, the judgment granting the demurrer was reversed. Reed v. King, 145 Cal.App.3d 261, 193 Cal.Rptr. 130, 133.

Cal.App.1983. Subsec. (2)(b) and com. (g) cit. in disc. The plaintiff construction company's bid to repair a bridge was accepted by the state of California. The contract called for removal of sunken fragments, removal and replacement of damaged concrete piles, and construction of a new fender on a pier. High tides and strong currents interfered with work at the site, resulting in delays and significantly greater costs than the plaintiff had anticipated. In this action, the plaintiff sought contract damages for these unanticipated costs of construction, for losses in profits, and for loss of an advantageous competitive position in the

industry because he was misled by incorrect tide data in the construction plans provided by the defendant to bidders on the project. In a separate action, the plaintiff claimed he was misled by the state's failure to disclose information in its possession regarding a similar repair project in 1969 of a pier only 528 feet away which was a part of the same bridge. The trial court concluded that the state was not liable for either misrepresentation or nondisclosure and entered judgment in the state's favor. On appeal, the judgment was reversed in so far it precluded liability for nondisclosure in combination with the state's affirmative and misleading representation. The undisclosed information would have assisted the contractor in formulating its bid and would have qualified or cast doubt upon the misrepresentations in tide data supplied by the state. The evidence also suggested that the plaintiff would not have entered the contract had the disclosure of the information been made. The trial court erred by rejecting the plaintiff's contention that a cause of action arose independent of any intent to conceal. This court stated that there was no requirement of proving an affirmative fraudulent intent to conceal. Reversed and remanded. Welch v. State, 139 Cal.App.3d 546, 188 Cal.Rptr. 726, 733.

Colo.App.1981. Cit. in sup. The defendant husband and his family were being transferred by his company. The company had a program whereby another corporation would purchase the employee's home. Prior to the time the defendant was notified that he was being transferred, the Colorado Department of Health informed him that uranium tailings were found under his home and recommended that corrective measures be taken, which the defendant did not do. The defendant and his wife sold their house to the corporation but did not disclose anything about the uranium tailings. The plaintiffs, as prospective buyers, went through the home and talked with the defendants, believing that they were the actual sellers of the property. The plaintiffs purchased the home and about six months later the Colorado Department of Health told them about the uranium tailings. The plaintiffs sued, inter alia, the defendant employee and his wife, alleging fraud and deceit. The lower court found in favor of the defendants. The plaintiffs appealed, arguing, inter alia, that the trial court erred by instructing the jury that unless there was a direct contractual relationship between the plaintiffs, as buyers, and these defendants, as sellers, then the defendants did not have a duty to disclose the latent defect to the plaintiffs. This court stated that although these defendants did not sell directly to the plaintiffs, they should not be insulated from liability for their failure to disclose the latent defect if, in equity and good conscience, they should have disclosed it, and if the plaintiffs were among that group of persons whom the defendants intended to rely upon the nondisclosure and who justifiably did so rely. The defendants had met with the plaintiffs prior to the sale, which could indicate that reliance was both intended and justified. Reversed and remanded. Schnell v. Gustafson, 638 P.2d 850, 852.

Colo.App.1985. Subsec. (2) quot. in sup. and adopted. A borrower sued a lender to recover for the lender's failure to disclose the terms of a credit disability policy. The lower court granted the lender's motion for summary judgment; this court reversed and remanded the case, holding that the lender had a duty to make certain disclosures regarding the insurance policy. This court further held that if a sale of insurance is part of a loan agreement, the lender has a duty to disclose to the borrower, before the transaction is consummated, a brief written description of the insurance. The court stated that this duty may be fulfilled by making the disclosures clearly and conspicuously in any of the loan documents. The court concluded that a question of fact remained, precluding summary judgment, as to whether the disclosure in this case was made orally or in writing before the transaction was consummated. Bair v. Public Service Employ. Credit Union, 709 P.2d 961, 962.

Conn.App.1983. Com. (g) quot. in ftn. in disc. The sellers of a house informed their broker that their septic tank system was working satisfactorily, but did not inform the broker that government authorities had advised that the system violated regulations. The broker informed the buyers that the system was in satisfactory condition. After the closing, government authorities ordered the system altered to conform to regulations; this required excavation, blasting and other damage to the property. The buyers brought actions for fraudulent misrepresentation against the broker and the sellers. The trial court awarded damages against the sellers, but dismissed the claim against the broker. Affirming in part, this court held that the sellers were guilty of fraudulent misrepresentation and nondisclosure by deliberately hiding the essential facts about the system's illegality and thereby taking actual steps to mislead. Wedig v. Brinster, 1 Conn.App. 123, 469 A.2d 783, 788.

Del.Super.1981. Cit. in ftn. The plaintiffs purchased a house from the defendant realtor. The plaintiffs partially inspected the house before the sale and were told by the defendant that the house had been treated for termites. The plaintiffs were not told, however, of the permanent termite damage which existed in the house. After the sale, the plaintiffs discovered that the house had serious structural damage which had been caused by the termites. The plaintiffs sued the defendant alleging that he had defrauded them. The court stated that fraudulent concealment can occur either when there is active concealment of material information, like a defect, or where the defendant seeks to dissuade the plaintiff from investigating. The court held, inter alia, that the defendant failed to show, as a matter of law, that he was free of fraud in inducing the plaintiffs to purchase the home. Therefore summary judgment could not be granted in the defendant's favor. The court found that the defendant's conversation with the plaintiffs, prior to the sale, created an issue as to whether the plaintiffs were misled into believing that the house did not have a significant termite problem. The court stated that a representation may be fraudulent even if it is true, where the defendant knows that the statement is materially misleading because of omitted facts. A person who speaks, therefore, undertakes the duty to make full and fair disclosure of all matters of which he speaks. A broker is liable for any harm suffered for a fraudulent inducement to buy

where the reliance on the statement was justified. The reliance is justified where a reasonable person would have considered the statement important in making his decision of whether or not to buy. Lock v. Schreppler, 426 A.2d 856, 859.

Fla.App.1983. Cit. but dist. The sublessee of a gas station sublet or assigned the station to the plaintiff. The lessee confirmed to the plaintiff that the original sublease was in good standing. Implicitly, this confirmation reaffirmed a representation in the original sublease that there was a contractual relationship with the supplier. When the plaintiff had supply problems, it sued the lessee and sublessee, alleging that there was no valid contractual relationship. The trial court dismissed the plaintiff's complaint as to the lessee because there was no privity between them, which was required to sue on a failure to disclose a fact. This court reversed, holding that the facts could be construed to find an intentional misrepresentation of the existence of the contractual relationship. East Caribbean Dev. & Inv. v. K-K Auto Serv., 435 So.2d 364, 366.

Hawaii, 1979. Quot. in part in disc. and com. (k) quot. in ftn. in sup. The plaintiff, a real estate developer, sought reimbursement from a utility company for the cost of providing underground electric and telephone systems to a subdivision. The trial court entered judgment for the developer and the utility company appealed. The defendant argued that a rule prohibited it from paying the plaintiff on the ground that such a payment would be illegal. This court held that the defendant did not carry its burden of establishing that its undertaking to reimburse the plaintiff was in violation of that rule. The court held the defendant strictly to its burden of proof because of the conflicting public policies involved herein. The court noted, but did not resolve, whether a utility could enforce payment for its services in accordance with its tariff even though its customer had actually relied upon a misquotation of the rates. This court found that the lower court had correctly determined that the defendant did promise to reimburse the plaintiff, that it intended that this promise be relied upon and that the promise was in fact relied upon by the plaintiff. Therefore the plaintiff had established its claim for reimbursement. The amount of reimbursement was to be determined on remand. Molokoa Village, Etc. v. Kauai Elec. Co. Ltd., 60 Haw. 582, 593 P.2d 375, 381.

Ind.App.1983. Cit. in disc., cit. in ftn. but dist. The seller of corporate stock brought an action against the purchaser, seeking the money due on the sales contract and asking foreclosure on a security interest in the stock. The purchaser sought a setoff, claiming fraud and breach of warranty on the part of the seller. After the trial court entered judgment for the seller, the buyer appealed the ruling on the breach of warranty claim, and this court reversed and remanded. The court rejected the trial court's conclusion that reliance was a necessary element in establishing a claim for breach of warranty in the same way that proof of reliance was essential to a claim based on the tort of misrepresentation. Instead, the court held that since warranty was as much a part of a contract as any other element in the contract, the right to damages for its breach would depend only on the existence of the breach. Shambaugh v. Lindsay, 445 N.E.2d 124, 125.

Iowa App.1986. Quot. in disc. An investor sued a bank for misrepresentation and nondisclosure when the bank's representations regarding a company's financial status turned out to be false and it failed to disclose that it owned half of the company's inventory. The trial court directed a verdict for the bank. Affirming on the issue of misrepresentation, this court held that there was no evidence that the representations made by the bank were, at that time, false or known to be untrue. Reversing and remanding on the issue of nondisclosure, this court held that nondisclosure of self-dealing might constitute actionable nondisclosure. Nie v. Galena State Bank & Trust Co., 387 N.W.2d 373, 376.

Iowa App.1986. Quot. in sup., com. (f) quot. in sup., com. (c) cit. in sup. While her husband was in the hospital, the wife was induced by a bank officer who was a long-time family friend and business advisor to sign a note and mortgage on their unencumbered homestead as surety for her husband's defaulted business debts, without any explanation that the mortgage would destroy the judgment-proof security she had in the homestead. The trial court found for the bank in its foreclosure action against the debtors. This court reversed, holding that the bank had been in a confidential relationship with the debtors and therefore its exercise of undue influence over the wife rendered the mortgage invalid. The court reasoned that the bank had a duty to exercise utmost good faith for the wife's benefit and had failed to demonstrate by clear and convincing evidence that it had fulfilled that duty. Peoples Bank & Trust Co. v. Lala, 392 N.W.2d 179, 187, 188.

Md.1981. Cit. in disc. The plaintiff faced a wrongful death action brought by the family of a co-worker because the plaintiff had been driving a vehicle in which the co-worker was a passenger when an accident occurred which killed the co-worker. Both the plaintiff and the decedent were acting in the course of their employment at the time of the accident. The plaintiff therefore sought indemnification from his employer, the defendant, under its general automobile insurance policy and sought a declaratory judgment that such insurance applied. The trial court concluded that the defendant was liable to the plaintiff because the employer had a duty to prepare its vehicle for the plaintiff to drive and that this duty included procuring adequate insurance on the vehicle. The intermediate appellate court reversed and the plaintiff appealed. This court stated that the defendant had complied with the required security provisions of the motor vehicle laws, but negligence could still be found where a reasonable man would have taken additional precautions. Therefore it was important to determine whether the defendant owed the plaintiff an affirmative duty to procure and maintain auto liability coverage which did not have a cross-employee exception. The defendant

had not made any express representations concerning its insurance, but the plaintiff claimed that it had made a negligent misrepresentation by its silence. This court stated that if a party to a transaction is under a duty to speak, the failure to speak may be a negligent misrepresentation. Because the plaintiff had predicated the duty to speak on the employer-employee relationship and on a duty of the employer to warn, the negligence and misrepresentation theories were merged. This court stated that a principle is subject to liability in a tort action for failing to use care to warn an agent of an unreasonable risk involved in the employment if the principle should realize that it exists and the agent is likely not to become aware of it and to suffer harm. This harm could either be physical or the pecuniary harm suffered by the agent where he is contractually bound on behalf of a principle and is not fully aware of the risks of performance. Therefore a master has a duty to give such instructions to employees as are necessary concerning them and the work they are employed to do in order to prevent unreasonable risks to them and other servants. In this case, the harm which the plaintiff sought to avoid was the product of factors not within the control of or subject to the power of the employer such as the use of the cross-employee exception by the insurance company or the occurrence of the accident. This court held that Maryland law does not generally impose a duty on all employers who furnish a vehicle to one employee for use with a co-worker either to insure without the cross-employee exception or to warn of the effect of the cross-employee exception. This court therefore found that the employer had not breached a duty owed to the plaintiff, and the intermediate court judgment was affirmed. Leonard v. Sav-A-Stop Services, Inc., 289 Md. 204, 424 A.2d 336, 341.

Md.Spec.App.1984. Cit. in disc., subsec. (2)(b) cit. in disc. Patent owners brought an action against a licensee for rescission and damages for fraud and breach of contract. The trial court entered judgment for the licensee on all counts and this court affirmed, adopting the trial court opinion. Mere nondisclosure without intent to deceive was not fraud and was not actionable under applicable law absent a duty of disclosure. Nondisclosure was distinguishable from concealment and suppression, in which there was an object to create a false impression. Where the patent owners never asked the licensee for further information and the parties were dealing at arms' length, there was no duty to disclose. Finch v. Hughes Aircraft Co., 57 Md. 190, 469 A.2d 867, 888, 891, certiorari denied 300 Md. 88, 475 A.2d 1200 (1984).

Mass.1983. Subsec. (2)(b) cit. but dist. The purchasers of a house lot brought an action based on fraud, and other claims, against the sellers and their broker. The complaint alleged that the defendants represented that the lot passed percolation and high water tests, while failing to disclose that earlier tests revealed excessive wetness in the springtime which made the lot unsuitable for a house. The plaintiffs claimed they incurred increased construction costs as a result. The trial court directed a verdict for the defendants at the close of the plaintiff's case. On appeal, this court affirmed, stating that the defendants were not liable for fraud because they did not convey half-truths or ambiguous, partial disclosures; nondisclosure, in the absence of a duty to speak, did not amount to a tort. Moreover, the court noted, the plaintiff wife was told by the surveyor of the existence of excessive water; thus the plaintiffs' subsequent execution of the purchase agreement demonstrated that they did not rely on the representations or silence of the defendants. Nei v. Burley, 388 Mass. 307, 446 N.E.2d 674, 676.

Mich.1981. Subsec. (2)(c) cit. in sup. The plaintiff, a construction performance bond underwriter, sued to recover from indemnitors pursuant to an indemnity contract. The plaintiff's agents led the defendants to believe that there would be other indemnitors and that a bank would subordinate its security interest in the chosen contractor's assets. These bond requirements were not met. When the construction company defaulted under its labor and material bond, the plaintiff settled the claims and then brought suit against the sureties who signed the indemnity agreement. The lower courts found that the defendants' affirmative defense of actionable fraud was not established and that the doctrine of silent fraud did not apply. This court held that the innocent misrepresentation defense was incorrectly applied by the lower court, and that the defendants should have been permitted to prove the affirmative defense of silent fraud. Because the individuals the defendants dealt with were agents of the plaintiff, their knowledge that the defendants were relying on all the bond requirements being complete was imputed to the principal. The agents therefore had a duty to disclose that all the bond requirements had not been met. It is a general rule that a party to a business transaction is under an obligation to disclose to the other party any information which renders previous representations untrue or misleading. The jury could have found that the agents did not fulfill this duty. The case was therefore reversed and remanded for reconsideration of both the defenses of innocent misrepresentation and silent fraud. U.S. Fidelity and Guaranty Co. v. Black, 313 Mich. 99, 313 N.W.2d 77, 89.

Minn.1982. Cit. in ftn. The plaintiffs, several elderly and inexperienced investors, brought an action against a land development corporation and several of its officers, alleging securities violations and fraud. The lower court entered judgment for the plaintiffs, finding that the defendants had failed to disclose to the plaintiffs material information regarding the financial condition of the corporation. The defendants appealed, arguing, inter alia, that there was insufficient evidence of fraud, They contended that they had had no direct contact with the plaintiffs, that all representations made to the plaintiffs had been made by an independent contractor, a non-party to the action. The court dismissed these contentions and affirmed the judgment. The court noted that the defendants had had full knowledge of the incomplete and misleading nature of the representations that they had made to the independent contractor, and they knew that he in turn would pass the information on to the plaintiffs. They were thus liable for fraud. Vikse v. Flaby, 316 N.W.2d 276, 283.

Minn.App.1985. Quot. in sup. At a foreclosure sale of a building, the mortgagee bank's attorney informed the plaintiff of the bank's highest intended bid. Plaintiff decided to bid, and he purchased the building. Plaintiff then discovered a large sum of unpaid tax liens. Plaintiff brought an action against the bank and its attorney, claiming that the bank had owed him a duty to extinguish the liens or disclose their existence. The trial court granted defendants' motion for summary judgment. The appeals court reversed, holding that objective circumstances such as the attorney's statement of the price and the delay of the sale so that plaintiff could bid created a reasonable expectation in plaintiff that liens would be disclosed. Therefore, the bank had a duty to disclose. Gerdin v. Princeton State Bank, 371 N.W.2d 5, 9.

Minn.App.1985. Com. (1) and illus. 9 cit. in disc. Following the cancellation of a contract for deed because of the purchasers' nonpayment, the purchasers sued the seller, the real estate agent, and the listing agency for fraudulent misrepresentation. The purchasers alleged that the defendants failed to inform the purchasers that the home's water pressure was too low for normal family use. The trial court entered summary judgment for defendants, and the purchasers appealed. This court affirmed, holding that the purchasers' action for misrepresentation against the seller did not survive the cancellation of the contract for deed. As against the real estate agent and listing agency, the court affirmed the summary judgment in their favor because the sufficiency of the water supply was a fact open to discovery upon reasonable inquiry by the purchasers, and no evidence was presented that the defendants had actual knowledge of the low water supply. The court also held that the purchasers were not entitled to recover under a theory of unjust enrichment. Hommerding v. Peterson, 376 N.W.2d 456, 459.

Neb.1983. Quot. in sup. A bank brought an action to recover on a promissory note against the maker, who counterclaimed to reform the note so that it would be between the bank and its former president. The trial court directed a verdict for the bank and the maker appealed. This court reversed and remanded, stating that one who made a fraudulent misrepresentation was liable to the class of persons on whom he intended to induce reliance. Liability occurred when a misrepresentation was made to a third person if it was intended that or expected that it would be communicated to influence the conduct of another. One who had a duty to exercise reasonable care to disclose facts basic to the transaction was also subject to liability. In this case the maker presented the sufficient evidence to present a question of fact on the issue of his defense. Bank of Valley v. Mattson, 215 Neb. 596, 339 N.W.2d 923, 927.

N.Y.Sup.Ct.App.Div.1981. Com. (e) cit. in disc. Former wife brought action against her former husband seeking to set aside, upon grounds of fraud, an agreement which had the effect of modifying the child support and alimony provisions of an Illinois divorce decree. The lower court entered an order which denied the husband's motion to dismiss the wife's complaint upon the grounds of lack of personal jurisdiction and the bar of the statute of limitations, and the husband appealed. The appellate court held, inter alia, that the husband, who was under a duty to disclose to the wife his true income and who did not disclose to his attorney his true income, was liable for the misrepresentation of his attorney to the wife, with respect to his income, regardless of whether the attorney made the misrepresentations innocently. The court found that the attorney was the husband's agent and not an independent contractor and that, as the master, the husband may be liable for the misrepresentation of his servant under the theory enunciated in s 256 of the Restatement (Second) of Agency. Accordingly, the lower court's judgment was affirmed. Abate v. Abate, 82 A.D.2d 368, 441 N.Y.S.2d 506, 514.

N.Y.Sup.Ct.App.Div.1984. Cit. in conc. and diss. op. The plaintiff's husband died when the defendant's control valve caused a propane water heater to explode. The plaintiff sued for wrongful death and fraud, and sought, inter alia, punitive damages for loss of consortium. The defendant argued that the pleading was insufficient. The trial court allowed the plaintiff's complaint. This court modified and affirmed, permitting the fraud action but denying the prayer for punitive damages as derivative and contrary to statute. The concurring and dissenting opinion argued that the fraud claim should be dismissed. It noted that, as the concealment occurred after the transaction, the proper action would be strict liability. Young v. Robertshaw Controls Co., 104 A.D.2d 84, 481 N.Y.S.2d 891, 896, reargument denied 108 A.D.2d 986, 485 N.Y.S.2d 718 (1985).

N.Y.Sup.Ct.1985. Com. (e) cit. in case quot. in disc. An ex-husband moved for an order declaring that his two children were emancipated and sought to recover the child support payments made since the divorce. He claimed that the children and their mother had fraudulently concealed their status as employed full time and emancipated during the process of submitting the divorce decree. The court held that the ex-husband was entitled to restitution of the support payments. The court found that the mother was duty bound in honesty to advise the former husband that the children were emancipated. The concealment of the fact, the court stated, was of the same legal effect as an affirmative misrepresentation. Bryant v. Bryant, 130 Misc.2d 101, 495 N.Y.S.2d 121, 122.

Ohio, 1979. Cit. generally in disc., subsecs. (1) and (2) cit. in disc. and com. (h) and illus. (1) and (2) cit. in disc. The plaintiffs sued a real estate broker alleging that the defendant had concealed the presence of termites in the property bought by the plaintiffs. The lower court found in favor of the plaintiffs and the defendant appealed. This court affirmed. The court stated that an action for fraud and deceit is maintainable for both affirmative and negative misrepresentations. Therefore a party will be liable

for nondisclosure if he fails to use reasonable care to disclose a material fact which may induce another to act or refrain from acting if he knows that the failure to disclose will render a prior representation as untrue or misleading. The court held that this defendant was under a duty to disclose to the plaintiffs that the property was infested with termites because he had told the plaintiffs that the property was a good solid home and because he had later been told of the infestation. The plaintiffs relied upon the defendant's statements, which imposed a duty on him to disclose the additional and opposing information. Miles v. McSwegin, 58 Ohio St.2d 97, 388 N.E.2d 1367, 1369, 1370, 12 O.O.3d 108.

Ohio App.1983. Cit. in disc., com. (j) quot. in sup. The buyers of a house experienced flooding in the basement soon after they moved in. Both the real estate agent and the sellers were aware of a leaking problem during rain storms, but did not disclose such knowledge to the buyers. The contract provided that the buyers accepted the property "as is." The buyers brought suit against the realtor and the sellers. The trial court directed a verdict for the defendants. This court affirmed, holding that the buyers could not recover for fraudulent nondisclosure because the contract placed the risk of the existence of defects on the buyers, thereby relieving the defendants of any duty to disclose. The buyers also could not recover for fraudulent misrepresentation because the defendants had made no statements concerning the condition of the house. Finally, there was no evidence to support the buyers' claim that the defendants had intentionally concealed the defects, thereby barring any recovery for fraudulent concealment. Kaye v. Buehrle, 8 Ohio App.3d 381, 457 N.E.2d 373, 375, 376.

Or.1981. Cit. in disc. but dist.; cit. and quot. in part in ftn.; subsec. (2)(c) cit. and quot. in ftn.; subsecs. (1), (2)(c), and (2)(e) cit. in disc.; Rptr's Note quot. in ftn.; illus. 2, 9, 10, 11, and 12 cit. and quot. in part in ftn.; com. (b) quot. in part in disc.; coms. (c) and (d) cit. in disc.; cit. in conc. op.; cit. in diss. op. A lender brought an action against the accountants of a borrower to recover damages for misrepresentations made regarding the financial status of the borrower. The trial court entered judgment in favor of the accountants, holding that the plaintiff lender failed to prove that the false representations were made with the intent to defraud the plaintiff. Upon the plaintiff's appeal, the appellate court held that the plaintiff had pleaded and proved a cause of action for fraud, and the judgment of the trial court was reversed. The Supreme Court of Oregon allowed the accountants' petition for review to consider whether under the facts pleaded and the facts found by the trial judge the plaintiff was entitled to recover. The plaintiff at all times asserted a right to recover under s 551 of the Restatement (Second) of Torts (Liability for Nondisclosure). The court noted that some of the difficulty in resolving the case arose because of the confusion in determining that nature of liability described in s 551; the plaintiff asserted that s 551 describes an "intentional tort," while the trial judge concluded that the section was concerned with negligence. The court concluded that despite the inclusion of the concept of due care in the blackletter of s 551 of the Restatement and the Restatement (Second) of Torts, the section is concerned with conduct which subjects a defendant to liability in an action for damages for deceit, and that it may be said that from the outset of the case, the cause asserted was one for deceit. The court found that the duty imposed by s 551 is imposed only upon one who is party to a business transaction and that the accountants who were not a party to the business transaction between the lender and the firm for which the accountants were performing services could not be held liable for deceit under the provisions of s 551. The court noted that it still remained to be determined whether the plaintiff pleaded and proved facts which entitled it to a judgment independently of s 551, because a business transaction between deceiver and deceived is not essential to an action for deceit. The court held that the proper disposition of the case was to remand it to the trial court for the same trial judge to find whether or not the defendants had the necessary intent to subject them to liability for deceit. The appellate court's judgment was reversed, and the case was remanded. The concurring justice noted that the various sections of the Restatement are not statutes until enacted as such and therefore it is misleading to speak of pleading and proving a cause of action under any section thereof until the court has firmly said that the cited section corresponds to the law of the state. The dissenting justice believed that the plaintiff, by avoiding a theory of deceit and by citing s 551 as the sole basis for its case, did not present a sound legal theory of recovery since the scope of s 551 includes only business transactions such as sales as opposed to ongoing business relationships such as that in this case. United States Nat. Bank of Oregon v. Fought, 291 Or. 201, 630 P.2d 337, 339- 353.

Or.App.1979. Cit. in sup. and subsec. (1) quot. in ftn. Before entering into an earnest money agreement, the defendant had filled in a drainage ditch without installing a storm sewer as required by the city. The defendant allegedly concealed this fact, which diminished the market value of the property. The assignee of the agreement brought an action for fraud against the defendant, claiming that there had been an intentional deception. The trial court sustained a demurrer to the plaintiff's complaint and found for the defendant. The appellate court found that the active concealment of the natural drainage ditch was sufficient to state a cause of action. This court rejected the defendant's claim that it had not intended that the plaintiff, a third party, rely on the alleged misrepresentation. The court found that the plaintiff was not a third party and that the defendant had ample opportunity to discuss the drainage ditch with him. The court refused to allow a waiver clause in the agreement to preclude trial on the merits and refused to find that a clause requiring city approval of the plans prior to payment was sufficient protection if the property was indeed unsuitable. Therefore, the lower court's decision was reversed. Paul v. Kelley, 42 Or.App. 61, 599 P.2d 1236, 1238.

Or.App.1980. Cit. and quot. in part in ftn. Erron. cit. in ftn. as § 515. Following financial difficulties, a manufacturer agreed to place all of its cash receipts into the plaintiff bank in a bank-controlled cash collateral account so that all disbursements required

bank approval. The manufacturer began to divert funds from this account and the defendant accountants were aware of these diversions and that they were contrary to the manufacturer's agreement with the bank. When the diversions were discovered, this action was brought. Judgment was entered in the trial court for the defendants. This court held that the trial court had used an incorrect definition of fraudulent intent and therefore reversed. The court noted that at the trial and on appeal the parties had debated the applicability of s 551, Restatement (Second) of Torts. However, this court did not resolve this issue as it was not necessary to its decision. The court stated that although the plaintiff's complaint did not explicitly state all of the elements of fraud, the defendants did not raise this issue until this appeal. The court liberally construed the complaint and found that it was sufficient to state a cause of action for fraud. The court held that the defendants did in fact intend to defraud the bank and therefore reversed the judgment and remanded the case for entry of a judgment in favor of the plaintiff. United States Nat. Bank of Oregon v. Fought, 46 Or.App. 635, 612 P.2d 754, 755-757, 759, judgment reversed 291 Or. 201, 630 P.2d 337 (1981). See above case.

Or.App.1981. Cit. in case quot. in sup. The plaintiff purchased a mobile home from the defendant. The plaintiff brought an action for fraud, alleging, inter alia, that the defendant had misrepresented the length of time that the home could remain in its existing residential location and the year or model of the home. The jury returned a verdict for the plaintiff, but the lower court granted the defendant a judgment notwithstanding the verdict. The plaintiff appealed. This court stated that silence or nondisclosure could be the basis for a fraud action, so that a party need not make an affirmative statement to be liable in fraud. The court stated that where fraud is based on actual concealment, as opposed to simple nondisclosure, a duty to speak is not required. The court found that a jury could have found that the defendant actively concealed the reason for the sale of the mobile home. The court ultimately reversed and remanded with instructions. Caldwell v. Pop's Homes, Inc., 54 Or.App. 104, 634 P.2d 471, 477.

Pa.Super.1982. Illus. 3, coms. (k) and (l) quot. in conc. op. The plaintiffs purchased the defendant's house without asking, or being told, that the house was infested with termites. When the plaintiffs later discovered the infestation they brought an action in trespass, claiming as damages the costs of exterminating the termites and repairing their home. The lower court found for the plaintiffs and the defendant appealed. The appellate court affirmed, holding that termite infestation of a residential home was manifestly a serious and dangerous condition and that a seller had a duty to disclose such conditions that were dangerous to the purchaser regardless of the purchaser's inquiry as to those conditions. The concurring opinion noted that although he did not agree that the termites caused a situation so dangerous as to require disclosure, he found support in the Restatement for the proposition that a party to a business transaction had a duty to disclose. Quashnock v. Frost, 299 Pa.Super. 9, 445 A.2d 121, 130, 131.

Pa.Super.1984. Cit. in disc., subsec. (2)(e) and com. (l) quot. in part in sup. The purchasers of real estate sued five real estate salesmen and their agency for conspiracy and fraud. The defendants told the purchasers that the seller insisted that his three tracts of land be sold as a unit. The purchasers wanted only two tracts, but bought all three because of the defendants' representations. The purchasers alleged that the seller did not require a single buyer for all three tracts, that another buyer for one of the tracts had been available, and that the defendants duped the purchasers into buying all three tracts so that the defendants could increase their sales commission by assisting in the resale of the unwanted lot. The trial court sustained the defendants' demurrer. This court affirmed on the conspiracy count but reversed and remanded on the fraud count. The court concluded that the defendants failed to disclose facts basic to the sales transaction, most notably the seller's willingness to sell the lots to different buyers. Slaybaugh v. Newman, 330 Pa.Super. 216, 479 A.2d 517, 521.

Pa.Cmwlth.1979. Cit. and quot. in ftn. in sup. A property owner engaged the plaintiffs, a real estate broker and salesman, to find a purchaser for her vacant residence. The salesman negotiated a sales agreement for the property with a third party, and prior to closing the buyer inspected the property and found it to be in satisfactory condition. The purchase money remained in escrow after closing, pending the results of a termite inspection, and during this interim period the former owner called the salesman and informed him that the basement of the home had been badly vandalized. The salesman told the broker but no action was taken by either the salesman or the broker with respect to contacting the third party buyer. The buyer discovered the damage upon taking possession of the property and filed a complaint with the Real Estate Commissioner. The Commissioner investigated the sale and revoked the plaintiffs' licenses. The court affirmed and modified the decision. The court stated that, although the Commission erred in finding that the plaintiffs knowingly made a substantial misrepresentation by failing to disclose the vandalism because it was not shown that such failure induced the buyer to act or refrain from acting, the plaintiffs' failure to disclose did constitute bad faith, especially because of the ease of notifying the buyer and the plaintiffs' haste to obtain the release of the purchase money. Matter of Real Estate Lic. No. R.B.-001518-A, 47 Pa.Cmwlth. 236, 407 A.2d 922, 924-925.

Tenn.App.1986. Subsec. (1) quot. in sup. Following the demise of their joint business venture, one of the owners of a failed livestock market sued his former business partner and the bank where the associate maintained his separate accounts, alleging that the bank had caused the plaintiff's business losses by failing to inform him of his associate's precarious financial condition. The

trial court granted the bank's motion for summary judgment. This court affirmed, holding that liability for nondisclosure arises only in cases where the one being held responsible had a duty to disclose the facts at issue, such as when there was a definite fiduciary relation between the parties, or where the contract or transaction called for perfect good faith because it was intrinsically fiduciary. Because a bank/depositor relationship is treated as a debtor/creditor relationship, the court said, no duty of disclosure is generally imposed on the bank and therefore, in this case, the bank was not liable to the plaintiff because the bank had no fiduciary responsibility. Macon County Livestock Mkt., Inc. v. Kentucky State Bank, Inc., 724 S.W.2d 343, 349.

Tex.1979. Com. (b) cit. in sup. The plaintiff sought to rescind a contract to buy a lakefront lot from the defendant when it was found that there was an overflow easement on the property held by the local river authority. The lower court and the intermediate appellate court both held for the defendant but this court reversed. This court determined that promotional brochures advertised the property as being suitable for home construction and this fact induced the plaintiff to purchase the property. The court ruled that the plaintiff was entitled to rescission if the defendant had failed to disclose a material fact. The court held that the contract did not disclose the easement to the plaintiff and therefore rescission was granted. Smith v. National Resort Communities, Inc., 585 S.W.2d 655, 658.

Tex.Civ.App.1980. Quot. in part in disc. The plaintiff sought rescission of an interest he had purchased in a limited partnership and also sought the return of the consideration he had paid. The plaintiff alleged, inter alia, that he was induced to purchase the interest on the basis of material misrepresentations or omissions of fact made by the defendant. The trial court found that the defendant had not disclosed a number of very pertinent facts to the plaintiff concerning the partnership project. The lower court therefore found in favor of the plaintiff. This court stated that one is liable for not disclosing such information only if he is under a duty to exercise reasonable care to disclose such information. Here, the duty was supported by the existence of a fiduciary relationship between the plaintiff and the defendant, because they were close personal friends and the plaintiff had asked the defendant to find him a suitable investment vehicle. The defendant knew that the plaintiff had relied upon his expertise. The court stated that the requisite confidential relationship may arise informally and not only from technical fiduciary relationships. Therefore, the judgment of the trial court was affirmed. Adickes v. Andreoli, 600 S.W.2d 939, 945.

Tex.App.1982. Com. (b) cit. in disc. The plaintiffs listed for sale two tracts of land. An agent for the defendants expressed interest in purchasing both tracts, which were contiguous, as a package deal. The final agreement between the parties provided that the two tracts would be conveyed in consideration for the sale by the agent of properties in Missouri and Alabama and the creation of notes in favor of the plaintiffs on those properties. When the plaintiffs went to record their liens and deeds of trust on the Missouri and Alabama properties, they found that the agent had caused to be recorded deeds of trust on the properties in favor of a third party. Claiming that they were to have received first liens on all the properties, the plaintiffs filed suit to rescind the contract. The trial court granted a directed verdict for the plaintiffs and the defendant appealed. Affirming, this court noted that a seller of real estate was under a duty to disclose material facts which would not be discoverable by the exercise of ordinary care. Even in the absence of a duty of disclosure, a purchaser was entitled to rescind the transaction if an undisclosed fact was basic and one which the seller knew his purchaser would regard as material. Here, the concealment of the existence of the intervening liens on the Missouri and Alabama properties, at the time when the defendants knew that the absence of existence of such intervening liens was basic to the transaction and that the plaintiffs would consider the fact of such liens to be material, entitled the plaintiffs to rescind the transaction. River and Beach Land Corp. v. O'Donnell, 632 S.W.2d 885, 889.

Tex.App.1984. Subsec. (2)(b) and com. (g) cit. in sup. Plaintiff corporate debtor executed a loan agreement with defendant creditors. The agreement contained a management change clause which permitted the creditors to call in the loan if the debtor changed its management. The debtor's former chief executive officer sought to regain his position; however, the creditors opposed him. In a letter to the debtor, the creditors implied that the loan would be accelerated under the management change clause if the former chief executive officer was reinstated. Although there existed evidence that the loan was not in default, the directors appointed officers approved by the creditors. The debtor brought an action for damages alleging fraud, duress, and interference with business relations. The trial court found for the debtor and one creditor appealed. On appeal, the court granted the debtor's suggestion of remittitur and reformed the award, but affirmed as to all other issues. The court held, inter alia, that once the creditors conveyed in their letter false and misleading information, they were under a duty to disclose the whole truth regarding any intended action, since a deliberate suppression of material facts constitutes fraud. State Nat. Bank v. Farah Mfg. Co., 678 S.W.2d 661, 681.

Va.1979. Quot. in part in ftn. in sup. The plaintiffs bought a residence from the defendants, who had been living in the property. The plaintiffs had asked about water problems on several occasions and were told that there had been no problems even though there had been some minor problems. Between the time the contract was executed and the time the plaintiffs took possession, the basement flooded so badly that the fire department was called to pump out the water. The plaintiffs were not informed of this and about one year later the house was flooded again. The plaintiffs sued the defendants for fraudulent inducement. The lower court found in favor of the purchasers. This court stated that the plaintiffs could not have been fraudulently induced to sign the

contract because the concealment or misrepresentation occurred subsequent to the formation of the contract. However, one party can fraudulently induce the other to perform by concealing some fact which might excuse the performance of that other party. The statements made by the defendants prior to the execution of the contract were erroneous although, according to the evidence, not made in an attempt to defraud. These statements caused the parties to enter into a contract under a material mutual mistake of fact which made the contract voidable at the option of the buyers. However, the defendants acquired information after formation which negated precontract representations and they were therefore required to disclose this new information. Here, however, the defendants not only did not disclose this information, they attempted to conceal the effects of the flooding and fraudulently induced the plaintiffs to perform. Affirmed. Ware v. Scott, 220 Va. 317, 257 S.E.2d 855, 858.

Wash.App.1978. Cit., subsec. (1) quot. in ftn. and subsec. (2) quot. in part. Suit was brought by a borrower alleging that the lender's employee had created an implied contract that the lender would procure credit life insurance on deceased borrower's life, but that none was obtained. One of plaintiff's theories of recovery was that the defendant negligently failed to define mortgage insurance for her as it was used in the savings and loan industry and that defendant should have known that the term mortgage insurance was ambiguous, and therefore defendant should have explained its meaning to plaintiff. The lower court found for defendant, and, on appeal, the court held, inter alia, that if plaintiff did ask for life insurance sufficiently clearly to inform defendant of what she wanted, then defendant was required to explain why it felt that her obtaining insurance was impossible and that for defendant to keep silent at that point constituted a failure to disclose under s 551 of the Restatement. Hutson v. Wenatchee Fed. Sav. & Loan Ass'n, 22 Wash.App. 91, 588 P.2d 1192, 1198, 1200.

Wash.App.1982. Cit. in disc. The defendant realty company undertook the representation of the defendants in the sale of their home. At the time the listing agreement was signed, the company's agent asked if there was anything wrong with the property and was told that there was not. Actually, the sellers had been having problems with their neighbor's sewage spilling on the property and the agent knew that there were drainage and sewage problems. The plaintiffs agreed in writing to buy the property and took possession. By that time they had found water standing on the front lawn and a musty smell in the backyard but did not know of the past experience of sewage coming from the neighbor's property. After the deed was recorded, septic efflux was discovered in the backyard and the toilets in the house erupted with raw sewage. The plaintiffs sued, alleging violation of the state consumer protection act and fraudulent misrepresentation. A jury returned a verdict for the plaintiffs for $20,000. On appeal, the defendants argued that the court incorrectly defined an unfair and deceptive act under the statute as a basis for liability. Affirming the verdict, this court stated that an unfair or deceptive act was one which was unlawful and against public policy as declared by the legislature or judiciary. The legislature had specifically prohibited negligent or knowing misrepresentation. Washington case law imposed liability when a real estate broker failed to disclose matters within one's knowledge when there was a duty to speak. The court's instructions, when taken as a whole, adequately defined the term "unfair or deceptive act" in the context of legislative mandate and judicial law. McRae v. Bolstad, 32 Wash.App. 173, 646 P.2d 771, 774, affirmed and cause remanded 101 Wash.2d 161, 67 P.2d 496 (1984).

Wash.App.1982. Cit. and quot. in sup. This action arose out of the proposed purchase and sale of certain real property. The defendants, real estate salespersons, entered into a joint venture agreement with the owner of the property. Pursuant to the joint venture, proceeds from the sale of the owner's property would be divided between the owner and the salespersons. A purchase agreement was subsequently entered into by the owner and a buyer, but the buyer was not informed of the joint venture agreement. After the closing, a local zoning commission denied permission to construct an apartment building on the property. The buyer demanded repayment of the purchase price. When refused, he brought this action against, inter alia, the owner and the salespersons. The trial court rescinded the contract for sale for mutual mistake of fact regarding zoning approval and ordered the defendants to jointly repay the purchase price plus interest, upon finding that the defendants had violated the state's Consumer Protection Act. The defendants appealed, and this court affirmed. The defendants had a duty of full disclosure of any interest in the property antagonistic to that of the plaintiff. Their failure to disclose the interest of the salespersons in the property constituted a violation of the Act, as the buyer may not have entered into the contract had he known of the interest of the salespersons. Wilkinson v. Smith, 31 Wash.App. 1, 639 P.2d 768, 770.

Wash.App.1985. Quot. but not fol., com. (f) cit. but not fol. Apple orchard investors entered into an agreement that named a fruit company to operate their orchard. The fruit company recommended that the owners delay harvest, but failures in the refrigeration system and other factors caused internal browning of the apples. The investors sued the fruit company on theories of breach of fiduciary duty, negligence, and violations of consumer and merchant acts. The trial court dismissed the investors' claims. Affirming as modified, this court held that the Restatement rule articulating the duty of care of a party to a business transaction applied to actions in fraud or negligent misrepresentation and did not apply to the instant case. The court stated that the trial court had correctly focused on clearly defined duties rather than analyze the fruit company's duties in express fiduciary terms. Cusick v. Phillippi, 42 Wash.App. 147, 709 P.2d 1226, 1231.

Wis.1980. Cit. in sup. and quot. in ftn. in sup., coms. (b) and (d) quot. in ftn. in sup. and coms. (j) and (l) quot. in disc. Plaintiff

buyer filed a complaint, alleging that he purchased a lot from the defendant sellers with the disclosed intention to construct a house, and that defendants knew of the existence of an underground well and falsely, and with intent to defraud, failed to disclose this fact which they had a duty to disclose, of which fact they knew plaintiff was unaware, and which would have, and did have, material bearing on the construction of a residence on the property. Defendants' motion to dismiss plaintiff's complaint was overruled, and defendants appealed. This court stated that in a claim for intentional misrepresentation, a subdivider-vendor of a residential lot has a duty to a noncommercial purchaser to disclose facts which are material to the transaction, which are known to the vendor and which are not readily discernable to the purchaser. In view of such statement, the court affirmed and held that the motion to dismiss the complaint had been properly overruled. Ollerman v. O'Rourke Co., Inc., 94 Wis.2d 17, 288 N.W.2d 95, 100, 104.

Wis.1981. Subsec. (1) cit. in case quot. in disc., subsec. (2) quot. in ftn., subsec. (2)(b) cit. in disc., com. (g) quot. in ftn. Two creditors of the decedent's estate petitioned for an extension of time for filing claims, alleging that letters from the special administrator and her attorney were partial or ambiguous statements requiring them to disclose to the creditors information about filing claims so as to prevent the written communication from being misleading. The lower courts held for the creditors, deeming their claims to be properly and timely filed. The state supreme court disagreed, reasoning that the silence on the part of the administrator was not misleading, because she had no duty to disclose the filing date to each creditor individually. Because the court found that no duty to disclose existed, her failure to disclose did not constitute misrepresentation. Accordingly, the decision was reversed and the case remanded. Matter of Estate of Lecic, 104 Wis.2d 592, 312 N.W.2d 773, 779, 781, 783.

Wis.1985. Quot. in ftn., quot. and cit. in ftn. to conc. op., subsecs. (1), (2), and (2)(a) and (c) cit. in conc. op., subsec. (2)(e) cit. in ftn. to conc. op. A broker sued an experienced investor to recover money the investor owed on his account. The investor counterclaimed for losses he sustained on soybean futures transactions, alleging that the broker had failed to give him additional information concerning the soybean crop estimate. The investor requested that the case be submitted to the jury on theories of intentional misrepresentation, negligent misrepresentation, strict responsibility for misrepresentation, and breach of fiduciary duty. The trial court granted the broker's motion for judgment notwithstanding the verdict on the investor's claim of breach of fiduciary duty and the intermediate appellate court affirmed. This court reversed and remanded. The court held that a broker did not owe a fiduciary duty to an investor who had a nondiscretionary account. The fiduciary duty, the court noted, arose from a formal commitment to act for the benefit of another, and, absent an express agreement to place a greater obligation on the broker, there was no fiduciary duty. However, the court ruled that the negligent misrepresentation claim had not been fully tried, and that the breach of fiduciary duty theory had prejudicially misled the jury. Although the broker did not have an a priori duty to disclose known and relevant information, the court reasoned, he did have a duty not to report negligently the information he had volunteered. Arguing that the majority had misconstrued the concepts of fiduciary duty and trust and confidence, the concurring opinion stated that a "nonfiduciary" business relationship between a principal and agent could become a relationship of trust and confidence, which would impose on the broker the same duty that a traditional fiduciary relationship might impose, namely, a duty to disclose material facts relating to the transaction in question. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Boeck, 127 Wis.2d 127, 377 N.W.2d 605, 612-615.

Case Citations July 1991 -- June 1998:

U.S.1997. Subsec. (2)(a) quot. in case quot. in disc. After a company hired a law firm to represent it in a potential tender offer for another company's common stock, a partner in the law firm began purchasing call options for the other company's stock. The government indicted the partner for securities fraud, fraudulent trading in connection with a tender offer, and violations of the federal mail fraud and money laundering statutes. A jury convicted the partner, but the Eighth Circuit reversed, holding in part that the Securities and Exchange Commission exceeded its rulemaking authority under § 14(e) of the Exchange Act when it adopted SEC Rule 14e-3(a) without requiring a showing that the trading at issue entailed a breach of fiduciary duty. This court reversed and remanded, holding, inter alia, that insofar as it served to prevent the type of misappropriation charged against the partner, Rule 14e-3(a) was a proper exercise of the Commission's prophylactic power under § 14(e). The court stated that the SEC, cognizant of the proof problem that could enable sophisticated traders to escape responsibility, placed in Rule 14e-3(a) a "disclose or abstain from trading" command that did not require specific proof of a breach of fiduciary duty. U.S. v. O'Hagan, 521 U.S. 642, ___, 117 S.Ct. 2199, 2216, 138 L.Ed.2d 724.

C.A.1, 1992. Cit. in case cit. in disc. Buyers of capital stock brought action for fraud against seller company, alleging that company failed to disclose the existence of separate business proposal that would affect buyers' business prospects. The district court granted defendant summary judgment. This court affirmed, holding that since an essential element of fraud was the materiality of the undisclosed information, the uncertain and ambiguous nature of buyers' evidence of the impact of company's proposal on buyers' business was insufficient to survive summary judgment. Milton v. Van Dorn Co., 961 F.2d 965, 969.

C.A.1, 1993. Quot. in disc. Borrowers sued the Federal Deposit Insurance Corporation, as receiver of a failed bank, to recover

damages and to enjoin it from collecting on promissory notes issued to them by the bank, alleging that the bank failed to disclose that the project for which the loans were made was subject to a notice of responsibility requiring the removal of hazardous waste from the property. Affirming the district court's dismissal of the case, this court held that since plaintiff's misrepresentation claim based on nondisclosure, as much as one based on an affirmative assertion, was tantamount to a challenge to the truthfulness of the bank's warranty that the project was free of any notices of responsibility and thus was analogous to a breach of warranty claim, it was barred by a federal statute making invalid all agreements, including warranties, that tended to diminish the interest of defendant in any asset it acquired unless certain requirements were met. McCullough v. F.D.I.C., 987 F.2d 870, 873.

C.A.2, 1989. Subsec. (2)(a) quot. in case quot. in disc. After investors in a tax-sheltered limited partnership who claimed to have discovered that it was a fraudulent enterprise defaulted on promissory notes they made to pay for their interests, the guarantor of the notes sued the investors for reimbursement pursuant to the terms of an indemnification agreement between them. The district court granted the plaintiff's motion for summary judgment. Affirming in part, reversing in part, and remanding, this court rejected the defendants' argument that the plaintiff aided and abetted a securities fraud because it knew of misstatements in a private placement memorandum issued by the limited partnership and failed to disclose them to the defendants. The court stated that the plaintiff owed no duty of disclosure to the defendants because there was no fiduciary relationship between them. National Union Fire Ins. Co. v. Turtur, 892 F.2d 199, 207, on remand 743 F.Supp. 260 (S.D.N.Y.1990).

C.A.2, 1991. Subsec. (2)(a) quot. in case cit. in disc. and cit. in conc. and diss. op. A stockbroker purchased stock after receiving confidential information from a client regarding a proposed tender offer for a company owned by the client's wife's family. The broker was convicted in federal district court of insider trading and perjury, including numerous counts of securities and mail fraud and of fraudulent trading in connection with a tender offer. A panel of this court reversed the convictions in their entirety. On rehearing en banc, this court affirmed the defendant's fraudulent trading convictions but reversed his securities and mail fraud convictions, holding, inter alia, that the defendant was not liable for securities fraud under Rule 10b-5 as an aider and abettor or as a tippee of confidential information because the government was unable to establish that the client owed the wife's family a fiduciary duty; therefore, absent a predicate act of fraud by the client against his wife's family, the defendant could not be held derivatively liable. The concurring and dissenting opinion argued that the defendant's fraudulent trading convictions also should be reversed on the ground that the authority by which the SEC promulgated the rule under which he was convicted was questionable. U.S. v. Chestman, 947 F.2d 551, 565, 586, certiorari denied 503 U.S. 1004, 112 S.Ct. 1759, 118 L.Ed.2d 422 (1992).

C.A.2, 1993. Coms. (f), (k), and (l) and illus. 1 cit. in disc. Purchaser of stock warrants transferable into the selling company's common stock sued the company for fraud, inter alia, after he learned of a two-year holding period during which public trading of the stock was prohibited. Reversing in part the district court's granting of summary judgment for defendant and remanding, this court held that although defendant's chief executive officer had no informal fiduciary duty toward plaintiff that would have required him to make full disclosure of the stock restrictions, he had a duty to speak because of his superior knowledge with respect to defendant's securities. Brass v. American Film Technologies, Inc., 987 F.2d 142, 151, 152.

C.A.2, 1995. Com. (k) cit. in headnote and sup. A typewriter manufacturer sued two Dutch banks that financed the purchase of manufacturer's subsidiary, alleging that the banks were liable for the subsidiary's misappropriation of the manufacturer's trade secrets. District court entered judgment on jury verdict for manufacturer. This court vacated and remanded, holding that plaintiff's release of the banks in 1982 barred any claim arising from conduct that occurred before the effective dates of the releases. There was no showing that plaintiff signed the releases while laboring under mistaken assumptions about the banks' involvement in the acquisition of the subsidiary, and plaintiff was aware of the close relationship between the banks and the acquiring company. Remington Rand Corp. v. Amsterdam-Rotterdam Bank, N.V., 68 F.3d 1478, 1478, 1484.

C.A.2, 1996. Subsec. (2)(a) quot. in case quot. but dist. In a stock market manipulation case, defendants appealed from their convictions in district court of mail and securities fraud and conspiracy. Affirming, this court held, in part, that defendants' fraudulent short sales of high-value stocks to generate false credits were sufficiently connected to their scheme to manipulate the market for penny stocks for which defendants' firm was the market maker to constitute a securities law violation. The court stated that the reliance by defendants on a Supreme Court insider-trading case to argue that they had no fiduciary duty to disclose their deceit to the market and that therefore the short sales could not be considered part of the manipulation scheme was misplaced, since that case did not apply to individuals, such as defendants, who sought to benefit personally from an illegal, self-created scheme. U.S. v. Russo, 74 F.3d 1383, 1391, cert. denied ___ U.S. ___, 117 S.Ct. 293, 136 L.Ed.2d 213 (1996).

C.A.3, 1993. Cit. in sup. An automotive oil change and lubrication shop franchisor sued its supplier of motor oil, alleging fraud, tortious interference with contract, and RICO violations after the supplier's salespersons had induced franchisees to defect to the supplier and its competing franchise through threats, offers of free equipment and direct sale of oil, and manipulation of equipment agreements between the franchisor and the franchisees. Affirming the district court's grant of the supplier's motion for

partial judgment as a matter of law, this court held, inter alia, that, under New Jersey law, the relationship between the franchisor and supplier did not impose on the supplier a duty to disclose that it might enter into a joint venture with a competitor of the franchisor, so that the supplier could not be liable to the franchisor for fraudulent failure to disclose. Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1185.

C.A.3, 1995. Cit. generally in disc., cit. in disc., cit. but dist., subsec. (2) cit. in disc., com. (k) quot. in sup. Utility company responsible for operating a jointly constructed nuclear power plant sued supplier of part for, inter alia, negligent misrepresentation, breach of the duty of good faith and fair dealing, and fraud after the part failed. The district court granted defendant's motion for summary judgment on the negligent misrepresentation claim, dismissed plaintiff's breach claim and entered judgment on a jury verdict for defendant on the fraud claim. Affirming, this court held that nondisclosure did not constitute fraud where, as here, sophisticated business entities dealt at arm's length and no duty to speak existed, even though one party may have had an advantage because of its superior knowledge. In addition, the court refused to impose an independent duty of good faith and fair dealing where the obligation was not tied to a contractual term. Finally, the liability that would be imposed for negligently supplying information for the guidance of others did not supplant the economic loss doctrine but merely provided a remedy where the injured party was not protected by privity of contract. Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 611, 612.

C.A.4, 1989. Cit. in disc., com. (e) cit. in disc. A seller of land sued the buyer, who was the general manager of a water district, alleging that the defendant breached his fiduciary duty as a public official by failing to disclose his intention to cause a change in water policy that would increase the subject property's value. The trial court entered judgment on a jury verdict for the plaintiff. Reversing, this court held that the fact that the defendant was a public official with a general fiduciary responsibility to members of his constituency did not mean that he had a specific fiduciary duty to the plaintiff as an individual member of the public and concluded that the defendant had no fiduciary relationship with the plaintiff. The court said that the defendant as buyer had no duty to disclose in this situation and that there was not enough evidence to support the allegation that the defendant intended to change the water policy affecting the subject property, since there was no evidence from which the jury could conclude that the defendant manipulated the political process to obtain a new policy favorable to him. Nussbaum v. Weeks, 214 Cal.App.3d 1589, 263 Cal.Rptr. 360, 365, 367.

C.A.6, 1992. Subsec. (2)(a) quot. in case quot. in disc. Investor in automobile dealership who guaranteed loan for dealership to cover overdrafts sued bank for securities fraud for failing to disclose dealership's financial condition, inter alia. Affirming the district court's entry of judgment for defendant, this court held, inter alia, that defendant had no duty to disclose, since plaintiff could not show that the material facts about which he contended he was unaware were not readily available to him, because plaintiff never inquired about them. Smith v. American Nat. Bank and Trust Co., 982 F.2d 936, 943.

C.A.7, 1993. Subsec. (2)(e) cit. in sup. (Cit. as s 551(e).) A bankrupt partnership sued a bank and law firm, alleging fraudulent omissions in a failure to reveal that a loan agreement had not been signed by all of the bond holders, causing the partnership to be potentially liable to subsequent investors for representations made in reliance on the omissions. This court, affirming the district court's dismissal of the action, held, inter alia, that the omissions were actionable notwithstanding whether the defendants owed a duty arising from a fiduciary or other special relationship. The action was properly dismissed, however, said the court, as no injury giving rise to entitlement to damages had, as yet, been incurred by the plaintiff. Midwest Commerce Banking v. Elkhart City Centre, 4 F.3d 521, 524.

C.A.8, 1996. Subsec. (2)(a) quot. in case cit. in sup. Individual was charged with, among other things, securities fraud under § 14(e) of the Securities Exchange Act (Act) and Rule 14e-3. A jury convicted him on all counts and the district court entered judgment accordingly. Defendant subsequently challenged the conviction, arguing that the Securities and Exchange Commission (SEC) exceeded its rulemaking authority under § 14(e) when it promulgated Rule 14e-3. This court agreed and vacated the conviction, holding, inter alia, that § 14(e) was patterned after § 10(b) of the Act, which defined fraud as a failure to disclose information only where there was a duty to do so; that the duty to disclose arose from a fiduciary or other trust relationship; and that the SEC exceeded its rulemaking authority by allowing liability under § 14(e) without proof of a breach of fiduciary duty. U.S. v. O'Hagan, 92 F.3d 612, 625, 626, reversed ___ U.S. ___, 117 S.Ct. 2199, 138 L.Ed.2d 784 (1997).

C.A.8, 1997. Subsec. (2)(c) cit. but dist. Recipients of silicone temporomandibular joint (TMJ) implants brought products liability action against manufacturer's parent corporation for injuries allegedly caused by the implants. The parent had never manufactured the implants or supplied any of their components, but had performed research on the silicones used in the implants. The district court granted summary judgment for the parent, and the court of appeals affirmed, holding, inter alia, that parent was not liable based on theories of fraudulent concealment or fraudulent misrepresentation. Absent a relationship between parent and plaintiffs, parent had no duty to correct its previously published representation that silicones as a class are inert, and there was no evidence that parent engaged in active concealment or suppression of information relating to silicone implants. In re

Temporomandibular Joint (TMJ) Implant Products Liability Litigation, 113 F.3d 1484, 1497.

C.A.9, 1991. Subsec. (2)(c) cit. in ftn. (Erron. cit. as subsec. (5)(c).) A Chapter 11 debtor limited partnership sought an accounting and rescission of an amended agreement and a promissory note and the restitution of monies previously paid to a researcher under the amended agreement. The researcher counterclaimed for sums due under the note and the amended agreement. The bankruptcy court held that the plaintiff was not entitled to restitutionary relief but concluded that the note and amended agreement were unenforceable on several grounds, including fraud. The bankruptcy appellate panel affirmed. Affirming, this court held, inter alia, that the evidence was sufficient to support the finding of fraud. The court noted that the researcher owed the limited partners a duty of disclosure. In re Mediscan Research, Ltd., 940 F.2d 558, 563.

C.A.9, 1993. Subsec. (2)(a) cit. in disc. Gas station/convenience store franchisees sued franchisor, among others, when the franchise was not renewed, asserting, inter alia, a claim for misrepresentation for failing to disclose the alleged misdeeds of the previous franchisee. Affirming the district court's granting of summary judgment for defendant, this court held, inter alia, that defendant had no duty to disclose problems with the previous franchisee's bookkeeping, since defendant was not a party to the deal between the previous franchisee and plaintiffs and the dealings between defendant and plaintiffs were nothing more than an arm's-length business transaction. Reyes v. Atlantic Richfield Co., 12 F.3d 1464, 1472.

C.A.9, 1996. Quot. in treatise, subsec. (2)(e) cit. in disc. and headnote. A Chapter 7 debtor appealed a Bankruptcy Appellate Panel's (BAP's) decision holding the debtor's debt to a doctor to be nondischargeable under 11 U.S.C. § 523(a)(2)(A) because it was incurred by fraud. Debtor's corporation had leased an office building from building owner and entered into a sublease with the doctor, but debtor failed to tell the doctor that he was in default on the master lease. The BAP's decision reversed the bankruptcy court's decision that the doctor's reliance on the debtor's misrepresentations was not justifiable. This court affirmed, holding, inter alia, that debtor had a duty to disclose the fact that the building owner would never accept the priority provision upon which the doctor was insistent, because the owner refused to communicate with the doctor and the debtor was the doctor's sole source of information regarding the transaction. In re Apte, 96 F.3d 1319, 1320, 1324.

C.A.9, 1996. Cit. and quot. in disc., cit. in headnote, cit. generally in ftn. A creditor bank brought an adversary proceeding to determine whether a Chapter 7 debtor's credit cards were nondischargeable for fraud. Bankruptcy court found that the debtor's credit card debt owed to creditor was nondischargeable under 11 U.S.C. § 523(a)(2)(A) because of fraud. This court affirmed, holding that the bank established all of the elements of actual fraud: 1) that debtor made a false representation; 2) that debtor had intent to deceive; 3) that creditor justifiably relied on debtor's false representation; and 4) that creditor was damaged. The court stated that when a debtor, with intent to defraud the creditor, makes minimum payments with cash advances from other credit cards, the debtor has a duty to disclose to the creditor that he no longer intends to pay his credit card debt. Since the debtor failed to make this disclosure in this case, he committed actual fraud. In re Eashai, 87 F.3d 1082, 1084, 1089.

C.A.9, Bkrtcy.App.1998. Quot. in sup., subsec. (1) cit. in sup., com. (f) cit. in disc. Creditor/client brought action to determine the dischargeability of debtor/attorney's unsecured $250,000 debt under s 523(a)(2)(A), (a)(2)(B) and (a)(4) of the Bankruptcy Code. The bankruptcy court found the debt nondischargeable under s 523(a)(2)(A) and (a)(2)(B), but dismissed the s 523 (a)(4) claim. Affirming in part and reversing in part, this court held that an attorney's failure to disclose information he had a duty to disclose under a rule of professional responsibility could constitute a false representation of nondisclosure under s 523 (a)(2)(A); that debtor breached his ethical duty here when he borrowed money from creditor without advising creditor of the nature of their adverse pecuniary relationship and creditor's right to seek independent counsel; and that the debt was nondischargeable under s 523 (a)(2)(A); however, the bankruptcy court erred in finding the debt nondischargeable under s 523 (a)(2)(B). In re Tallant, 218 B.R. 58, 65.

E.D.Cal.Bkrtcy.Ct.1997. Cit. in headnotes, quot. in sup., subsecs. (1) and (2)(a) cit. in disc., com. (f) cit. in sup., com. (k) cit. in disc. Client sought determination that the debt created when he loaned $250,000 to his friend and attorney was nondischargeable as one arising from fraud. Entering judgment for client, the court held, in part, that attorney owed client both a common law and a statutory duty to disclose the fact that he owed close to $3,000,000 in other unsecured debt, that attorney's failure to disclose this information or include it on the profit and loss statement he prepared for client constituted a materially false representation that amounted to actual fraud, that attorney intended to deceive client in order to obtain the loan, that client was justified in relying on attorney's representations, and that attorney's conduct proximately caused client's loss. In re Tallant, 207 B.R. 923, 924, 925, 931, affirmed in part, reversed in part 218 B.R. 58 (9th Cir.BAP 1998). See above case.

S.D.Cal.Bkrtcy.Ct.1996. Cit. in case cit. in disc. Purchasers of a cliffside home brought a dischargeability proceeding against the debtors-sellers under the fraud discharge exception of the Bankruptcy Code. This court, among other dispositions, ordered that plaintiffs claim against debtors was nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A). Sellers made both material misrepresentations and material omissions to buyers in connection with the sale of the home, as they distorted the true nature of

problems with the plumbing in the maid quarters and failed to disclose excavations in the concrete slab beneath the family room. The materiality of these misrepresentations arose from the $140,000 negative impact that truthful disclosure would have had on the fair market value of the home, and consequently, on plaintiffs' decision to buy the property for $715,000. In re Russell, 203 B.R. 303, 312.

D.Colo.1993. Subsec. (2)(a) cit. in case cit. in sup. Buyers and assignees of bonds sued underwriter, among others, asserting common law and securities fraud claims, inter alia. Denying in part defendant's motion to dismiss, the court held, inter alia, that, plaintiffs' allegations that defendant manipulated market for 1986 bonds to create market for 1988 bonds by buying up 1986 bonds at prices near par value, with knowledge of failure to comply with requirements of 1986 bonds, thus inducing plaintiffs to buy 1986 bonds, sufficiently alleged duty by defendant to disclose material information to plaintiffs. Alter v. DBLKM, Inc., 840 F.Supp. 799, 807.

D.Colo.1993. Cit. in sup. Purchaser of realty from corporation and Resolution Trust Corporation in its receivership capacity sued for various contract and tort damages alleged to have arisen from nondisclosure of contamination of a well on the property or the property's location in a flood plain. Granting in part defendants' motions to dismiss, this court held, inter alia, that, under Colorado law, there was no tort for negligent concealment in the vendor/purchaser context. Haney v. Castle Meadows, Inc., 839 F.Supp. 753, 756.

D.Colo.Bkrtcy.Ct.1997. Quot. in disc. A former client who made loans to an attorney sought a declaration of nondischargeability of the debtor attorney's debts based on fraud or false pretenses. This court entered a judgment of dismissal for debtor attorney, holding, inter alia, that the attorney did not make any affirmative misrepresentations to the client either fraudulently or negligently. The evidence showed that the attorney was forthright and honest in his dealings with the client, and the client knew from the beginning that this was a risky start-up business and that it was in serious need of financial support. The client was not an unsophisticated investor, and he talked to several people besides the attorney before he made his first loan. In re Waller, 210 B.R. 370, 373.

D.Conn.1995. Com. (g) cit. in disc. From 1987 to 1990, an engineering company purchased 9-volt lithium batteries with the brand name "Ultralife" from a camera company for inclusion with engineering company's battery-powered products. In 1990, camera company stopped manufacturing the Ultralife. Engineering company brought suit asserting several claims relating to the batteries' price, quality, safety, and discontinued production. This court granted in part and denied in part camera company's motion for summary judgment, holding, inter alia, that plaintiff stated a cause of action for fraud, because there was a fact issue as to whether defendant's written disclosure to plaintiff of the Ultralife's potential for overheating and failure should have fully disclosed the Ultralife's potential for fire and explosion. Omega Engineering, Inc. v. Eastman Kodak Co., 908 F.Supp. 1084, 1096.

D.Hawaii, 1993. Cit. in sup., subsec. (2)(e) quot. in sup. Owner of building under construction sued surety for contractor principal, alleging, inter alia, fraudulent and negligent misrepresentation, fraudulent withholding of material information, and breach of contract arising from surety's refusal to cover allowance items in the construction contract. Denying surety's motion for summary judgment, the court held that surety could be found liable for fraudulent and negligent misrepresentation regardless of whether its alleged representation that the bond would cover allowance items was characterized as a factual or legal misrepresentation, and that owner stated a valid claim for nondisclosure because surety's alleged failure to inform owner of its policy regarding allowance items was a factual misrepresentation basic to the bond transaction. The court held, moreover, that surety's alleged fraud could also warrant reformation of the contract to make surety liable for allowance items, regardless of the principal's liability. Elliot Megdal & Assoc. v. Hawaii Planning Mill, 814 F.Supp. 898, 904, 905.

N.D.Ill.Bkrtcy.Ct.1992. Cit. in sup, coms. (a), (b), and (k) cit. in sup. Law firm represented debtors in a state court action. During that representation, debtors filed for Chapter 13 bankruptcy, yet failed to notify law firm of its bankruptcy filing although firm was creditor requiring notice. The court dismissed the confirmed Chapter 13 plan for material default. Debtors filed second bankruptcy petition, this time under Chapter 7, seeking discharge of the amount owed law firm. Law firm filed an adversary proceeding. The court held that amount owed law firm was nondischargeable debt obtained by false representation or actual fraud. It noted that firm had more than a four-year relationship with debtors before debtors brought Chapter 13 petition, and more than a five-and-one-half-year relationship with debtors before the court dismissed debtors' Chapter 13 case; law firm satisfied elements of actual and reasonable reliance that debtors would not mislead them, which entitled them to judgment. In re Malcolm, 145 B.R. 259, 262, 263.

S.D.Iowa, 1994. Cit. in sup., quot. in ftn., subsec. (2)(a) cit. in headnote and quot. in sup., com. (m) cit. in sup. After a fatal car accident, the grandmother of the two children who survived the accident sued the auto insurer for failure to disclose uninsured motorist coverage. This court granted plaintiff's motion for summary judgment to the extent that in connection with the

fraudulent nondisclosure claim defendant was under a duty to exercise reasonable care to disclose the uninsured motorist coverage provisions of the policy. The court stated that, while plaintiff's retention of an attorney may arguably diminish the duty to disclose coverage, the duty was not extinguished. Weber v. State Farm Mut. Auto. Ins. Co., 873 F.Supp. 201, 202, 208-209.

D.Kan.1993. Cit. in sup., subsec. (2) cit. in sup. A company that acquired another through a stock purchase sued the acquired corporation's chief executive officer, chief operating officer, and its accounting firm, alleging negligent misrepresentation and other claims arising from the stock sale after product and customer problems surfaced and losses were incurred. This court, mostly denying summary judgment motions by the defendants, held, inter alia, that, under Kansas law, purely economic damages, without a showing of physical injury or property damage, could be recovered for negligent misrepresentation in connection with the stock sale. TBG, Inc. v. Bendis, 841 F.Supp. 1538, 1567.

D.Kan.1997. Coms. (k) and (l) cit. in disc. When apartment building roofs began to leak as a result of work done by a roofing-supply-company-recommended contractor, buildings' owner sued roofing supply company for fraud and negligent misrepresentation in connection with certain omissions and statements defendant made concerning contractor and his work. Defendant moved for summary judgment. Granting the motion in part and denying it in part, the court held that material factual issues existed as to whether defendant, which promised to issue a warranty for the roofs once they were repaired, ever intended to issue such a warranty, and whether defendant negligently misrepresented roofing contractor's qualifications; however, defendant was not required to disclose its belief that no roofer would agree to fix the roofs and accept liability for contractor's deficient workmanship, or that it planned to discourage prospective roofers from agreeing to such terms. Kreekside Partners v. Nord Bitumi U.S., Inc., 963 F.Supp. 959, 966.

E.D.Ky.1989. Subsec. (1) and com. (a) cit. in sup. A man bought a race horse at an auction. Subsequently, the buyer discovered that the horse had a defect that might affect its racing qualities and sued the seller and the auctioneer for rescission. This court granted the defendants summary judgment, rejecting the plaintiff's argument that the sales contract should be rescinded because the defendant had misrepresented the horse's condition. The court said that the defendants had no duty to inspect the horse, and that the express waiver of all warranties in the sales contract had put the plaintiff on notice of that fact. Cohen v. North Ridge Farms, Inc., 712 F.Supp. 1265, 1272.

D.Mass.1987. Cit. in disc. A footwear company sued its primary lending bank for, inter alia, deceit and tortious interference with business relationships, alleging that the bank's failure to give the plaintiff an opportunity to respond to the bank's demand for payment of promissory notes before it set off the funds held in the plaintiff's expense account against the amounts remaining to be paid under the notes forced the plaintiff to file for bankruptcy. This court granted in part and denied in part the defendant's motion to dismiss, holding, inter alia, that the bank was not liable for its nondisclosure to the plaintiff's other lenders of its intention to withdraw financial support from the plaintiff, because it had no duty to disclose; and that the plaintiff failed to state a claim for tortious interference because there was no allegation that the bank intentionally interfered with the plaintiff's existing employee and creditor relations. The court stated that interference that was merely incidental to another purpose and not the intended result of a party's action was not a basis for tort liability. Spencer Companies v. Chase Manhattan Bank, N.A., 81 B.R. 194, 202.

D.Mass.1994. Subsec. (2)(a) cit. in sup. Owner of computerized voting machines redrew its parts supplier's billing instructions, from "sold to owner, ship to assembler," to "sold to assembler, ship to assembler," exploiting owner's superior knowledge of assembler's financial troubles and shifting a substantial portion of any risk of assembler's going bankrupt from owner to parts supplier. Sitting on a stack of unpaid bills, supplier sued owner for breaching a statutory duty to disclose information known about assembler. The court awarded supplier damages in the amount of unpaid invoices, holding that the jury was correct in its assessment that owner had acted unfairly in failing to disclose assembler's financial troubles. The court said that, while owner's relationship with supplier may not have risen to that of a formal fiduciary status, it went well beyond that of ordinary buyer and seller. Industrial General v. Sequoia Pacific Systems, 849 F.Supp. 820, 824, reversed 44 F.3d 40 (1st Cir.1995).

D.Mass.1995. Cit. in case quot. but dist., subsec. (2) cit. but dist. Buyer of wastewater treatment system that lacked a static mixer component necessary for the system's proper operation sued seller, alleging, inter alia, violation of a Massachusetts statute prohibiting unfair business practices. Entering judgment for plaintiff, the court held that defendant's conduct in neglecting to reveal its installation error when it became aware that the system was failing and willfully and knowingly declining to advise plaintiff of relevant information within its possession warranted the jury's finding of liability under the statute. The court rejected defendant's argument that, once the system was substantially installed, defendant had no further obligation to disclose defects that impaired the system's performance, stating that defendant's deceptive conduct amounted to continuing affirmative representations that the static mixer had been installed as promised. Cambridge Plating Co., Inc. v. NAPCO, Inc., 876 F.Supp. 326, 337, affirmed in part, vacated in part 85 F.3d 752 (1st Cir.1996).

D.Mass.1995. Adopted in case cit. in sup., subsec. (2) cit. in headnotes and in sup. After a bicycle manufacturer determined that hazardous pollutants had contaminated the soil and ground water at the bicycle manufacturing plant it had agreed to buy, it rescinded the stock purchase agreement and sued seller for fraudulent concealment, inter alia. The court denied in part buyer's motion for partial summary judgment, holding that buyer's fraudulent concealment claim failed because of the lack of proof that seller took affirmative steps to conceal or prevent buyer from acquiring knowledge of the defects and the absence of undisputed material facts that established the existence of a fiduciary duty owed by seller to buyer or other similar relationship of trust and confidence that required disclosure. Roadmaster Industries, Inc. v. Columbia Mfg. Co., Inc., 893 F.Supp. 1162, 1164, 1179.

D.Mass.1997. Cit. in disc. Investors brought securities fraud action against brokerage firm, alleging that defendant engaged in a scheme to manipulate certain computer stock by driving the price of the stock higher while secretly unloading millions of shares at inflated prices. Plaintiffs also asserted claims for negligent misrepresentation and deceit, based on "bullish" statements defendant's representative made to a popular financial journal. Granting defendant's motion to dismiss, the court held, in part, that plaintiffs' allegations of securities fraud were insufficient to state a claim, that the claim for negligent misrepresentation failed for lack of proof of defendant's actual knowledge of plaintiffs' reliance on the alleged misrepresentations, and that the deceit claim failed because plaintiffs did not establish the falsity of representative's statements. In re Fidelity/Apple Securities Litigation, 986 F.Supp. 42, 49.

D.Mass.Bkrtcy.Ct.1990. Cit. in case quot. in disc. A debtor trust and a guarantor sued a bank for several claims including fraud, alleging that the bank knowingly and intentionally misrepresented to the trust the amount of consideration that the trust would pay for a loan. Granting partial summary judgment for the plaintiffs, this court held, inter alia, that the bank was liable because it had actual or constructive knowledge that the guarantor's adviser, acting in concert with and as an agent for the bank, would divert as a kickback an additional $75,000 from the trust's loan proceeds account for use by the bank and its agents. The court stated that by entering into the loan agreement, the trust had reasonably relied on the bank's representations about the extent of the consideration. In re 604 Columbus Ave. Realty Trust, 119 B.R. 350, 374.

D.Minn.1995. Cit. in case quot. in disc., subsec. (2)(c) quot. in disc. Patients who received silicone-containing temporomandibular joint (TMJ) implants sued parent companies of TMJ manufacturer for, inter alia, fraudulent concealment and misrepresentation. Plaintiffs, who allegedly sustained injuries when the silicone in their TMJs deteriorated, maintained that defendants' failure to publish new findings concerning the risks associated with silicone implants constituted a breach of their duty to correct previously published information regarding the safety of silicone. Granting defendants' motion for summary judgment, the court held that they were under no duty to correct 50- year-old articles that made no representations about the safety of silicone when used in medical implants. Furthermore, there could be no duty where, as here, there was no business or fiduciary relationship between the parties. In re TMJ Implants Products Liability Litigation, 880 F.Supp. 1311, 1317, affirmed 113 F.3d 1484 (8th Cir.1997). See above case.

D.Nev.1994. Quot. in case quot. in sup. Undercover vice officers who had agreed to be featured in an episode of a nationally broadcast series documenting quality detective work sued a local television station, among others, for misrepresentation by intentional omission, among other claims, after producer breached its promise to preserve the officers' anonymity by failing to digitize and blur their faces so they would by unrecognizable to any viewers. This court granted the television station summary judgment, holding, inter alia, that plaintiffs failed to present any evidence from which it could conclude that the station was under a duty to disclose that it was going to air the undigitized version of the show. The circumstances surrounding the program's airing did not create a duty on station's part to make any disclosures to plaintiffs, since there was no contract between station and plaintiffs, nor were there representations made by station. Does I-VI v. KTNV-Channel 13, 863 F.Supp. 1259, 1265.

D.Nev.1995. Cit. in headnote, quot. in case quot. in sup. Utility sued sellers of electrical equipment containing polychlorinated biphenyl (PCB), among others, for, inter alia, fraud by nondisclosure, alleging that defendants were liable for costs incurred when plaintiff replaced toxic capacitors and transformers with PCB-free equipment. Adopting the magistrate judge's report and recommendation and granting defendants' motion for summary judgment, the court held that plaintiff could not recover damages absent a showing that defendants had a duty to disclose facts concerning the dangers associated with PCB. The court rejected plaintiff's contention that a special relationship existed between and among the parties, explaining that this was an ordinary vendor-vendee affiliation that gave rise to no unique obligations. Nevada Power Co. v. Monsanto Co., 891 F.Supp. 1406, 1409, 1417.

D.N.J.1996. Coms. (a), (b), and (k) cit. in disc. Purchasers of Chapter 7 debtor's home sued to obtain a nondischargeability determination for claims arising from debtor's alleged failure to disclose structural defects in the home. Bankruptcy court determined that purchasers failed to establish by a preponderance of the evidence that their claim was nondischargeable. On appeal, purchasers argued that bankruptcy court failed to make any findings of fact concerning whether debtor had actual knowledge of the defects and/or whether debtor intentionally concealed this knowledge. This court affirmed in part and vacated

and remanded in part, holding, inter alia, that bankruptcy court erred as a matter of law by not making such findings, because purchasers could satisfy their burden if they established that debtor knew the property had structural defects and intentionally concealed this information, and that a reasonable man would attach importance to the alleged omission in determining his course of action. The court stated that, under New Jersey law, silence may provide a basis for an actionable misrepresentation under s 523 (a)(2)(A). In re Reynolds, 193 B.R. 195, 202, on remand 197 B.R. 204 (Bkrtcy.N.J.1996).

E.D.N.Y.1995. Com. l cit. in case quot. in sup. Swiss manufacturer that distributed and sold perfumes sued American perfume distributors claiming damages for breach of contract and fraud. Defendants argued that plaintiff had no right to rely on their representations as to their marketing capabilities, when such information was readily available to plaintiff and could have been discovered had plaintiff investigated. This court denied in part defendants' motion to dismiss, holding, inter alia, that plaintiff stated a valid claim against defendant for fraudulently inducing plaintiff to enter the distribution agreement. The court stated that the complaint set forth all of the elements of fraud, namely an intentional false material misrepresentation by defendants, upon which plaintiff relied, resulting in damages. It also stated that it was reasonable for plaintiff to rely on the representations that defendants made about their marketing network. PDP Parfums de Paris v. International Fragrances, 901 F.Supp. 581, 586.

S.D.N.Y.1987. Subsec. (2)(a) cit. in case quot. in disc. A trader in call options of a company's stock lost money when the market price of the stock rose as a result of allegedly false statements made to the public by company insiders. The trader sued the company and its directors to recover his losses. This court granted the defendants' motion for partial summary judgment, holding, inter alia, that there was no fiduciary or other similar relationship of trust and confidence between an option trader and the issuer of the underlying securities that would give rise to a duty to disclose material inside information to the trader. Starkman v. Warner Communications, Inc., 671 F.Supp. 297, 303.

S.D.N.Y.1988. Subsecs. (2)(e) and (2)(b) quot. in disc. (Subsec. (2)(e) erron. cit. as s 551(e).) Several banking institutions sought to recover from a foreign state over $40 million they paid out as guarantors after the foreign state defaulted on its repayment of loans for the construction of a power plant. This court entered judgment for the plaintiffs, holding that the defendant had contractually waived its right of sovereign immunity; that British law, as specified in the choice of laws clause in the parties' recourse agreement, was applicable where there was no evidence that the clause was consented to as a result of fraud or misrepresentation; that under British law the plaintiffs were entitled to recover because defendant failed to prove any mistake or reliance on an alleged misrepresentation that would invalidate the recourse agreement; and that, since there was no evidence of an agency relationship between the plaintiffs and the project's contractor, any misrepresentation made by the contractor was not attributable to the plaintiffs. Morgan Guar. Trust Co. of N.Y. v. Rep. of Palau, 693 F.Supp. 1479, 1496, 1497.

S.D.N.Y.1993. Com. (1) quot. in part in sup. A bank purchased an interest in a participation agreement with a packaging bank for loans made to real estate partnerships to convert apartments into condominiums. When the real estate partnerships defaulted on their loans, bank's assignee sued the packaging bank, alleging breach of contract and various torts. Denying in part defendant's motion for summary judgment, this court held, inter alia, that under New York law, an express disclaimer in the participation agreement, providing that the bank participating in the loans was basing its decision on its own analysis without relying on the packaging bank, did not relieve the packaging bank of its duty to disclose delays in the state's approval of the underlying project, of which the packaging bank knew it had superior knowledge. Banque Arabe Et Internationale D'Investissement v. Maryland Nat. Bank, 819 F.Supp. 1282, 1292.

S.D.N.Y.1993. Cit. in ftn. Property owners sued asbestos manufacturers and distributors, alleging several claims including negligence and alternative liability. Plaintiffs specifically asserted that some members of the asbestos industry knew of risks connected with asbestos and acted to suppress information with respect to that knowledge during a period from the 1930s into the 1950s. Magistrate recommended grant of summary judgment for defendants. Approving and adopting magistrate's report and recommendations, this court held, inter alia, that, while deliberate concealment by an industry member of serious risks concerning a product could lead to liability, plaintiffs here failed to present sufficient evidence to create genuine issue of material fact as to these defendants' liability. The court noted that, in an industry in which it is foreseeable that one actor can and will rely on what has been learned by others about hazards, deafening silence where an alarm would be required or expected can be highly misleading. 210 E. 86th St. Corp. v. Combustion Engineering, 821 F.Supp. 125, 129, reversed ___ A.D.2d ___, 679 N.Y.S.2d 21 (1998).

S.D.N.Y.1994. Com. (f) cit. in disc. Investors in a partnership sued general partner for racketeering and common law fraud, among other claims, alleging that their investment transfers represented payments for partnership interests in a general partnership. Defendant argued that the transfers were loans, rather than payments for partnership interests. This court, among other dispositions, denied defendant's motion for summary judgment on one plaintiff's common law fraud claim, because there was evidence from which a reasonable jury could conclude that plaintiff's provision to defendant made her the owner of a partnership interest, not a mere lender. A jury could also conclude that defendant breached a duty to disclose to plaintiff the true

nature and full value of her interest before allowing her to relinquish that interest to him. Bickhardt v. Ratner, 871 F.Supp. 613, 619.

S.D.N.Y.1994. Cit. in ftn. After cancellation of shipment of parts for prefabricated housing from the United States to Israel, plaintiff shipper sued defendant shippers for lost profits. The district court granted defendants partial summary judgment dismissing plaintiff's complaint seeking lost profits, but denied summary judgment insofar as plaintiff sought out-of-pocket expenses. This court reaffirmed as to treatment of overhead as part of out-of-pocket expenses, stating that such overhead could be allowed to the extent that it was reasonably incurred because of plaintiff's contract with either defendant shipper or defendant parts manufacturer. Noting the concept that the party with greater knowledge should disclose it to avoid unfair surprise, the court stated that plaintiff could recover out-of-pocket expenses and overhead if it kept defendants informed in writing as the undertaking progressed of the amount and type of expenses incurred, and the amount and nature of effort being expended. Four Points Shipping & Trading v. Poloron Israel, 853 F.Supp. 95, 97.

W.D.N.Y.1991. Com. (c) quot. in disc. A shareholder sued a corporation and its officers for common-law fraud as a basis for alleged racketeering activities by the defendants in violation of the Racketeer Influenced and Corrupt Organizations Act, claiming that the defendants failed to disclose their intention to pursue a merger with another company when they bought the plaintiff's stock in the corporation. Granting the defendants' motion to dismiss, the court held, inter alia, that the plaintiff failed to allege the omission of a material fact by the defendants, since the mere intention to pursue a possible merger at some time in the future, without more, was simply not a material fact. Panfil v. ACC Corp., 768 F.Supp. 54, 60.

S.D.Ohio, 1990. Quot. and cit. in sup., quot. in ftn., subsec. (2)(c) and com. (j) cit. in sup. A corporation sued its financial advisor, which had furnished both information and financial means to another corporation, enabling an attempted hostile takeover of the plaintiff. Plaintiff alleged, among other claims, fraudulent nondisclosure in breach of a fiduciary duty to disclose the fact that defendant was simultaneously advising the other corporation, a well-known corporate raider expressing an interest in acquiring a company fitting plaintiff's profile. Plaintiff contended that it would not have provided defendant with confidential information had it known of defendant's relationship with the other corporation and that its damages were caused by defendant's nondisclosure. The court denied defendant's motion to dismiss, holding that, under Ohio law, an action for nondisclosure by one having a duty to disclose could be premised on fraud or negligence, and that plaintiff had sufficiently alleged the materiality of the nondisclosure, as well as the elements of causation and reliance. General Acquisition, Inc. v. GenCorp Inc., 766 F.Supp. 1460, 1477-1481.

W.D.Okl.1989. Cit. in disc. Investors in limited partnerships who lost their investments sued the law firm that prepared the offering memorandum relating to the sale of limited partnerships and stock on which the investors relied to their detriment. This court granted the defendant's motion to dismiss regarding the plaintiffs' claim that state law imposed a special duty on attorneys involved with securities, without regard to privity or an attorney-client relationship and without regard to securities statutes, when it was foreseeable that the defendant's negligent performance of professional services would injure others. The court noted that the offering memorandum stated that the financial statements were prepared by and were the sole responsibility of the defendant's client. Moreover, the defendant did not undertake to prepare, evaluate the accuracy of, or opine upon the accuracy of financial statements furnished by its client and said so; it could not, therefore, have foreseen that persons in the plaintiffs' position would nevertheless expect it to disclose any misrepresentations or omissions in its client's financial statements. Buford White Lumber Co. v. Octagon Properties, 740 F.Supp. 1553, 1562.

E.D.Pa.1989. Subsec. (2)(a) cit. in ftn. Customers of a brokerage firm lost over $400,000 in option trading due to improper actions by the firm's broker. They sued the firm and the firm's clearing agent under the antifraud provisions of the federal securities laws, alleging that the firm and the clearing agent knew of the broker's improprieties and failed to act or disclose to the plaintiffs those wrongdoings. This court denied the firm's motion to dismiss, holding that the firm had a fiduciary duty to the plaintiffs to disclose material information. However, the court granted the clearing agent's motion to dismiss, in part, since the agent had no fiduciary duty to the plaintiffs and there were no allegations in the plaintiffs' complaint which sufficiently established an independent duty to disclose. While determining that liability could not be imposed upon the clearing agent for its alleged mere omissions, the court granted leave to the plaintiffs to replead with more specificity the facts concerning the clearing agent's role as a fiduciary. Antinoph v. Laverell Reynolds Securities, Inc. 703 F.Supp. 1185, 1187.

E.D.Pa.1997. Cit. in headnote, cit. in disc. Italian city and city officials sued president of renowned art collection for, inter alia, breach of contract, breach of the implied covenant of good faith and fair dealing, and fraudulent concealment in connection with defendant's decision to allow the collection to be exhibited in Germany rather than Italy. Defendant filed a counterclaim for defamation. All parties moved for summary judgment. Granting the motions, the court held, in part, that Pennsylvania had a more significant relationship to the dispute than Italy, and thus Pennsylvania substantive law applied; that plaintiffs' contract claim failed for lack of a meeting of the minds; that, in the absence of a contract, plaintiffs could not maintain their claim for breach of

the implied covenant of good faith and fair dealing; that there could be no fraud where defendant was under no duty to disclose that a German museum had been awarded the exhibit; and that the defamation counterclaim failed because defendant did not establish that plaintiffs acted with actual malice when they called defendant a "con man." City of Rome v. Glanton, 958 F.Supp. 1026, 1028, 1039.

E.D.Pa.1997. Cit. in case quot. in disc., cit. in ftn., com. (f) quot. in part in ftn. Patient who sought therapy in order to receive counseling for an eating disorder sued therapists for, inter alia, fraudulent misrepresentation, alleging that defendants' course of therapy involved the implantation of false memories of satanic rituals and sexual assault. Defendants moved to dismiss the complaint. Granting the motion in part and denying it in part, the court held that defendants, as plaintiff's fiduciaries, had a duty to inform her of the true nature of the "therapy," and that failure to do so gave rise to a claim for fraudulent misrepresentation. Lujan v. Mansmann, 956 F.Supp. 1218, 1229.

E.D.Pa.1997. Subsec. (2)(a) quot. in part in case cit. in ftn. Defendant moved for the dismissal of an indictment charging him with, among other things, knowingly concealing assets or property from the Resolution Trust Corporation (RTC) in violation of 18 U.S.C. § 1032(1). Defendant performed real estate settlement services for the sale of homes constructed by a developer who allegedly engaged in various fraudulent activities against his lending institution. Granting the motion, the court held, in part, that defendant could not be found liable for violations of 18 U.S.C. § 1032(1) in the absence of a legally cognizable duty to the RTC to make the existence of the assets known, and that defendant, who was not acting on behalf of developer's lender or the RTC, was under no duty to reveal the existence of the property at issue. U.S. v. Seitz, 952 F.Supp. 229, 236.

E.D.Pa.Bkrtcy.Ct.1987. Cit. in sup. The seller of a house designated to her daughter the authority to transact the sale. A broker located a purchaser and wrote a sales agreement containing specific clauses requiring the seller to provide roof and termite inspections. The daughter never had the roof inspected, and after the first termite report showed active infestation, the seller's daughter ordered a new termite report, which showed no active termites. On discovering the existence of the first report, the purchaser sued the seller and broker for the cost of the roof repairs and termite-related damages. This court rendered judgment for the plaintiff, holding that as principal, the seller was liable for her daughter's breach of the sales agreement regarding the roof inspection; that the existence of termites was a material fact and therefore misrepresentations concerning it constituted fraud; and that the daughter was liable for her own deceit, even though she was acting in the capacity of the seller's agent. In re Humphrey's Pest Control Co., Inc., 80 B.R. 687, 696.

M.D.Pa.1994. Cit. and quot. in sup., subsec. (2)(b) cit. in sup. Lessee grocery store owner sued lessor retail store for breach of contract, fraudulent misrepresentation, and unjust enrichment, after lessor failed to construct the store's shell. This court granted in part and denied in part lessor's motion for summary judgment, holding, inter alia, that there was sufficient evidence that lessor committed an actionable misrepresentation through its failure to disclose material facts bearing on its lack of progress in constructing lessee's store. When lessor represented to lessee that materials would be provided to lessee and that the food store would be completed with haste, lessor was under a duty to disclose the fact that it held other construction obligations in higher priority or that it hoped to coordinate the construction of other stores with lessee's store. Fox's Foods, Inc. v. Kmart Corp., 870 F.Supp. 599, 610, 611.

D.R.I.1990. Subsec. (2)(b) cit. in case quot. in disc. A former tenured university professor sued the university, alleging that the university had wrongfully rescinded an early retirement agreement and seeking specific performance of the agreement. This court entered judgment for the university, holding that the university was within its rights to rescind the early retirement agreement because the professor had fraudulently misrepresented the status of his negotiations to obtain a position at another university. The court stated that, while the professor did inform university officials that he was negotiating with other schools over jobs, his failure to tell them that he had all but accepted a position at another university was a half-truth that constituted fraud because the university had an interest in knowing the outcome of such negotiations once the professor volunteered their existence. Nash v. Trustees of Boston University, 776 F.Supp. 73, 83, judgment affirmed 946 F.2d 960 (1st Cir.1991).

N.D.Tex.1986. Subsec. (2)(a) quot. in case quot. in sup. The Securities and Exchange Commission (SEC) sued employees of a corporation, alleging, inter alia, that the defendants had traded on inside and material information and seeking injunctive and equitable relief for the alleged violations of § 10(b) of the Securities Exchange Act of 1934. Holding that the SEC failed to prove by a preponderance of the evidence that the defendants traded on material information, the court denied the prayer for injunctive relief and disgorgement. The court stated that the SEC's allegations required proof that the defendants had a duty to disclose the alleged information or to abstain from trading. The court found that, even if the defendants did possess material inside information, they had no duty to disclose the information or to abstain from trading; such a duty arose when a party had information that another party was entitled to know because of a fiduciary or other similar relation of confidence and trust between them. S.E.C. v. Fox, 654 F.Supp. 781, 790.

W.D.Tex.1985. Quot. in disc., com. (k) quot. in disc. The Federal Deposit Insurance Corporation (FDIC) sought to collect on promissory notes that had been executed by individuals to a limited partnership, and then assigned to a failed bank in consideration for the sale and leaseback of the bank's building complex. This court found for the FDIC, holding that the defendants had not been fraudulently induced to enter into the bank's sale-leaseback transaction or to execute the promissory notes, that no fiduciary relationship existed between the bank and the limited partnership, and that the bank's factual disclosures and representations were adequate to inform the partners of its financial position and the reasons for selling the building complex. FDIC v. Eagle Properties, Ltd., 664 F.Supp. 1027, 1043, 1044.

D.V.I.1991. Cit. in disc., subsec. (2)(b) and com. (f) cit. in disc. A dissatisfied homebuyer sued the seller's broker and the seller, inter alia, seeking pecuniary loss damages on the ground that the broker misrepresented the location of an easement on the property. The court granted the defendants summary judgment, holding that, assuming any misrepresentation by the broker occurred, the broker had corrected her alleged misrepresentation before the closing by disclosing the existence and location of the easement to the plaintiff's attorney. The court said that, even if the attorney never informed the plaintiff of the broker's disclosure of the easement, the attorney's knowledge could be imputed to the plaintiff, since the plaintiff was responsible for creating authority and the appearance of authority in the attorney; as against the defendants, the plaintiff was accountable for any of the attorney's mistakes. Lempert v. Singer, 766 F.Supp. 1356, 1362, 1364.

N.D.W.Va.1989. Cit. in disc. Employees accepted promotions from union positions to nonunion management positions after the company made representations that each employee could return to the union position if the employee desired and that layoffs would be based on date of hire seniority. After various layoffs based upon management seniority date, the plaintiffs sued the company claiming breach of contract, fraud, and intentional infliction of emotional distress. Granting summary judgment for the defendant in part, this court held, inter alia, that all contract and tort claims relating to return to union positions, which were covered by a collective bargaining agreement, were preempted by federal law; the company was not liable for constructive fraud because it did not owe a duty of disclosure to the employees of the parameters of the right to return; and the company's actions were not so outrageous as to constitute infliction of emotional distress. Regarding constructive fraud, the court stated that if the plaintiffs were concerned about the details of the right to return, they could have ascertained the company's return policy with reasonable investigation. White v. National Steel Corp., 742 F.Supp. 312, 337, judgment affirmed in part, reversed in part 938 F.2d 474 (4th Cir.1991), certiorari denied 502 U.S. 974, 112 S.Ct. 454, 116 L.Ed.2d 471 (1991).

E.D.Wis.1991. Quot. and cit. in sup., subsec. (2)(e) and com. (l) quot. in sup., com. (j) cit. in case quot. in disc. Buyers of corporate stock sued two directors of the corporation, alleging securities fraud in making misrepresentations to the buyers and failing to disclose material facts concerning the companies' financial condition. The plaintiffs purchased 10% of the company for $100,000 in 1987 without knowing that the company's accountants had valued its net worth at $76,798 one month earlier. One year later, the corporation was dissolved. The court denied the defendants' motion for summary judgment, holding that the defendants had a duty to disclose basic facts of financial condition to the buyer, including the corporation's debt, its need for a cash infusion, and its shaky financial condition. In failing to disclose these facts, it said that the defendants presale statements were misleading. Jersild v. Aker, 766 F.Supp. 713, 718.

E.D.Wis.1992. Subsec. (1) quot. in ftn. (Erron. cit. as Torts 3d.) Shareholders of corporation that owned several fast-food restaurants sued controlling shareholder for breach of his fiduciary duty, alleging that defendant usurped a corporate opportunity when he formed a new corporation that acquired 16 additional restaurants without affording plaintiffs an opportunity to invest in the deal. Denying plaintiffs' motion for summary judgment, the court held that substantial questions of fact existed as to whether the opportunity was a corporate one, whether the material information had in fact been disclosed to one of the shareholders before his death and he had rejected the opportunity to invest, and whether defendant had acted in good faith. Havlicek/Fleisher Enterprises, Inc. v. Bridgeman, 788 F.Supp. 389, 399, 402.

Alaska, 1987. Subsec. (2) quot. in ftn., com. (k) cit. in disc. and in ftn., illus. 9-12 cit. in disc. (cit. as illus. to com. l). The purchaser of a four-plex sued the former owner of the complex, among others, alleging that the defendant fraudulently or negligently misrepresented that the property contained off-street parking. The trial court entered judgment on a jury verdict for the plaintiff. This court set aside the verdict and remanded the case, holding that the defendant did not have an affirmative duty to disclose the lack of off-street parking to the plaintiff. The court reasoned that the plaintiff's claim failed because the lack of off-street parking was an obvious fact that the ordinary purchaser would have been expected to discover, by ordinary inspection and inquiry, before the purchaser bought the property advertised for sale. Matthews v. Kincaid, 746 P.2d 470, 471, 472.

Ariz.App.1994. Subsec. (2)(e) quot. in case quot. in sup. Purchasers of residential lot sued seller for, inter alia, negligent misrepresentation by omission. Plaintiffs, who required water service in order to construct a home on the lot, alleged that they were damaged by defendant's failure to inform them that the water company was overextended and unable to provide service. Reversing the trial court insofar as it entered summary judgment for defendant on this issue and remanding, this court held that

because defendant was aware of plaintiff's utility needs and had included in other purchaser's agreements a disclaimer regarding the availability of water, it owed plaintiffs a duty to disclose potential water service problems. Alaface v. National Inv. Co., 181 Ariz. 586, 892 P.2d 1375, 1384-1385.

Ark.1991. Cit. in disc. Owners of property, which had been used as a gas station and car wash, sold the property to purchasers who intended to operate the service station and the car wash. The purchasers of the property sued the sellers alleging fraudulent concealment, misrepresentation, and the tort of outrage, when the sellers failed to inform them about a new federal regulation governing gasoline storage tanks. The trial court granted summary judgment for the sellers. Affirming, this court held that there was no false representation either expressly, or by concealment of material information, or by nondisclosure. The court determined that there was no proof that the sellers intentionally prevented the purchasers from learning about the federal regulation and that the purchasers had no duty to disclose the existence of the federal environmental regulation because both parties had equal access to the knowledge. Baskin v. Collins, 305 Ark. 137, 806 S.W.2d 3, 5.

Cal.App.1988. Subsec. (2)(e) quot. in disc. A landlord sued an insurer and a broker after the insurer denied liability for damage done by a backed-up sewer, alleging that the broker had negligently misrepresented the terms of the policy. The trial court granted the defendants' motion for summary judgment. Reversing, this court held that there was a triable issue of material fact concerning whether the broker negligently misrepresented the terms of the policy to the plaintiff. Eddy v. Sharp, 199 Cal.App.3d 858, 245 Cal.Rptr. 211, 213.

Cal.App.1988. Cit. in case cit. in disc. A tenant of an apartment complex being converted to condominiums sued on theories of breach of contract and fraud, inter alia, the bank that provided a loan secured by a deed of trust to the purchasers of the tenant's unit, alleging that he was never given the opportunity to exercise his right of first refusal to purchase his apartment. The trial court sustained the bank's demurrer without leave to amend and dismissed the action. Affirming in part and reversing in part, this court held that the bank owed the tenant no duty of disclosure, since he was not a party to the loan transaction between the bank and the purchasers of the property. Mullin v. Bank of Amer. Tr. & Sav., 199 Cal.App.3d 448, 245 Cal.Rptr. 66, 74.

Cal.App.1989. Subsec. (2)(e) quot. in case quot. in sup. A bank sued a bank loan customer for conversion to recover against the defendant promisee's guarantees and promissory notes for the purchase of an automobile dealership. The defendant counterclaimed against the bank for fraudulently inducing him to purchase the highly leveraged car dealership, which led to his declaring bankruptcy and the loss of his successful dealership. The trial court found in favor of the defendant and awarded compensatory and punitive damages, as well as attorney fees. This court affirmed, holding, inter alia, that there was sufficient evidence that the defendant had reasonably relied on the fraudulent misrepresentations of the bank and its agents. The court said the bank had no reasonable ground for believing the car dealership was a good, financially sound, and profitable venture when it induced the defendant to borrow the money to purchase it. Security Pacific Nat. Bank v. Williams, 213 Cal.App.3d 927, 262 Cal.Rptr. 260, 277.

Cal.App.1991. Cit. in disc., cit. in headnote, subsec. (2)(e) quot. in disc. and cit. generally in case cit. in disc. An investor brought an action for breach of fiduciary duty, inter alia, against a clearing broker, among others, after the penny stocks in which she had invested lost almost all of their value. The trial court granted the defendant's motion for summary judgment. Affirming, this court held that, since there was no evidence that the defendant knew that the plaintiff's broker dealer had failed to fully advise the plaintiff about the speculative nature of the penny stocks, the defendant had no duty to advise the plaintiff of the nature of the stocks and could not be held liable for its failure to disclose material information to the plaintiff about her investments. Petersen v. Securities Settlement Corp., 226 Cal.App.3d 1445, 277 Cal.Rptr. 468, 468, 474.

Cal.App.1992. Quot. in case quot. in ftn. The beneficiaries of a life insurance policy sued the insurer to recover for the insured's suicide. The policy provided that suicide, whether the insured was sane or insane, was not a risk that the insurer assumed during the first two policy years. The trial court granted summary judgment for the insurer. On appeal, the beneficiaries argued that the insurer breached an affirmative duty to point out the suicide provision and explain its effects to the insured. This court affirmed, holding that the suicide exclusion was plain, clear, conspicuous, and unambiguous as a matter of law; therefore the insurer did not breach an affirmative duty to disclose. Furthermore, knowledge of the insured's history of observation, care, and hospital treatment for depression did not impose an affirmative duty to advise the insured specifically about the suicide provision and its effect on coverage; the insured did not ask for coverage for all suicide-related death, ask whether the policy would cover suicide-related death, or seek clarification of the suicide exclusion after receiving the policies. Malcom v. Farmers New World Life Ins. Co., 4 Cal.App.4th 296, 5 Cal.Rptr.2d 584, 588.

Cal.App.1993. Cit. in disc. Insured sued insurer for breach of contract and breach of covenant of good faith and fair dealing for insurer's failure to defend against third party's claim that insured misrepresented facts concerning his son's business and business experience to induce third party's investment. The trial court granted insurer summary judgment. This court affirmed, holding

that insurer had no duty to defend against third party's suit when suit had no potential for recovery on any claim covered by policy. Explaining that third party could prove only that plaintiff acted intentionally when he made false statements, failed to correct misrepresentations, and failed to provide additional information, the court said that the intentional claims alleged did not constitute an "occurrence" under the policy, which courts had uniformly interpreted to mean "accidental" events only. Dykstra v. Foremost Ins. Co., 14 Cal.App.4th 361, 17 Cal.Rptr.2d 543, 546.

Colo.1991. Quot. in spec. conc. and diss. op. A bank customer who had opened a joint account in her name and her son's name sued the bank after it set off the funds in the joint account against bank loans on which her son had defaulted. The trial court entered summary judgment for the bank, and the intermediate appellate court affirmed. Reversing in part and remanding, this court held that summary judgment was inappropriate because an issue of fact existed as to whether a constructive trust could be imposed on the bank on the ground that it knew that the plaintiff's son held title to the account subject to a resulting trust in the plaintiff's favor and that evidence existed that could overcome the presumption that the plaintiff intended to make a gift to her son when she set up the joint account. A specially concurring and dissenting opinion argued that the majority should have addressed on certiorari the plaintiff's claim that the bank was negligent in causing the plaintiff's funds to be subject to set off, on the ground that the bank breached its duty of reasonable care when it undertook to give the plaintiff financial planning advice and failed to inform her of other account options. Mancuso v. United Bank of Pueblo, 818 P.2d 732, 744.

Colo.App.1990. Subsec. (2)(b) cit. in sup., subsec. (2)(e) quot. in sup. A terminated employee sued her former employer contending that the employer had fraudulently failed to disclose a substantial, known risk that the project that she was being hired to manage would be discontinued in the near future. The trial court entered judgment on a jury verdict in favor of the plaintiff. This court affirmed, holding that the employer had a duty to disclose the risk that the project would be discontinued to the plaintiff when she interviewed for the position, and that this failure to disclose caused the plaintiff financial losses because of her reasonable reliance on those assurances. The court reasoned that the defendant's statements indicating that the company was financially secure and that the project had a bright future created a false impression. Moreover, the defendant recruited the plaintiff specifically to manage sales for the project, and induced her to move to Denver from New Orleans and give up her attempt to start her own business. Berger v. Security Pacific Inf. Systems, 795 P.2d 1380, 1383.

Colo.App.1991. Subsec. (2)(e) cit. in disc. Purchasers of residential real estate sued the seller, a title insurance company, and various real estate brokers involved in the transactions for failure to make them aware, before closing, that the properties were included in a general improvement district and were thus subject to additional taxes. The trial court granted the defendants' motions for summary judgment. Affirming, this court held that the plaintiffs presented insufficient evidence to establish that the seller had a duty to disclose the fact that the properties were within the district, inter alia. It noted that the seller did not know that the purchasers were unaware of the improvement district at the time of the sale; on the other hand, the plaintiffs, at a minimum, had constructive notice of the district, which was recorded in the county offices, and had received inquiry notice based on the purchase agreement. Burman v. Richmond Homes Ltd., 821 P.2d 913, 918.

Colo.App.1996. Cit. in headnotes, quot. in disc., subsec. (2)(e) cit. in disc. An oil and gas company that had a mineral development agreement with an Indian tribe sued a company that purchased interests in those oil and gas rights and the purchaser's employee, asserting claims for fraudulent concealment of the results of the purchaser's employee's desorption tests, misappropriation of geological data, and civil conspiracy. Trial court granted defendants summary judgment. This court vacated and remanded, holding, inter alia, that defendants did not have a duty to disclose their findings of gas in the subject land from their geophysical tests. No evidence of a relationship of trust and confidence between the two oil and gas exploration companies, as competitors, was presented that would give rise to a duty to disclose. The information defendants acquired would not make untrue a previous representation, since there were no previous representations between the two regarding the amount of gas in the subject land. Furthermore, because the employee was rightfully on the land looking for coal, he was not a geophysical trespasser, and consequently, defendants had no duty to disclose their discovery of gas. Mallon Oil Co. v. Bowen/Edwards Assoc., 940 P.2d 1055, 1055, 1059-1060, affirmed 965 P.2d 105 (Colo.1998).

Fla.App.1990. Subsecs. (1) and (2)(e) and com. (j) quot. in conc. and diss. op. (Erron. cit. as Restatement of Torts.) Mortgagees brought an action to foreclose a residential mortgage for nonpayment of installments, and the mortgagor counterclaimed on the grounds of fraud, misrepresentation, and failure of consideration, alleging that the mortgagees knew of latent defects that rendered the property uninhabitable and failed to disclose them. The trial court granted a summary judgment of foreclosure in favor of the mortgagees and dismissed the mortgagor's counterclaim with prejudice. This court vacated the summary judgment and reversed and remanded the dismissal of the counterclaim on the ground that the dismissal with prejudice was an abuse of discretion, since the court could not determine with certainty that the mortgagor was unable to allege further facts or an alternative theory. The concurring and dissenting opinion argued that, even though the mortgagees were not the sellers, they owed the mortgagor a duty to disclose all latent material defects prior to closing and their failure to do so constituted actionable fraud and deceit. Kovach v. McLellan, 564 So.2d 274, 281.

Fla.App.1994. Cit. in sup. Investors sued lawyers retained by promoter of limited partnership to prepare offering prospectus and other legal documents for restaurant venture that ultimately failed. The trial court dismissed plaintiffs' second and third amended complaints and entered final judgment for defendants. Reversing in part and remanding, this court held, inter alia, that plaintiffs' third amended complaint, which alleged defendants' failure to disclose certain material facts in the limited partnership documents, contained sufficient allegations to state a cause of action for fraud. Gutter v. Wunker, 631 So.2d 1117, 1118.

Hawaii App.1997. Quot. in sup. Shopping center tenant sued leasing company and its salesman for, inter alia, fraud and misrepresentation, alleging that defendants' untruths about the center's leasing program and occupancy rates caused tenant to suffer huge financial losses, which eventually put it out of business at that location. The trial court struck plaintiff's demand for a jury trial and granted defendants' motion for summary judgment. Vacating and remanding, this court held that defendants could not invoke the section of the parties' lease agreement dealing with waiver of the right to trial by jury because, even though defendants were agents of landlord, a disclosed principal, they were not parties to the lease, nor were they intended third-party beneficiaries of the agreement; that parol evidence was admissible to show fraud in the making of the lease agreement; that material factual issues existed as to whether defendants' comments about available space and occupancy rates constituted fraud, rather than mere puffery; and that defendants were under a duty to disclose problems concerning the leasing program. Pancakes of Hawaii v. Pomare Properties, 85 Hawai'i 300, 944 P.2d 97, 115.

Idaho, 1987. Cit. and quot. in ftn., subsecs. (2)(a), (b), and (e) cit. in disc. A real estate agent and a number of her relatives formed a partnership and purchased duplex apartments as investment property. Subsequently, they learned of structural defects and sued the vendors and the builder, alleging, inter alia, misrepresentation. The trial court granted summary judgment for the defendants. Affirming in part and reversing in part, this court held that it was error to grant summary judgment on the claim of misrepresentation, since genuine issues of fact existed as to whether the sellers' nondisclosure of soil problems, along with their assurances that the duplexes were constructed with quality, constituted misrepresentation. Tusch Enterprises v. Coffin, 113 Idaho 37, 740 P.2d 1022, 1026-1028.

Idaho, 1989. Subsecs. (1) and (2) quot. in case quot. in conc. and diss. op. and cit. generally in case cit. in conc. and diss. op. (T.D. No. 12, 1966). Property owners sold real property to a buyer through a real estate agent who mistakenly assured the buyer that a subsurface septic disposal system could be installed. After it was discovered that no septic system could be installed, the buyer sued the property owners for rescission, which was granted by the trial court. The defendants cross-claimed against the real estate agent for indemnity. The trial court held that the defendants were entitled to indemnity because the agent's representations about the septic system were unauthorized. This court vacated the judgment and remanded, holding, inter alia, that the defendants were allowed to recover only that part of the money that had not directly benefited them in the course of the sale. The concurring and dissenting opinion argued that the agent should not have shouldered all the fault in this case because the defendants did not disclose to him the facts concerning the unsuitable septic system conditions. Powell v. Nietmann, 116 Idaho 590, 778 P.2d 340, 354, 355.

Idaho, 1990. Cit. in diss. op., quot. in diss. op. (T.D. No. 12, 1966), cit. in Appendix. A managing general partner of a partnership that owned property obtained bogus leases from two individuals to secure long-term construction financing from a bank prior to selling the property to a third party. The purchaser sued the individuals who signed the bogus lease agreements alleging several claims including fraud and negligent misrepresentation. The trial court entered a judgment n.o.v. for the defendants ruling that Idaho did not recognize negligent misrepresentation as a viable cause of action. Affirming, this court held that the purchaser's proper cause of action was in contract, not tort. The dissent argued that the court erred in submitting the negligent misrepresentation issue to the jury, when both parties objected to the issue. It also asserted that the purchaser had a prima facie case of fraudulent nondisclosure against the defendants, based on the reckless or careless indifference displayed by the defendants that the spurious leases would be used to beguile the bank into granting long-term financing. Hudson v. Cobbs, 118 Idaho 474, 797 P.2d 1322, 1327, 1330-1331, 1339-1340, 1344, 1369, 1372.

Idaho App.1992. Subsec. (2) cit. in sup. A hospital sued an obstetrician and his wife, who had signed a promissory note in return for preliminary payment for construction of a medical office building that was never finished, to recover on the note after the defendants had missed the construction deadline and agreed to terminate the contract and repay the advance. Affirming a judgment for the plaintiff, this court held, inter alia, that the hospital had not fraudulently induced the obstetrician to settle by failing to disclose demands made by competing physicians, including threats to "boycott" the hospital if it allowed the deal to proceed, as the contract did not produce a special relationship requiring the hospital, as creditor, to disclose its attitudes regarding the desirability of the contract or the attitudes of third parties not under its control. St. Alphonsus Med. Center v. Krueger, 124 Idaho 501, 861 P.2d 71, 78.

Ind.App.1990. Cit. in ftn. Mortgagors sued a mortgage company for negligence, inter alia, arguing that the defendant acted unreasonably and without the requisite prudence when it proceeded to distribute the loan proceeds after learning that the

mortgage contained a misdescription of the subject property. The trial court dismissed the claim. Affirming, this court held that, when viewed in the light most favorable to the trial court's verdict, the evidence did not lead to the conclusion that the defendant failed to use reasonable care in distributing the loan proceeds. The court noted that the plaintiffs' argument did not rely on a theory of liability for nondisclosure under s 551 of the Restatement (Second) of Torts, pointing out that this theory was akin to fraud, the circumstances of which would have to be averred specifically to make out a cause of action in Indiana. Crum v. AVCO Financial Services, 552 N.E.2d 823, 830.

Md.Spec.App.1996. Subsec. (2)(b) quot. in sup., com. (g) quot. in sup. High-level executive sued employer for breach of contract, deceit, and negligent misrepresentation. Executive was terminated after approximately one month of service because he refused to sign an employment agreement whose terms were materially different from those discussed during a two-year period of negotiations with employer's president and manager. The trial court granted defendant's motion to dismiss. Affirming in part, reversing in part, and remanding, this court held that dismissal of the contract claim was appropriate, but that plaintiff had sufficiently alleged both deceit and negligent misrepresentation where he showed that he left a lucrative position with his former employer in reliance on defendant's partial and fragmentary disclosure of the employment terms he would be required to accept. Lubore v. RPM Associates, Inc., 109 Md.App. 312, 674 A.2d 547, 556, 561.

Mass.1989. Cit. but dist. A former corporate official sued his ex-employer's law firm for malpractice, misrepresentation, and violation of a consumer protection statute. The ex-employee alleged: that he was a client of the defendant during a corporate reorganization; that the defendant led him to believe he would receive an employment contract; and that the defendant drafted a corporate voting agreement that led to the plaintiff's termination. The jury found, inter alia, that there was an attorney-client relation between the plaintiff and defendant and that the defendant had breached its duty; however, the trial judge granted the defendant's motion for a new trial, because the finding of an attorney-client relation was against the weight of the evidence. This court affirmed the order granting a new trial. As to nondisclosure, the court found that the defendant's position as the corporation's counsel effectively precluded any duty to disclose to the plaintiff, in an attorney-client context. The court stated that the circumstances in this case also precluded foreseeable reliance on the defendant's services by the nonclient plaintiff, because the firm definitively represented the plaintiff's corporation and potentially conflicting duties existed. Robertson v. Gaston Snow & Ely Bartlett, 404 Mass. 515, 536 N.E.2d 344, 349, certiorari denied 493 U.S. 894, 110 S.Ct. 242, 107 L.Ed.2d 192 (1989).

Mass.1993. Quot. in disc. Husband and wife rented an apartment from landlord who later sold apartment to another landlord. After wife became pregnant, an inspection of the apartment revealed high levels of lead-based paint. The apartment was deleaded over a period of four months, during which time the couple's newborn baby required medical intervention because of lead in his bloodstream. The couple sued, inter alia, the first landlord for violating the Massachusetts unfair trade practices statute by failing to disclose the presence of lead-based paint. Trial court entered judgment for the couple, holding that landlord's nondisclosure of presence of lead-based paint violated the statute. Reversing, this court held that the statute imposed no liability for nondisclosure in this case, since the nondisclosure was not material, knowing, and willful. There was no evidence that landlord knew of presence of lead-based paint, or that any complaints regarding lead-based paint were directed to the landlord while he owned the apartment. Underwood v. Risman, 414 Mass. 96, 605 N.E.2d 832, 836.

Mass.1993. Cit. in disc., subsec. (2) quot. in ftn., com. (h) cit. in disc. and quot. in ftn. Partner in a real estate partnership sued bank for failing to inform her that it held a second mortgage on the other partner's collateral. The trial court, inter alia, denied plaintiff's motion to rescind the loan agreement. Affirming, this court held, inter alia, that there was no error in not granting rescission; although plaintiff might not have entered into the agreement had she known that the mortgage on the property was not a first mortgage, she signed the loan agreement and received a benefit of almost $400,000 from it. The court also took note of the facts that plaintiff did not offer to return the money and that defendant's actions were negligent, not willful. Walsh v. Chestnut Hill Bank and Trust Co., 414 Mass. 283, 607 N.E.2d 737, 741.

Mass.1995. Cit. in ftn. Adoptive parents sued the Commonwealth after they learned that their adopted child's biological mother suffered from chronic schizophrenia and that the child had been diagnosed during infancy as mentally retarded, alleging that a Commonwealth adoption agency made negligent material misrepresentations of fact prior to adoption concerning the child's medical and family history. Affirming the trial court's entry of judgment on a jury verdict awarding plaintiffs damages, this court held that liability for "wrongful adoption" would be allowed for claims based on both intentional and negligent misrepresentation. The court said that an adoption agency had an affirmative duty to disclose to adoptive parents information about a child that would enable them to make a knowledgeable decision about whether to accept the child for adoption, noting that the affirmative duty applied both to private adoption agencies and to state agencies. Mohr v. Com., 421 Mass. 147, 162, 653 N.E.2d 1104, 1112.

Mass.App.1994. Cit. in sup. Purchaser of office building and its assignee sued vendor's general partners and affiliates, alleging fraud and unfair trade practices, based on assurances that the leases in the building would survive the sale and lack of disclosure of

knowledge that a lessee would breach its lease, and settled a claim against the corporate lessee in the building for breach of its lease. Affirming the trial court's granting of summary judgment for remaining defendants, this court held, inter alia, that vendor was under no duty to disclose, since the parties were sophisticated business people active in real estate transactions and were represented by counsel and since plaintiffs made no credit check on the tenant. Greenery Rehabilitation Group, Inc. v. Antaramian, 36 Mass.App.Ct. 73, 78, 628 N.E.2d 1291, 1294.

Mass.App.1996. Cit. in headnote, cit. in disc., cit. in case quot. in disc., subsecs. (2)(b) and (2)(e) quot. but dist., com. (j) quot. but dist. Investors in unsuccessful limited partnership brought misrepresentation action against brokerage firm that issued the private placement memorandum on which they relied, alleging that firm failed to disclose in the memo that partnership's general partner had been convicted of embezzlement and mail fraud 14 years earlier. The trial court dismissed the complaint. Affirming, this court held that firm was under a duty to disclose only those facts that were basic to the transaction at issue, and that general partner's conviction, while arguably material, did not go to the essence of the deal. Wolf v. Prudential-Bache Securities, Inc., 41 Mass.App.Ct. 474, 672 N.E.2d 10, 11, 12.

Mass.App.1998. Cit. in headnote, cit. and quot. in sup., com. (m) cit. in sup. A subcontractor sued an architectural firm for deceit and negligent misrepresentation, among other claims, based upon alleged misrepresentations made by the firm in the plans and specifications for the construction of an elementary school for the school district. The trial court granted defendant summary judgment. This court reversed, holding, inter alia, that a fact issue existed as to whether defendant's failure to disclose a ledge in the parking lot could give rise to a deceit claim. Where defendant knew or should have known that potential bidders on the project would indeed rely on the plans and specifications for preparation of their bids, a jury could find sufficient facts creating a duty to disclose information about the ledge to prospective bidders such as plaintiff. Nota Const. Corp. v. Keyes Associates, 45 Mass.App.Ct. 15, 694 N.E.2d 401, 402, 404, 405.

Minn.1989. Cit. in disc. A party to arbitration sued a manufacturer, an arbitrator, and an attorney to recover for costs incurred during the arbitration proceeding. An original award of damages for breach had been vacated as a result of the manufacturer having had a prior relationship with the arbitrator. The trial court granted the manufacturer's motion to dismiss, but denied the motions of the arbitrator and the attorney, who had failed to disclose that the arbitrator had dealt with the manufacturer before. Affirming in part and reversing in part, this court held, inter alia, that the attorney was not subject to liability under tort theories of negligent misrepresentation and fraud for failing to disclose his client's social and business contacts with the arbitrator. Although the attorney may have been under an ethical duty to disclose to the tribunal his client's prior contacts with the arbitrator, his failure to disclose those contacts to his client's adversary was not actionable fraud, because the attorney owed no direct duty of disclosure to the adversary on which civil liability could be based. L & H Airco, Inc. v. Rapistan Corp., 446 N.W.2d 372, 380.

Mo.App.1992. Subsec. (e) and coms. (j), (k), and (l) cit. in ftn. Purchasers of homes sued the developer, among others, for fraudulently inducing their purchase while allegedly concealing the plan to build an apartment complex near the homes. The trial courtentered judgment on a jury verdict for plaintiffs, dismissing claims against other defendants. This court affirmed the dismissals but reversed the judgment for plaintiff and directed the court to enter judgment for defendant. It held that defendant did not have a duty to disclose information about the apartments because the apartments did not create an intrinsic defect in the homes. It concluded that, while such a development might influence the buyer's choice, defendant could reasonably expect that plaintiffs would inquire about the area's zoning before the purchase. Blaine v. J.E. Jones Const. Co., 841 S.W.2d 703, 708.

Mo.App.1994. Subsec. (2)(c) quot. in sup. Employer sued former employee for fraudulent misrepresentation and breach of contract, and employee counterclaimed for tortious interference with business relationship. Affirming the trial court's entry of judgment for employer in all respects, this court held, inter alia, that, with respect to plaintiff's fraud claim, employee had a duty to correct his previous representation that he had not signed a noncompete agreement with his first employer by disclosing to plaintiff that he had subsequently signed the agreement, since plaintiff relied on this representation and had no reason to believe that circumstances had changed. Refrigeration Industries, Inc. v. Nemmers, 880 S.W.2d 912, 918.

Mont.1990. Quot. in sup. Purchasers under contract for a deed sued a bank that was acting as its escrow agent for breach of the covenant of good faith and fair dealing, constructive fraud, failure to disclose, and negligent misrepresentation. The plaintiffs alleged that the defendant assured them that their contract for deed would amortize at the same rate as a trust indenture on the property and then misapplied the plaintiffs' prepayment, as a result of which the defendant refused to release the property to the plaintiff on completion of the contract deed because the trust indenture was not yet paid off. The trial court entered judgment on a jury verdict for the plaintiffs. Reversing and remanding with instructions, this court held, inter alia, that there was substantial evidence to support the verdict against the defendant on the claim for breach of a special duty to disclose but barred the other claims. The court stated that the bank owed the plaintiffs a fiduciary duty as their agent to disclose the payment discrepancy to them in a timely manner. Kitchen Krafters v. Eastside Bank, 242 Mont. 155, 789 P.2d 567, 573.

Neb.1989. Cit. but not fol. Three banks entered into a loan agreement with a third party, relying on financial compilations prepared by accountants. The loan went into default, and the banks sued the accountants, alleging negligence on their part in connection with the loan. The trial court held that the accountants' duty to exercise reasonable care extended to third parties who relied on information disclosed by them. Reversing, this court held that an accountant's duty of reasonable care, like that of an attorney, is to his client and generally does not extend to third parties absent fraud or facts otherwise establishing a duty. Citizens Nat. Bank v. Kennedy and Coe, 232 Neb. 477, 441 N.W.2d 180, 182.

Neb.1993. Cit. in case quot. in disc. Buyers of units in an oil exploration venture sued an individual alleged to have been the seller, seeking damages for fraud and other asserted wrongdoing. Reversing the trial court's entry of judgment on a jury verdict for defendant and remanding for new trial, this court held, inter alia, that the trial court erred in failing to instruct the jury that defendant could be held liable for fraudulently concealing material information, even though plaintiffs' proposed instruction was insufficient, as the issue was presented in the pleadings and there was evidence that defendant had concealed information from plaintiffs concerning defendant's failure himself to purchase any of the oil venture securities. Wilson v. Misko, 244 Neb. 526, 542, 508 N.W.2d 238, 250.

N.J.1995. Cit. in headnote, cit. in disc., com. (1) quot. in disc. (Erron. cit. as com. (I).) Purchasers of homes in a housing development sued the developer and its brokerage agent for fraud and negligent misrepresentation when they discovered the proximity of their homes to a hazardous waste landfill. The trial court granted defendants' motion for summary judgment, concluding that they had no duty to disclose the conditions of someone else's land. The intermediate appellate court reversed and remanded, finding that a duty existed. Affirming, this court held that the principle of caveat emptor had been abandoned in New Jersey property law and that a seller was under a duty to disclose known facts concerning off-site physical conditions unknown or unobservable by a buyer when the buyer would consider those facts material in the sense that they negatively affected the value or desirability of the property. Strawn v. Canuso, 140 N.J. 43, 657 A.2d 420, 422, 429.

N.J.Super.1994. Cit. in sup. and in headnotes, subsecs. (1) and (2) cit. in sup., and subsec. (2)(e) quot. in part and cit. in sup., com. (*l*) cit. in sup. Home purchasers brought class action against builders and brokers, asserting various fraud-related claims allegedly arising from failure to disclose existence of a nearby, closed landfill. This court, reversing in part and affirming in part denial of class certification and entry of summary judgment against purchasers and remanding, held, inter alia, that a developer-seller of residential housing in multi-home developments and their agents, has a duty to disclose the existence of off-site conditions, such as a landfill, which (1) are unknown to the buyers, (2) are known or should have been known to the seller and/or its broker, and (3) based on reasonable foreseeability, might materially affect the value or desirability of the property involved in the transaction. Furthermore, defendants were obligated to disclose existence of a landfill which could have a substantial negative impact on the value of the homes and on the quality of life in the area, since they elected to use the off-site environment to induce sales. Strawn v. Canuso, 271 N.J.Super. 88, 102, 104, 638 A.2d 141, 142, 148, 149, judgment affirmed 140 N.J. 43, 657 A.2d 420 (1995). See above case.

N.J.Super.1997. Cit. and cit. generally in disc., cit. in cases cit. in sup., subsecs. (1) and (2) cit. in disc., subsec. (2)(e) quot. in disc., com. (l) cit. and quot. in disc. Mortgagee/bank and its assignee brought action to foreclose on three properties owned by mortgagors. Mortgagors, who had bought the properties from another of bank's customers, argued that bank fraudulently induced them to enter the transaction in order to substitute healthy borrowers for its financially ailing customer. The trial court entered summary judgment against mortgagors. Affirming, this court held, in part, that bank was under no duty to disclose to mortgagors its customer's financial condition or the fact that an internal appraisal had revealed that the properties were worth less than the purchase price because, among other things, no special circumstances existed such that bank knew or had reason to know that mortgagors, sophisticated real estate investors, relied on bank's counsel and information. United Jersey Bank v. Kensey, 306 N.J.Super. 540, 704 A.2d 38, 45-47.

N.M.App.1988. Subsec. (1) cit. in disc. A builder who contracted to build a ski lodge restaurant sued the bank that had loaned the construction funds to the ski lodge owner, alleging that the bank negligently misrepresented to the builder that there were sufficient funds to cover the builder's expenses. The trial court dismissed the complaint for failure to state a claim. Reversing, this court held that the plaintiff had shown that the bank had a duty to disclose the status of the loan account to the plaintiff because the plaintiff had relied on the bank's assertions that its expenses would be paid. R.A. Peck, Inc. v. Liberty Fed. Sav. Bk., 108 N.M. 84, 766 P.2d 928, 932.

N.Y.Sup.Ct.App.Div.1989. Cit. in disc. An architectural firm contracted with a school district to design and build a new high school building. When the school was finished, the roof leaked so badly that the school district decided to replace it, at which time the firm revealed its awareness of the roofer's negligent performance. The school district sued the firm for, inter alia, breach of contract in failing to obtain roof guarantees and not revealing the negligence of the roofing subcontractor. The trial court granted a directed verdict for the defendant on all claims except the breach of contract requirement to obtain roof guarantees, for

which it granted a directed verdict for the plaintiff and granted damages in the amount of the roof bond. Modifying and affirming, this court held that the contract provision absolving the defendant from responsibility for construction defects did not apply because the architect knew of the defects and breached its express contractual duty to keep the plaintiff informed. The court noted that had the plaintiff sued for negligent misrepresentation or concealment based on the defendant's professional duty, expert testimony on standards of professional behavior would have been necessary. Board of Educ. v. Sargent, Webster, et al., 146 A.D.2d 190, 539 N.Y.S.2d 814, 820.

N.Y.Sup.Ct.1995. Com. (m) cit. in disc. After home buyers discovered the presence of a chemical on the property, resulting from treatment for termites 19 years previously, they sued the sellers seeking rescission based on mutual mistake, seeking rescission and damages for fraud or constructive fraud, and alleging breach of contract for the sale of an uninhabitable residence. This court dismissed plaintiff's claims, holding, inter alia, that plaintiff failed to state a cause of action for constructive fraud, because there was no misrepresentation of fact regarding termites or chlordane in that plaintiffs had access to the pertinent information and defendants informed plaintiffs of all they knew on the subject prior to the closing. Plaintiffs chose to go forward with the deal knowing that a termite condition once existed, not knowing the present state of the termite problem, and without attempting to protect themselves by adding a rider regarding the termite condition. Copland v. Diamond, 164 Misc.2d 507, 624 N.Y.S.2d 514, 522.

N.D.1987. Cit. in case quot. in sup., subsec. (1) quot. in sup. Creditors of a cattle company sued the bank that held the company's checking account on various counts, including fraud, claiming that the bank had given the creditors a false impression of the company's solvency by paying its overdrafts. The trial court granted partial summary judgment to the bank, dismissing the claims of fraud of those plaintiffs who had had no communication with the bank. Affirming in part, dismissing in part, and remanding, this court held, inter alia, that the bank had no duty to disclose the company's financial position to the plaintiffs. The court concluded that a party was liable for nondisclosure only if it was in a relationship that imposed a duty to inform, and that no such relationship existed here. Hellman v. Thiele, 413 N.W.2d 321, 326, 327.

N.D.1988. Subsec. (1) quot. in ftn. After a customer failed to pay a merchant and declared bankruptcy, the merchant sued a bank that provided the customer with a line of credit. The trial court granted the defendant's motion for summary judgment. Reversing and remanding, this court held that the evidence in the record was sufficient to raise issues of material fact on whether the bank committed actionable deceit against the plaintiff when it responded to the plaintiff's enquiries about the availability of credit for the customer's proposed purchases. Ostlund Chemical Co. v. Norwest Bank, 417 N.W.2d 833, 836.

N.D.1990. Quot. in sup., subsec. (2)(c) cit. in sup., subsec. (2)(e) quot. in sup. Without disclosure to farm sellers who believed a banker was merely financing a buyer's down payment on their farm, the buyer's father and the banker agreed to have the banker purchase the farm indirectly and obtain a loan sufficient to cover the buyer's down payment and reduce the father's debts to banks in which the banker had an interest. The buyer transferred the farm, purchased in return for a promissory note to the sellers, to the banker and failed to disclose that fact to the sellers. A mortgage against the farm securing a loan to the banker covering the down payment and the payment on the father's debts was recorded before the seller's mortgage securing the buyer's promissory note. The sellers received no payments for their farm beyond the down payment and sued the buyer, the buyer's father, and the banker for fraudulently depriving them of any security interest in their property. Affirming judgment on the jury's verdict for the sellers and its findings of fraud and deceit, this court held that the father and the banker had a duty of disclosing to the sellers that the banker would purchase the farm and obtain the first mortgage financing on it. Also, substantial evidence supported the finding that the buyer committed deceit in transferring the farm to the banker without disclosure to the sellers. Dewey v. Lutz, 462 N.W.2d 435, 440, 441.

Ohio, 1988. Cit. in disc. A bank financed a debtor's automobile and vehicle service contract and, without the debtor's knowledge, entered into a fee arrangement with the automobile dealership that arranged the debtor's bank loan. After the debtor canceled the vehicle service contract, the bank applied the refunded check to reduce the debtor's principal indebtedness on the loan. The debtor sued the bank for misrepresentation, fraud, and conversion, inter alia. The trial court rendered summary judgment for the bank, and the intermediate appellate court reversed in part. Reversing, this court held that the bank had no duty to disclose to the debtor the details of its financing fee arrangement with the automobile dealership, since no fiduciary or special relationship of trust and confidence existed between the debtor and the creditor. The court noted that full disclosure was sometimes required when partial fact disclosure may have created a misleading impression. Blon v. Bank One, Akron, N.A., 35 Ohio St.3d 98, 519 N.E.2d 363, 367.

Ohio App.1994. Cit. in disc., com. (j) quot. in sup. Condominium buyers and condominium association sued condominium development partnership and its partners, lawyer, and manager for fraudulent concealment, among other claims, for defendants' nondisclosure of repairs made to the units' heating system several years before the purchase. This court affirmed the trial court's granting of summary judgment for defendants, holding, inter alia, that parties' purchase contracts contained "as is" clauses, which

placed the risk of any defects on plaintiffs and relieved defendants of any duty to disclose. Arbor Vil. Condo. Assn. v. Arbor Village, 95 Ohio App.3d 499, 642 N.E.2d 1124, 1132.

Ohio App.1996. Cit. in headnote, cit. in disc., quot. but dist. Investor-borrowers who were involved in a condominium construction project brought negligence action against bank that had made the construction loan to the project developer, after the project failed and bank went into receivership. Specifically, plaintiffs argued that defendant should have informed them that developer was failing to meet its financial obligations. The trial court directed a verdict for defendant. Affirming, this court held that no fiduciary relationship existed between plaintiffs and defendant, that defendant was not liable for failing to disclose to plaintiffs that developer did not post a required $1 million in cash at the closing of his loan, and that defendant was not liable on the ground that it negligently supplied plaintiffs with information relating to developer's financial situation. Zammit v. Soc. Natl. Bank, 115 Ohio App.3d 543, 685 N.E.2d 850, 851, 859-860.

Ohio Com.Pl.1991. Subsecs. (1) and (2) cit. in sup. A wife who had been named a beneficiary on a payable-on-death endorsement on her husband's savings account brought a motion to show cause and a motion for a lump sum judgment to recover the amount that should have been on deposit with a bank and seeking reimbursement for attorney fees arising from litigation following the alleged improper release of the account. Granting the plaintiff's motion, this court held that a fiduciary relationship existed between the bank and the wife for the purpose of imposing a duty on the bank to reveal the nonexistence of the account upon which a temporary restraint had been ordered. The court stated that the concealment of information from the plaintiff did not constitute a fraudulent act, but did constitute a negligent concealment that misled the plaintiff to the erroneous conclusion that, should she be successful in her litigation, there would be security at hand from the account to effectuate collection. Paletta v. Paletta, 61 Ohio Misc.2d 721, 583 N.E.2d 1393, 1394- 1395.

Or.App.1995. Cit. in disc. Home buyer sued title insurer and escrow agent for breach of duty to defend, breach of escrow instructions, negligent misrepresentation, and fraud. Trial court granted defendants summary judgment. This court affirmed, rejecting, inter alia, plaintiff's assertion that defendants committed fraud by failing to disclose the existence of the partitioning approval that led defendants to include a certain exclusion in the title insurance policy. The court stated that defendants had no duty to disclose and, accordingly, were not liable for fraud. A duty to disclose could not be imposed on the escrow agent since no fiduciary duty existed. Gebrayel v. Transamerica Title Ins. Co., 132 Or.App. 271, 888 P.2d 83, 89.

Pa.1994. Quot. in sup. Parents who discovered that the child they had adopted had a history of severe physical and sexual abuse that had not been disclosed to them sued private placement agency and commonwealth agency responsible for placing wards of the commonwealth, claiming wrongful adoption and negligent placement of adoptive child. The trial court granted defendants' demurrers, and the commonwealth court reversed. Affirming in part, this court held, inter alia, that traditional common law causes of action sounding in fraud and negligence applied in the adoption context. The court stated that plaintiffs' complaint pleaded causes of action for intentional and negligent misrepresentation as well as one for negligent failure of defendants to disclose relevant information that they had in their possession at the time of the adoption, and concluded that plaintiffs could proceed to trial on those claims. Gibbs v. Ernst, 538 Pa. 193, 647 A.2d 882, 892.

S.D.1989. Cit. in diss. op. After consulting with a firm of land surveyors and engineers, a prospective developer of a piece of land hired a contractor to straighten a creek that ran through his property. The developer later suffered significant financial damages when he was sued by the state and the federal government for having changed the direction of the creek without a permit. After the developer sued the firm for negligent misrepresentation, the trial court entered judgment on a jury verdict for the defendant and this court affirmed. The dissent argued that the trial court erred in refusing the plaintiff's proposed jury instruction that a lay person was accustomed to rely largely on engineers for information about their rights and liabilities in construction projects, stating that the proposed instruction was an accurate statement of the law, recognizing that the disparity between the parties must be considered. Kaarup v. Schmitz, Kalda and Associates, 436 N.W.2d 845, 850.

S.D.1990. Subsec. (2) quot. but dist. After a dealership collapsed under the weight of financial problems, investors in the dealership sued the dealership's franchisor and its creditor for, inter alia, intentional and bad faith concealment of information that the dealership was in desperate financial condition at the time that the plaintiffs signed the guarantees of all indebtedness owed by the dealership to the creditor. The trial court granted the defendants' motions for summary judgment. This court affirmed, holding that it was undisputed that neither defendant was a party to the stock redemption transaction by which the plaintiffs acquired their interest in the dealership. Taggart v. Ford Motor Credit Co., 462 N.W.2d 493, 501.

S.D.1992. Subsec. (2) cit. in sup. and cit. in case cit. in disc.; subsec. (2)(e) quot. in disc.; com. (*1*) quot. in disc., cit. in sup., and quot. in ftn.; coms. cit. generally in disc. Buyer of diseased cattle sued seller for deceit, inter alia. The trial court entered judgment awarding plaintiff compensatory and punitive damages. Affirming in part, this court held that the trial court's finding that defendant had committed deceit was not clearly erroneous because the presence of the diseased and unvaccinated cattle inthe

herd was a fact basic to the transaction and defendant had had a duty to disclose that fact to plaintiff. Ducheneaux v. Miller, 488 N.W.2d 902, 912, 913.

S.D.1994. Subsec. (2)(e) quot. in sup. Buyer sued used-car dealership from which she bought van, asserting negligent misrepresentation and fraud and deceit claims after she discovered that van's engine was 18 years older than van. Reversing the trial court's grant of new trial on the issue of damages only and remanding for retrial on issues of both damages and liability, this court held, inter alia, that, despite sale contract's containing an "as is" clause, the trial court properly submitted buyer's deceit claim to jury for determination of witnesses' credibility and of whether defendant's omission constituted a misrepresentation, since deceit claim arose from the purported failure of dealership to inform her about the engine. Maybee v. Jacobs Motor Co., Inc., 519 N.W.2d 341, 344.

Tenn.App.1991. Subsec. (1) cit. in disc., subsec. (2)(a) cit. in disc., subsecs. (2)(b) and (2)(e) cit. in ftn. Shortly after purchasing a used car, the buyers discovered that the car had been extensively damaged and defectively repaired and they sued the previous owner, the dealership, and the financing company. The trial court awarded the buyers a judgment against the previous owner of the car but dismissed their claims against the dealer and the financing company. This court reversed and remanded the dismissal of the plaintiffs' U.C.C. and Magnuson-Moss implied warranty of merchantability claims against the dealer and the financing company. However, the court held, inter alia, that the dealer did not have a duty to inspect the car prior to the sale and to inform the plaintiffs that it had been extensively repaired or rebuilt. The court stated that the dealer did not have a fiduciary or other type of special relationship with the purchasers, and the purchasers failed to prove the existence of any of the circumstances that would have required the dealer to disclose that the car had been previously damaged and repaired. Further, the dealer could have concluded that the plaintiffs, through the prior owner, had acquainted themselves with the car's condition. Patton v. McHone, 822 S.W.2d 608, 614-616.

Tex.1995. Cit. and quot. in disc., cit. in case cit. in disc., cit. but dist., subsecs. (2)(a)-(2)(e) cit. but dist. Prospective employee who tested positive on a preemployment drug test, resulting in the withdrawal of her job offer, brought an action for negligence, inter alia, against the independent drug-testing laboratory that performed the test, alleging that defendant failed to warn her that ingestion of poppy seeds would produce a positive result. The trial court granted summary judgment for defendant, and the court of appeals reversed in part and remanded. This court modified the judgment of the court of appeals to affirm summary judgment for defendant on the negligence claim and, as modified, affirmed, holding, in part, that Restatement (Second) of Torts § 551 did not apply to impose on defendant a duty to disclose to either plaintiff or her prospective employer any information about the effect of eating poppy seeds on a positive drug-test result. Smithkline Beecham Corp. v. Doe, 903 S.W.2d 347, 352, 353, 358.

Tex.App.1989. Cit. in disc., subsecs. (2)(a) and (e) quot. in disc., com. (c) cit. and quot. in disc. A former employee sued her former employer and a group insurer, asserting that the defendant employer had deprived the plaintiff of health insurance by failing to tell her that, in order to be covered without proving good health, she had to enroll from the 91st through the 120th day of employment. The trial court granted the employer's motion for judgment n.o.v. Affirming, this court held that the employer was not negligent in not telling the plaintiff about the window period for buying insurance when she was informed that she could have insurance after 90 days and there was no evidence that the plaintiff would have purchased insurance during the window period had she known of it. Moreover, the court said there was no evidence the defendant knew the significance of the window period and noted that the plaintiff's conversations with the defendant regarding insurance occurred before her employment. Castillo v. Neely's TBA Dealer Supply, 776 S.W.2d 290, 295.

Tex.App.1993. Cit. and quot. in sup., subsec. (2) cit. in sup. (Erron. cit. as § 511 at pp. 634, 635.) A feed dealer sued its supplier for fraudulent nondisclosure of a material term in their dealership contract and for tortious interference with a prospective sales contract. This court affirmed in part a trial court judgment for the dealer, holding that the dealership contract was created when the dealer successfully bid on the dealership at an auction, and that the supplier breached its duty to disclose, prior to the dealer's successful bid, that the contract gave the supplier the right to terminate the dealership at any time. Subsequent disclosures made when the supplier forwarded the contract to the dealer for signature did not relieve the supplier of its duty to disclose the terminable-at-will provision before the business transaction was consummated. Ralston Purina Co. v. McKendrick, 850 S.W.2d 629, 633-636.

Tex.App.1996. Cit. in headnote, cit. in disc., cit. but not fol. Defaulting mortgagor whose farm equipment was sold at auction while he was away on active military duty sued mortgagee for violations of the Soldiers' and Sailors' Civil Relief Act (Act), the Texas Deceptive Trade Practices Act (DPTA), and for negligence, gross negligence, and misrepresentation. Following removal, the federal district court determined that, because plaintiff's neighbor actually brought the equipment to auction, defendant committed no wrongdoing under the Act. That court granted defendant's motion for summary judgment and remanded the state law claims to the state trial court, where the complaint was dismissed. Affirming, this court held that the district court's finding was entitled to preclusive effect with respect to plaintiff's DTPA, negligence, and fraud claims and, further, that defendant was

under no duty to disclose the auction to plaintiff. Engstrom v. First Nat. Bank of Eagle Lake, 936 S.W.2d 438, 439, 444.

Utah, 1990. Cit. in ftn., quot. in disc. A junior lienholder sued a senior lienholder and owner for fraud, alleging that the defendants failed to disclose the existence and content of a purchase agreement to him. The trial court entered judgment on a jury verdict for the plaintiff. Affirming in part, reversing in part, and remanding, this court held that the defendants were not the plaintiff's fiduciaries, and, accordingly, they had no affirmative duty as such to disclose to the plaintiff the existence and content of the agreements in this case. First Sec. Bank v. Banberry Development, 786 P.2d 1326, 1330, 1331.

Utah App.1994. Subsec. (2)(b) cit. in sup. Home buyers sued seller, among others, for breach of contract, negligent misrepresentation, fraudulent concealment, and fraudulent nondisclosure, among other claims, after buyers discovered water leakage into the house. Buyers specifically asserted that because seller disclosed to them that stucco on parapets around the garage was defective and offered to fix it, he had duty to disclose other defects in stucco of which he was aware. The trial court granted defendants summary judgment. Affirming, this court held, inter alia, that plaintiffs' fraudulent nondisclosure claim failed because seller had no legal duty to disclose his doubts, if any, about the integrity of the stucco applied to the house. The court stated that plaintiffs could not reasonably assume that absent the specific enumeration of all possible defects in the home, none existed, and that plaintiffs were unreasonable in not obtaining an inspection, or insisting on express rights in the agreement. Maack v. Resource Design & Const., Inc., 875 P.2d 570, 578.

Vt.1990. Subsec. (1) quot. in ftn. The buyer of a hotel and restaurant sued the seller for damages, claiming that the defendant fraudulently failed to disclose information about the capacity of the site's septic system. The trial court entered judgment for the plaintiff, holding that the defendant was liable for constructive fraud because it failed to disclose material facts and thereby induced the plaintiff to purchase the property. Reversing and remanding, this court stated that the plaintiff relied not on false information, having received none, nor on silence as to material facts, but on inferences it drew from discussions with the defendant regarding the property's septic capacity that the defendant expressly refused to warrant and held that, under the circumstances, the plaintiff's reliance was not justified and could not be the predicate of liability for fraud, constructive or actual. Sugarline Associates v. Alpen Associates, 155 Vt. 437, 586 A.2d 1115, 1120.

Vt.1993. Cit. in sup., subsec. (2)(b), (c), and (e) quot. in sup. A laid-off employee sued his former employer for alleged negligent failure to disclose and negligent misrepresentation concerning job security when he was hired. Affirming in part and reversing in part a judgment for the employee and remanding, this court held, inter alia, that the employer owed a duty to its new employee to disclose that there was a good chance his job would be eliminated because of cutbacks, particularly as the employee had expressed concerns about job security at the time of hiring, but emotional distress damages were not recoverable in actions for negligent misrepresentation or negligent failure to disclose. Pearson v. Simmonds Precision Products, Inc., 160 Vt. 168, 624 A.2d 1134, 1135-1138.

Wash.1987. Quot. in sup. Bondholders sued a power company, various investment advisers, and others, to recover for injuries resulting from the company's default on its revenue bonds, alleging, inter alia, negligent misrepresentation and fraud. The trial court dismissed all the plaintiffs' and intervenors' claims for failure to state a claim on which relief may be granted. Reversing in part, this court held that the trial court's dismissal was error, since it was possible that the investment advisers knew that the intervenors would be part of a limited group that would receive the information and rely on it in deciding whether to buy bonds. Moreover, in cases of fraudulent misrepresentation, said the court, a duty may be owed to third parties who the defendant has reason to expect will receive the information, regardless of privity or fiduciary relationships. Haberman v. Public Power Supply System, 109 Wash.2d 107, 744 P.2d 1032, 1070, appeal dismissed 488 U.S. 805, 109 S.Ct. 35, 102 L.Ed.2d 15 (1988).

Wash.1993. Cit. in disc. A university student employee who was not eligible for retirement system coverage, but from whose wages the university withheld social security taxes, brought a class action against the university, alleging breach of contract, statutory violations, breach of fiduciary duty, misrepresentation, and nondisclosure. The trial court entered judgment for the class on the breach of contract and statutory claims, but granted summary judgment for the university on the other claims. Affirming in part, this court held, inter alia, that the university was not liable for allegedly failing to disclose that only employees in positions eligible for retirement systems coverage were subject to social security and that the class employees were not in retirement-eligible positions, in the absence of a showing that the university reached a consensus or "knew" which specific employee job positions were ineligible for retirement and social security coverage. Pope v. University of Washington, 121 Wash.2d 479, 493, 852 P.2d 1055, 1063, cert. denied 510 U.S. 1115, 114 S.Ct. 1061, 127 L.Ed.2d 381 (1994).

Wash.App.1989. Subsec. (2)(a) quot. in disc. A foster parent who was accused of the sexual abuse of one of his foster children agreed to take a polygraph test in return for being permitted to remain in his house pending the outcome of the investigation. After the parent failed the test, all of the foster children were removed from the home. A hearing examiner found that the allegations were not proven and had the parent's name removed from the central registry of child abusers. Although the parent's

foster care license was not revoked, the human services agency never again placed children in his care. The accused man and his wife sued the state and the investigator; the jury awarded the plaintiffs damages on the claim that the investigator had failed to disclose material facts, and held for the defendants on the other claims. This court reversed, holding, inter alia, that the investigator had no duty to disclose the potential consequences of failing the polygraph examination. The court stated that the trial court erred when it instructed the jury to determine whether the investigator occupied such a relationship of trust and confidence with the couple that he had a duty to disclose to them any material information in his knowledge pertaining to the polygraph test before it was administered. Favors v. Matzke, 53 Wash.App. 789, 770 P.2d 686, 689, review denied 113 Wash.2d 1033, 784 P.2d 531 (1989).

Wis.App.1989. Com. (j) quot. in disc. A husband and wife who discovered that the house they purchased from a bank had significant structural defects, although the bank's real estate agent allegedly represented that the house was structurally sound, sued, inter alia, the bank for the cost of remedying the defects on a theory of breach of warranty. The trial court granted the bank's motion for summary judgment. Affirming, this court held that, because the bank sold the building "as is" and made no express or implied warranty of fitness, it was not liable to the buyer for structural defects of which neither the bank nor the buyers had knowledge. Omernik v. Bushman, 151 Wis.2d 299, 444 N.W.2d 409, 411.

Wis.App.1989. Cit. in sup. When a husband and wife defaulted on their farm loan, the lender sued to enforce the security agreement and the borrowers counterclaimed for damages on the grounds of negligent financial advice and violation of the lender's fiduciary duty. The trial court granted summary judgment for the plaintiff and dismissed the defendants' counterclaims as time barred. Affirming in part and reversing in part, this court held that the trial court correctly granted the plaintiff's motion for summary judgment on the security agreement claim. Holding also that the counterclaims were not time barred, the court said that the second counterclaim stated a claim for negligence but not for violation of the lender's fiduciary duty, since any fiduciary relationship between the parties triggered only a duty on the part of the lender to disclose and the borrowers did not allege that the lender failed to disclose facts that they would reasonably have expected the lender to disclose. Production Credit Ass'n v. Vodak, 150 Wis.2d 294, 441 N.W.2d 338, 346, review denied 443 N.W.2d 311 (1989).

Wis.App.1992. Subsec. (1) cit. in diss. op. Accounting firm audited the financial records of a company and issued a report that was distributed to the company's creditors. The accounting firm later discovered a material error in the audit report but refrained from notifying the company's creditors when the company threatened legal action. The company subsequently went bankrupt, and a creditor that had relied on the audit report sued the accounting firm for intentional and negligent misrepresentation. Following a jury trial, the court entered judgment n.o.v. for the creditor on the negligent misrepresentation claim. Affirming in part, this court held that the trial court should have granted summary judgment for the creditor on the negligent misrepresentation claim because the creditor's reliance on the report was reasonably foreseeable. The dissent argued that the accounting firm did not breach any legal duty owed to the creditor, as there existed evidence sufficient to support a jury finding that the accounting firm did not actually know that the creditor was relying on the audit report. Chevron Chemical Co. v. Deloitte & Touche, 168 Wis.2d 323, 483 N.W.2d 314, 322.

Wyo.1995. Cit. in headnotes, cit. and quot. in sup., cit. and quot. in diss. op., subsecs. (1) and (2)(e) quot. in diss. op., com. (j) quot. in sup. and diss. op., coms. (k)-(m) and illus. 9 quot. in diss. op. Home purchasers sued sellers for breach of contract, fraud, deceit, misrepresentation, and nondisclosure after discovering a sediment problem in the well system. Trial court entered judgment for purchasers, holding that the sellers' failure to disclose was negligent and amounted to a misrepresentation. This court reversed, holding that absent an allegation of fraud, an "as is" clause in a contract to sell realty bars a claim for nondisclosure. Here, there was no evidence of fraud by sellers, the purchasers failed to take advantage of the contract clause providing for inspections by experts hired by purchasers, and purchasers failed to look at the water system, ask about the well's condition, or even turn on a faucet. One dissent argued that sellers had a duty to exercise reasonable care to disclose the existence of the sediment, especially where purchasers inquired about the water. Another dissent argued that a seller should not be able to hide behind an "as is" contract in order to justify not disclosing a material fact that would induce a buyer to refrain from buying the property. Richey v. Patrick, 904 P.2d 798, 798, 799, 801-806, 808, 809, 811.

Case Citations July 1998 -- June 2003:

C.A.1, 2002. Cit. in sup. Real estate broker sued vendors in state court for breach of listing agreements and misrepresentation, inter alia, seeking to recover commission after broker's attempts to procure buyers for vendors' property were repeatedly rejected. Action was removed based on diversity of citizenship and the district court granted vendors summary judgment. Affirming, this court held, inter alia, that vendors had no affirmative duty to disclose to broker that third party had right to approve minimum sales prices of lots. Sparks v. Fidelity Nat. Title Ins. Co., 294 F.3d 259, 274.

C.A.2, 1999. Subsec. (2)(a) cit. in headnote and quot. in case quot. in disc. Shareholder in a privately held real estate investment

trust sued other shareholders, alleging that defendants' attempts to ensure shareholder approval of their proposal to form a new entity had violated SEC Rule 10b because they were engaging in insider trading. District court sanctioned plaintiff and its counsel. This court affirmed in part, reversed in part, and remanded, holding, inter alia, that the district court erred in determining that plaintiff's Rule 10b-5 cause of action was frivolous. Defendants acknowledged that they knowingly traded on inside information, and a fact issue existed as to materiality. Simon DeBartolo Group, L.P. v. Richard E. Jacobs Group, Inc., 186 F.3d 157, 169.

C.A.5, 2000. Subsec. (2)(c) cit. in ftn. A not-for-profit entity of seven colleges that lost half of its portfolio when the mortgage-backed bond market crashed sued bond broker, which had been forced into bankruptcy. Bankruptcy court entered judgment for plaintiff, holding that broker was liable for negligence. The district court affirmed. This court reversed and remanded, holding that broker's alleged misrepresentations and omissions were not material to the plaintiff's investment decision because plaintiff fully understood the nature of the market, the risk of the investment, and the proportion of the investment to its portfolio, and plaintiff's treasurer was not under a mistake as to the facts basic to the transaction. In re Westcap Enterprises, 230 F.3d 717, 725.

C.A.5, 2001. Subsec. (1) quot. in disc. Buyer seeking formed joint venture with partner to locate and supply manufacturing equipment. Partner contracted with seller to purchase equipment. Buyer paid some of the monies owed for the purchase to partner, who in turn, paid seller. Upon joint venture's default on payments to seller, partner and seller negotiated a mutual release, unbeknownst to buyer, whereby seller regained control of the equipment, and partner's debt was discharged. Buyer sued seller, alleging, in part, fraudulent concealment. District court granted seller's motion for judgment as a matter of law on claim. Affirming, this court held, inter alia, that seller was not liable for fraudulent concealment where seller was not under a duty to disclose information regarding value of plant and equipment, particularly where there was no evidence that seller withheld or intended to withhold information. Invest Almaz v. Temple-Inland Forest Products Corp., 243 F.3d 57, 77.

C.A.5, 2001. Cit. in disc. Credit-card company brought adversary proceeding against Chapter 7 debtor, seeking a determination that debtor's credit-card debt was nondischargeable on grounds of false pretenses, false representation, or actual fraud. The bankruptcy court found the debt dischargeable, and the district court affirmed. Reversing, this court held that debtor, through each credit-card use, represented her intent to pay, and that plaintiff, in authorizing the loan, actually relied on the representation; the court remanded for determinations as to whether debtor's representations were knowingly false, and whether plaintiff's reliance was justifiable. The court noted that when one had a duty to speak, concealment of insolvency could constitute fraudulent misrepresentation; an overt act was not required. In re Mercer, 246 F.3d 391, 404.

C.A.8, 2002. Subsec. (2) quot. in disc. Optionee sought to enforce option to purchase 10% interest in limited partnership, and district court granted optionee summary judgment. Optionor appealed, alleging that optionee committed fraudulent concealment and violated the option's antiassignment provision by attempting to exercise the option with an agreement already in place to transfer the interest to a third party. This court affirmed, holding, inter alia, that optionors failed to show that optionee had a duty to disclose its reason for requesting an extension of the option deadline. The court rejected optionors' assertion that optionee owed a fiduciary duty based on the option agreement between the parties. LG & E Capital Corp. v. Tenaska VI, L.P., 289 F.3d 1059, 1063.

C.A.8, 2002. Subsec. (2)(a) cit. in disc., subsecs. (2)(c) and (2)(e) cit. and quot. in disc. After failed negotiations, seller of rights to provide satellite television services sued intended buyer for fraudulent nondisclosure, breach of contract, and fraudulent misrepresentation. District court granted summary judgment to buyer on fraudulent-misrepresentation claim. This court affirmed, holding, inter alia, that buyer had no duty to disclose information to seller. Furthermore, seller did not demonstrate special relationship between parties that would have imposed upon buyer the duty to disclose information about buyer's financial condition to seller. A sophisticated business entity did not have duty to disclose facts regarding its financial condition to another business entity as part of an arm's-length negotiation. Schaller Telephone Co. v. Golden Sky Systems, Inc., 298 F.3d 736, 740-742.

C.A.10, 2000. Subsec. (2)(a) cit. and quot. in case cit. and quot. in sup. The SEC brought a securities fraud action against an employee of a bond underwriter for his alleged acts and omissions that occurred while he was advising governmental agencies regarding the issuance of bonds and the interim reinvestment of the proceeds from the bond issues. Reversing the district court's grant of summary judgment for defendant and remanding, this court held, inter alia, that a genuine issue of material fact existed as to whether there was a fiduciary or similar relationship of trust and confidence between defendant and the agencies so as to give rise to a duty on defendant's part to disclose his alleged bid-rigging and payments made by recipients of the reinvestment contracts to the underwriter. S.E.C. v. Cochran, 214 F.3d 1261, 1264.

C.A.11, 2000. Subsec. (2)(a) cit. in ftn. Purchasers of used automobiles sued automobile manufacturer and components manufacturer under state Racketeer Influenced and Corrupt Organizations (RICO) Act, alleging federal mail and wire fraud for

manufacturers' failure to notify purchasers of component defect. District court denied manufacturers' summary-judgment motion, and certified interlocutory appeal. Reversing and remanding, this court held, inter alia, that although defendants had a fiduciary duty to disclose defect to plaintiffs, defendants' breach of that duty did not constitute mail or wire fraud; therefore, plaintiffs did not have a cause of action under the RICO statute. Ayres, et al, v. General Motors Corp., 234 F.3d 514, 521.

C.A.Fed.2003. Com. (m) quot. in ftn. Designer of computer memory systems sued manufacturer for patent infringement, and manufacturer counterclaimed for fraud. The district court entered judgment on a jury verdict for manufacturer on the fraud counterclaim. Reversing in part and remanding, this court held, inter alia, that designer was not liable for fraud, because the jury's implicit finding that designer breached its duty to disclose a pending patent application related to the standardization work of an industry committee to which it belonged was not supported by substantial evidence. The court analyzed the existence of a duty to disclose as a question of fact, although it noted that a review of the relevant law of other states and Virginia's law on other tort duties strongly suggested that this issue might well be a legal question with factual underpinnings. Rambus Inc. v. Infineon Technologies AG, 318 F.3d 1081, 1087, cert. denied ___ U.S. ___, 124 S.Ct. 227, 157 L.Ed.2d 135 (2003).

D.Ariz.1998. Cit. in disc. Property buyers sued sellers and real estate brokers, alleging, in part, that defendants committed fraud and intentional misrepresentation during the listing of the property, during the advertisement of the property, and during the execution of the real property disclosure statement. This court granted in part and denied in part defendants' motion for partial summary judgment, holding, inter alia, that a jury could find that sellers were negligent in not informing plaintiffs that the main residence was a blocked-in mobile home and that some of the wells were inoperable and contained contaminated water. Coleman v. Watts, 87 F.Supp.2d 944, 953.

E.D.Cal.1999. Quot. in case cit. in disc. Judgment creditor brought an adversary proceeding to have the debtor's debt declared nondischargeable as procured by fraud. Bankruptcy court granted creditor's motion for summary judgment as to the nondischargeability of the judgment debt, holding that the state-court default judgment established each of the elements of fraud, and that under California's rules of collateral estoppel, this determination was conclusive. This court affirmed, holding, inter alia, that the default judgment constituted fraud within the meaning of 11 U.S.C. § 523(a)(2), because the creditor's complaint sufficiently pled all the elements of fraud. Harmon v. Kobrin, 242 B.R. 183, 186, reversed 250 F.3d 1240 (9th Cir.2001).

N.D.Cal.2002. Cit. in case quot. in disc., subsec. (2)(e) quot. in case quot. in disc. Insured who was involved in an automobile accident brought suit in state court against insurer and local insurance agents, after insurer denied coverage. The action was removed to federal court. Granting plaintiff's motion to remand to state court, this court held that agents were not fraudulently joined, since it was possible that California courts would recognize a negligence cause of action against agents individually for breach of a "special duty" to insured. Macey v. Allstate Property and Cas. Ins. Co., 220 F.Supp.2d 1116, 1122, 1124.

D.Colo.2001. Subsec. (2) cit. in sup., subsec. (2)(e) cit. and quot. in sup. Sellers of land and of shares of water in an irrigation company sued real estate broker, among others, for breach of fiduciary duty, negligent misrepresentation, and fraudulent concealment, among other claims, alleging that broker had a duty to disclose the rising value of the water shares while sale was pending and that they relied on his expertise. This court granted in part defendants' motion to dismiss, holding, inter alia, that sellers failed to state a claim for fraudulent concealment, because a transaction-broker had no duty to disclose that property priced by the seller had risen in value above the asking price. Sussman v. Stoner, 143 F.Supp.2d 1232, 1239, 1240.

D.Conn.Bkrtcy.Ct.2002. Cit. in disc. Creditor brought an adversary proceeding against Chapter 7 debtor to except debt from discharge as one obtained by fraud. Denying creditor's motion for summary judgment, the court held, inter alia, that a genuine issue of material fact existed as to whether debtor's conduct rose to the level of actual fraud, false pretenses, or false representation. In re Miller, 282 B.R. 569, 576.

D.Del.2002. Subsec. (2)(e) cit. in ftn. and cit. and quot. but dist. Lender sued members of a bankrupt limited liability company, arguing that defendants had a duty to disclose that assignment of collateral to plaintiff was faulty and that, by failing to make that disclosure, they committed a material omission. Granting in part defendants' motion for summary judgment, the court held, inter alia, that defendants had no duty to disclose, since defendants did not enter into any agreements or transactions with plaintiff. Moreover, as a general rule under New York law, banking relationships between sophisticated parties were not special relationships that invoked a duty to disclose. Chase Manhattan Bank v. Iridium Africa Corp., 197 F.Supp.2d 120, 138.

D.Hawaii, 1999. Subsec. (2) quot. in disc. Owner of racing yacht brought suit for fraud and conversion against woman who assisted in transporting the yacht to Japan, alleging that because of defendant's refusal to surrender the bill of lading due to a dispute over her compensation, plaintiff had to post a bond in the amount of the value of the yacht to receive delivery of the yacht from the ocean carrier. Defendant counterclaimed for breach of contract, unjust enrichment, and punitive damages. This court granted in part and denied in part plaintiff's motion for partial summary judgment, holding, inter alia, that while defendant had a

duty as plaintiff's agent to disclose any interests adverse to plaintiff's, there was a fact issue as to whether defendant committed fraud by failing to disclose her adverse intentions to plaintiff where defendant asserted that at the time she took possession of the bill of lading, she had no intention to withhold it from plaintiff. Matsuda v. Wada, 101 F.Supp.2d 1315, 1324.

D.Kan.2001. Subsec. (1) cit. and quot. in ftn. Manufacturer of printed plastic roll stock sued ink supplier for, in part, negligent omission, alleging that defendant failed to disclose information related to the ink's propensity to cause an ink-transfer problem called "blocking." Granting defendant's motion to dismiss plaintiff's tort claims, the court held, inter alia, that defendant owed no duty to plaintiff to disclose information that defendant did not learn about until after the parties had entered into their contracts. The court noted plaintiff's contention that, although Kansas courts had not recognized a cause of action for negligent omission, the elements of negligent omission were found in Restatement (Second) of Torts § 551(1). Plastic Packaging Corp. v. Sun Chemical Corp., 136 F.Supp.2d 1201, 1206.

D.Minn.Bkrtcy.Ct.1999. Cit. in disc. In Chapter 7 proceedings, client security board seeking reimbursement of payments made to clients that lost money in business transactions with debtor-attorneys sought determination that the amount of the reimbursement was nondischargeable under 11 U.S.C. § 523(a)(2)(A) as a debt incurred as a result of attorneys' fraudulent conduct. Finding the debt dischargeable, the court held, in part, that one attorney's conduct, which included silence and nondisclosure of conflicts of interest and ultimately led to his disbarment, was careless, harmful, and unprofessional, but insufficient to amount to fraud for purposes of dischargeability. Even if attorney's silence could be considered a misrepresentation, there was no evidence that he intended to deceive or defraud clients. In re Wyant, 236 B.R. 684, 696, 697.

E.D.Mo.1999. Subsec. (2)(a) quot. in case quot. in disc. Shareholders of merged bank brought class action against bank formed by merger and its individual officers, alleging, in part, that defendants violated federal securities laws by failing to disclose in the proxy statement the magnitude of investment in a hedge fund and the extent of related losses. Denying in part defendants' motion to dismiss, the court held, inter alia, that corporate insiders had a duty to disclose material information whenever failure to disclose that information would be to the detriment of the shareholders, the persons to whom the fiduciaries owed a fiduciary duty. In re BankAmerica Corp. Securities Litigation, 78 F.Supp.2d 976, 993.

D.Neb.2000. Cit. in disc. and sup., quot. in ftn. in sup. Buyer of gas-fired boiler sued seller, among others, for, inter alia, negligent misrepresentation, alleging that it was damaged by its reliance on defendant's cost estimate, which was approximately half of plaintiff's actual operating expense. Denying defendant's motion for summary judgment, the court held, in part, that material factual issues existed as to whether defendant exercised reasonable care in computing and providing the cost estimate, and whether defendant was under a duty to disclose that the cost of adding a second boiler would exceed the estimate. Outlook Windows Partnership v. York Intern., 112 F.Supp.2d 877, 896-898.

D.N.J.1998. Subsec. (2) quot. in sup., com. (l) quot. in sup. A Lithuanian distributor of American pantyhose sued the pantyhose manufacturer, alleging common law fraud, tortious interference with business relations, breach of warranty, and federal statutory violations, among other claims. After defendant's donation of a large volume of pantyhose to a relief organization resulted in the pantyhose flooding the Lithuanian market at artificially low prices, plaintiff had agreed to release any claims against defendant arising from the donation in exchange for a large amount of free pantyhose manufactured in Mexico by defendant. This suit arose when plaintiff complained that the Mexican pantyhose were defective. This court, among other dispositions, granted defendant's motion for summary judgment on the portion of plaintiff's fraud claim that alleged that defendant fraudulently failed to inform plaintiff of the negative results of a marketing survey concerning Mexican pantyhose that had been described as identical to the American pantyhose. The omitted report did not directly indicate that the Mexican pantyhose were defective, but only reflected consumer dissatisfaction. Lithuanian Commerce Corp. v. Sara Lee Hosiery, 179 F.R.D. 450, 478.

E.D.N.Y.2000. Cit. in disc. In nationwide class-action suit against tobacco companies based on alleged conspiracy to conceal dangers of smoking, the district court held that general liability questions would be decided under New York law, as New York's interest in the action was more significant that that of any other state, while depecage would be applied to permit individual questions of liability to be determined by law of each individual plaintiff's own state. In its analysis, the court noted that state laws' elements for a claim of fraudulent concealment, though not uniform in all states, shared many attributes. Simon v. Philip Morris Inc., 124 F.Supp.2d 46, 71.

E.D.N.Y.2002. Cit. in disc. Consumers who suffered smoking-related illnesses sued cigarette manufacturers for fraud and conspiracy, inter alia, and sought class certification. This court certified the class subject to modifications. In its memorandum, the court determined that plaintiffs' claims were not preempted under Federal Cigarette Labeling and Advertising Act, but were governed by New York law. The court found that relation back to a time earlier than certification of present class was appropriate regarding statute of limitations. The court stated that to toll limitations bar using fraudulent-concealment doctrine, a plaintiff must show diligent investigation, that defendants thwarted investigation, and that plaintiffs had no notice of its claims. In re

Simon II Litigation, 211 F.R.D. 86, 144, 169.

N.D.Ohio, 1998. Cit. and quot. in ftn. A limited partnership in the venture capital business sued a bank to avoid a suretyship agreement it executed in the bank's favor, alleging that the bank had superior knowledge of the merger partner's poor financial situation and purposefully withheld this information from plaintiff to induce plaintiff into providing the surety agreement. This court, among other dispositions, granted the bank's motion for summary judgment on plaintiff's claim of fraudulent inducement. The court held, inter alia, that plaintiff failed to establish fraudulent inducement, because plaintiff failed to give evidence that the bank intentionally withheld financial information from plaintiff to induce the partnership into executing the agreement. There was also no evidence that the bank had a duty to disclose such information to plaintiff. Brantley Venture Partners v. Dauphin Deposit Bank, 7 F.Supp.2d 936, 945.

D.Or.2001. Cit. in disc. Customers sought enforcement of arbitration award in their favor against securities clearing broker. Granting plaintiffs' motion to confirm the award, the court held that clearing broker could be held liable for the fraudulent acts of introducing broker under the Washington and California Securities Acts, and thus was jointly and severally liable to plaintiffs for the full amount of damages. Koruga v. Fiserv Correspondent Services, Inc., 183 F.Supp.2d 1245, 1246.

E.D.Pa.1998. Cit. in headnote, cit. in disc. Surviving policyholder sued insurer for, inter alia, negligent misrepresentation, alleging that defendant's agent sold her and her late husband a life insurance policy that failed to meet their expressed needs. Granting defendant's motion for summary judgment, the court held, in part, that agent made no affirmative misrepresentations concerning the policy; that, even if he did, plaintiff failed to show that she relied on his assertions; and that agent was under no duty to discuss other insurance options, offer term insurance, or explain the benefits of such a policy. Weisblatt v. Minnesota Mut. Life Ins. Co., 4 F.Supp.2d 371, 372, 379.

M.D.Pa.Bkrtcy.Ct.1998. Cit. in headnotes, cit. in cases quot. in disc., cit. and quot. in sup. Debtors sued creditor bank to void, on the grounds of fraud and misrepresentation, a release they had executed, alleging that defendant's failure to divulge a contact between its executive and the executive of a bank whose stock debtors had used as collateral for the loan was sufficiently material to void the execution of the release. The court held that cause did not exist to void the release, since debtors failed to establish that defendant had any duty to them to reveal the contact. The court found that the bank executives' discussion regarding the status of debtors' loan could hardly be considered material to debtors' plans. In re Solfanelli, 221 B.R. 141, 141, 143.

W.D.Pa.1999. Subsec. (b)(2) cit. in disc. and quot. in ftn. Company that bought all shares of a medical software corporation sued the software corporation's former owner and an investment banking firm that introduced the parties to the transaction, alleging fraud and negligent misrepresentation, among other claims. Plaintiff alleged that defendants improperly failed to disclose hidden problem areas within the acquired corporation, including "Y2K" deficiencies in its software products. This court granted in part and denied in part defendants' motion to dismiss, holding, inter alia, that plaintiff's fraud claim based upon omissions by the former owner failed, because there were no partial or ambiguous statements that would be misleading and, thus, no duty to speak ever arose. Furthermore, plaintiff did not rely upon representations specifically excluded by the integration clause. But, the court determined that it was premature to dismiss plaintiff's fraud and negligent-misrepresentation claims against the banking firm under the economic-loss doctrine. Sunquest Info. Systems v. Dean Witter Reynolds, 40 F.Supp.2d 644, 656, 657.

W.D.Pa.Bkrtcy.Ct.2002. Adopted in case cit. in disc., subsec. (2) cit. in sup. Lessor of farm equipment sought determination that its claim against Chapter 7 debtor was not dischargeable. Entering judgment for debtor, bankruptcy court held that debtor's nondisclosure of fact that he had disposed of certain equipment that was subject of lease/purchase agreement and cross-collateralization agreement was not a false representation for purposes of § 523(a)(2) of Bankruptcy Code, notwithstanding debtor's contractual obligation to disclose disposals of such equipment. In re Booher, 284 B.R. 191, 204, 205.

E.D.Wis.2000. Subsec. (2)(e) quot. in case quot. in disc. Insured sued insurer for breach of contract, bad faith, and intentional infliction of emotional distress. Insurer brought a third-party claim against insured's father, who was the broker that filled out the application, asserting that if broker had correctly reported insured's history of emotional and mental disorders to insurer when insured applied for disability insurance, it would not have issued the policy on the terms that it did. This court granted in part and denied in part broker's motion for summary judgment against insurer, holding, inter alia, that fact issues existed as to whether broker knew that insured's preapplication visits to a psychiatrist were for treatment of depression. Lewis v. Paul Revere Life Ins. Co., 80 F.Supp.2d 978, 995.

W.D.Wis.1998. Cit. in case cit. in disc., cit. in headnote. Patient who was injured when defective orthopedic bone screw devices were attached to his spine during spinal fusion operations sued the manufacturer, designer, and seller of the devices, alleging products liability, breach of warranty, and fraud. Patient also alleged a conspiracy among manufacturers of spinal implants, doctors, and medical societies to fraudulently promote the sale of spinal implant devices by conducting seminars while concealing

information concerning regulatory status, lack of research, and the financial relationships between doctors promoting the devices and device manufacturers. This court granted defendants summary judgment, holding, inter alia, that plaintiff failed to prove that his surgeons' recommendations of instrumented fusion surgery were affected by any concealment at defendants' seminars. Cali v. Danek Medical, Inc., 24 F.Supp.2d 941, 942, 949.

Ala.1999. Cit. in headnotes, cit. in disc., com. (m) quot. in sup. Insured sued insurer for suppression of facts concerning the basis for calculating the replacement value of plaintiff's property. The trial court entered judgment on a jury verdict for plaintiff. Reversing, this court held that whether defendant had a duty to disclose the information at issue was a question of law for the court, and that, as a matter of law, defendant owed plaintiff no duty of disclosure. State Farm Fire & Cas. Co. v. Owen, 729 So.2d 834, 834, 835, 839-840, 843.

Alaska, 1998. Cit. in sup., quot. in case quot. in sup., cit. in ftn., subsec. (2) quot. in ftn. A cargo shipper sued a carrier for negligence, breach of contract, and unseaworthiness. The carrier brought a third-party complaint against the shipper's insurance broker, claiming that the broker committed negligent misrepresentation by failing to disclose to the carrier that the policy did not waive subrogation. Trial court granted the broker summary judgment. This court affirmed, holding that the broker was entitled to summary judgment because the carrier had identified no fact issues suggesting that the broker owed it any duty at all. The court stated that, assuming arguendo that a party could incur a duty to disclose under Restatement (Second) of Torts § 551 without actually knowing of another's reliance, the carrier had alleged no facts from which the broker reasonably should have inferred the carrier's reliance. Arctic Tug & Barge v. Raleigh, Schwarz, 956 P.2d 1199, 1199, 1202, 1203.

Alaska, 1999. Cit. in case cit. in ftn. Survivors of individual who was shot and killed by troubled 17-year-old brought wrongful death action against shooter's parents, alleging, inter alia, negligent supervision. The trial court entered summary judgment for defendants. Affirming, this court held that defendants were not under a duty to control their son where they did not have reason to know of a specific opportunity and need to restrain him so as to prevent an imminently foreseeable harm. Dinsmore-Poff v. Alvord, 972 P.2d 978, 987.

Ariz.2000. Cit. in disc. Seller of real property sued buyer's real estate agent for negligent misrepresentation, alleging that the agent failed to inform the seller that the buyer was or might have been unable to perform because of financial difficulties. Trial court granted defendant summary judgment, holding that defendant had no legal duty to plaintiff. The intermediate appellate court affirmed. This court reversed and remanded, holding, inter alia, that since the buyer had a duty to disclose her financial condition to the sellers, her agent had a duty to disclose. The court stated generally that a buyer cannot present himself as a ready, willing, and ready buyer if he knows that there is a significant risk that the deal will never close because of his inability to perform. Lombardo v. Albu, 199 Ariz. 97, 14 P.3d 288, 290, 291.

Ariz.2002. Cit. and quot. in ftn. Bank that provided interim financing for construction project sought declaratory judgment that it performed its contractual obligations in financing agreement between bank, permanent lender, and borrower. Permanent lender counterclaimed, charging bank with fraudulent concealment, among other claims. Trial court granted bank summary judgment, holding that bank owed no duty to permanent lender to disclose information about borrower's financial condition. Appellate court affirmed. This court reversed in part and remanded, holding, inter alia, that fact issues existed as to fraudulent-concealment claim, since there were reasonable inferences from which jury could find that bank had knowledge of false information being given permanent lender, and bank took measures intended to prevent permanent lender from learning the truth. Wells Fargo Bank v. Arizona Laborers, Teamsters and Cement Masons Local No. 395 Pension Trust Fund, 201 Ariz. 474, 496, 38 P.3d 12, 34.

Ariz.App.2001. Cit. in sup. and in diss. op., com. (j) cit. and quot. in sup. and in diss. op., quot. in ftn., subsec. (1) quot. in sup., subsec. (2)(e) quot. in sup. and cit. and quot. in diss. op., com. (l) cit. in sup., coms. (k) and (m) quot. in sup. Purchasers of apartment complexes sued vendors for fraud and nondisclosure of facts, despite "as is" clause in agreement of sale, after purchasers discovered defective pipes in complexes. Trial court entered judgment on jury verdict for defendants on fraud claim, but for plaintiffs on nondisclosure claim. Affirming, this court held, inter alia, that vendors had duty to disclose to purchasers latent defects that were known to vendors, notwithstanding contract's "as is" clause. S Development Co. v. Pima Capital Management Co., 201 Ariz. 10, 31 P.3d 123, 127-131, 133, 138.

Cal.2003. Subsec. (1) quot. in disc. Stockholder brought putative class action against corporation and three of its officers for fraud or negligent misrepresentation, alleging that fraudulent quarterly report that overreported earnings and profits wrongfully induced him to hold stock instead of selling it. The trial court entered judgment for defendants, but the court of appeals reversed. Reversing, this court held that plaintiff failed to sufficiently plead the element of actual reliance on defendants' alleged misrepresentations to state a holder's action for fraud or negligent reliance under California law. Small v. Fritz Companies, Inc., 30 Cal.4th 167, 174, 132 Cal.Rptr.2d 490, 495, 65 P.3d 1255, 1259.

Cal.App.2000. Quot. in disc. After insurer failed to provide insureds with a defense in a malicious-prosecution action, insureds sued insurer and insurance agent, alleging that agent misled them into believing he had delivered a policy duplicating the coverages of an insurer whose policy was not being renewed. Trial court granted summary judgment to insurer and agent, holding that a prior judgment in a federal court action between insureds and the insurer issuing the prior policy precluded insureds' claim. This court reversed and remanded, holding, inter alia, that fact issues existed as to plaintiff's claims for reformation, negligent misrepresentation, negligent failure to procure adequate liability-insurance coverage, and breach of contract to procure insurance. The court stated that a disparity in knowledge could impose an affirmative duty of disclosure on the insurer or its agent. Butcher v. Truck Ins. Exchange, 77 Cal.App.4th 1442, 92 Cal.Rptr.2d 521, 537, 538.

Cal.App.2000. Subsec. (1) quot. in disc. Shareholder brought a putative class action against corporation and three of its directors and officers for fraud and negligent misrepresentation, alleging that defendants made misrepresentations about the corporation's quarterly revenue and earnings that induced him and other similarly situated shareholders to continue holding shares that they otherwise would have sold. The trial court sustained a general demurrer. Reversing in part, this court held, inter alia, that, under the principle of forbearance, common law claims of fraud and negligent misrepresentation could be based on the decision of shareholders to retain or refrain from selling their shares after they had received material and misleading statements from the corporation. Greenfield v. Fritz Companies, Inc., 82 Cal.App.4th 741, 753, 98 Cal.Rptr.2d 530, 539, review granted and opinion superseded 101 Cal.Rptr.2d 653, 12 P.3d 1068 (2000).

Colo.1998. Subsec. (2) cit. in headnotes and sup., subsec. (2)(e) cit. and quot. in sup. and ftn. Oil company that had an exclusive right to explore for oil on Indian tribe property sued a competitor and its geologist, alleging trespass for conducting tests on the property and fraudulent concealment. Plaintiff alleged that defendants had a duty to disclose their knowledge regarding the tests before buying plaintiff's rights to the land. Trial court entered judgment for defendants and the appellate court affirmed. This court affirmed, holding, inter alia, that defendants were not liable for fraudulent concealment, because they did not have a duty to disclose their knowledge of potential gas reserves to plaintiff prior to the sale. Mallon Oil v. Bowen/Edwards Associates, 965 P.2d 105, 106, 108, 109, 111, 112.

Hawaii, 2002. Cit. in ftn. to conc. op. Automobile shoppers sued car dealership, alleging that they had traveled to defendant's lot in response to a misleading automobile-sale advertisement. The trial court granted defendant's motions for summary judgment and partial summary judgment. Vacating and remanding, this court held that, because plaintiffs claimed to have spent their $3-$5 in gasoline in reliance on defendant's advertisement, which they alleged was intended to induce them to visit defendant's lot for the purpose of purchasing an automobile, they showed sufficient damages to support a negligent-misrepresentation claim. The concurring opinion argued that a prima facie case for negligent misrepresentation required only proof of some, not substantial, pecuniary injury. Zanakis-Pico v. Cutter Dodge, Inc., 98 Hawai'i 309, 336, 47 P.3d 1222, 1249.

Idaho, 1998. Subsec. (2) cit. in case quot. in sup., com. (f) cit. in sup. Former wife brought action against former husband, alleging that he fraudulently induced her to partition land they once held as tenants in common by neglecting to inform her that he had harvested timber on a portion of the land awarded to her. The trial court entered judgment for wife. Affirming, this court held, in part, that husband's nondisclosure of the fact that at least $30,000 worth of harvestable timber existed on wife's share of the property constituted nondisclosure of a material fact; that, as a cotenant, husband had a duty to disclose the fact of harvesting; and that wife justifiably relied on husband's duty to disclose all material facts that would affect her decision to partition. Watts v. Krebs, 131 Idaho 616, 962 P.2d 387, 391, 392.

Iowa, 2002. Subsecs. (2) (b), (c), and (e) cit. and quot. in sup. Smoker and wife sued cigarette manufacturers in federal district court for damages from cigarette smoking. Answering certified questions, the supreme court held, inter alia, that for design-defect products-liability cases, Iowa would apply risk/utility test set forth in §§ 1 and 2 of Restatement Third of Products Liability, and that a product manufacturer's alleged failure to warn or disclose material information would support fraud claim by customer only when disclosure was necessary to prevent a prior representation from being misleading. Wright v. Brooke Group Ltd., 652 N.W.2d 159, 174-177.

Kan.1998. Cit. but dist., cit. generally in diss. op., subsecs. (2)(b), (2)(c), and (2)(e) quot. in diss. op. Borrower who refinanced consumer loans three times within a 15-month period sued lender for, in part, fraud on the ground that no one ever told him that origination fees were charged every time a loan was refinanced. Affirming the trial court's grant of summary judgment for defendant, this court held, inter alia, that the duty to exercise reasonable care under Restatement (Second) of Torts § 551 was not applicable here; defendant made all disclosures required by law and had no duty to make additional disclosures. The dissent argued that the promissory notes were ambiguous and that § 551 described the duty to disclose. Gonzales v. Associates Financial Service, 266 Kan. 141, 967 P.2d 312, 326, 332.

Mass.App.1999. Subsecs. (1) and (2)(a) quot. in disc. After coexecutor petitioned for allowance of decedent's will, decedent's

son, who was other coexecutor, filed affidavit of objections. Finding that decedent's grandson committed fraud and exerted undue influence over decedent, probate court ordered grandson to deliver certain bank accounts and allowed will in part. Affirming in part, this court held that, by reason of confidential relationship between decedent and grandson, grandson had duty to disclose to decedent that she was mistaken in her belief that her son had taken items from her safety deposit box, since grandson knew that his nondisclosure was affecting decedent's disposal of her assets. Rood v. Newberg, 48 Mass.App.Ct. 185, 192, 718 N.E.2d 886, 893.

Mass.App.1999. Cit. in disc., quot. in ftn., subsecs. (1) and (2)(b) cit. in disc. Poultry producer sued wholesaler and wholesaler's president and sole shareholder for, inter alia, negligent misrepresentation in connection with information that was omitted from a financial statement wholesaler submitted to producer. The trial court entered judgment against wholesaler but in favor of president. Affirming, this court held that, under the circumstances, it was not necessary to pierce the corporate veil to find president liable; however, the information complained of could not form the basis of producer's action, since president did not act knowingly, recklessly, or even negligently in failing to include it in the financial statement. Townsends, Inc. v. Beaupre, 47 Mass.App.Ct. 747, 716 N.E.2d 160, 164-165, 166.

Mass.App.2002. Subsec. (2)(b) cit. in disc. After dram-shop claims were made against insured corporation's policy, the Liquor Liability Joint Underwriting Association of Massachusetts (LLJUA), which issued the policy, sued insured, alleging that insured was not qualified to obtain $500,000/$1 million coverage because it did not have an equivalent amount of general liability insurance for its insured lounge. By impleader, LLJUA sued insured's insurance broker, which jointly prepared insurance application form, alleging misrepresentation. Trial court held that broker was not liable for misrepresentation. This court affirmed, holding, inter alia, that LLJUA did not establish a misrepresentation within the application, because application and insurance binder truthfully disclosed that there was no general liability insurance policy in place for insured's lounge. Liquor Liability Joint Underwriting Ass'n of Massachusetts v. AIM Ins. Agency, 55 Mass.App.Ct. 715, 722, 774 N.E.2d 653, 659.

Mass.App.2003. Subsec. (2)(a) cit. in disc. At family gathering, father demanded that his three sons sign a document that he refused to let them read and falsely told sons that document was for a bank. Upon father's death, sons learned that document was a deed conveying each son's remainder interest in family home to their father and sister, jointly with right of survivorship. Sons sought declaratory relief, alleging that signatures were obtained by fraud. Trial court declared deed valid. This court affirmed, holding that, given suspicious circumstances, sons could not reasonably have relied on father's misrepresentation to excuse them from reviewing deed before signing it. No fiduciary or confidential relationship existed, since sons were independent adults who did not depend on father's advice in financial or business matters. Collins v. Huculak, 57 Mass.App.Ct. 387, 394, 783 N.E.2d 834, 841.

Mo.App.2002. Cit. in disc., subsec. (1) cit. in disc. and quot. in ftn., subsec. (2) quot. in disc. Buyers of business sued sellers and their brokers for rescission and restitution or, in the alternative, damages for fraudulent misrepresentation, negligent misrepresentation, and breach of contract, alleging that they were not given all material financial records of the business. The trial court granted summary judgment for brokers. Reversing and remanding, this court held that genuine issues of material fact, precluding summary judgment on the misrepresentation claims, existed as to whether partial disclosure of information created a duty to make a complete disclosure, whether the withheld documents were material, and whether buyers could reasonably have relied on brokers to supply the missing documents. Kesselring v. St. Louis Group, Inc., 74 S.W.3d 809, 814.

Mont.1998. Cit. in disc. Workers' compensation carrier brought action against state compensation insurance fund, alleging that defendant misrepresented and failed to disclose certain facts related to the coverage of an injured employee. The Workers' Compensation Court dismissed the complaint for lack of subject matter jurisdiction. Affirming, this court held that, because plaintiff's claim sounded in tort and did not assert a dispute over benefits payable under the Workers' Compensation Act, the Workers' Compensation Court lacked jurisdiction over the cause of action. Liberty v. State Fund, 1998 MT 169, 962 P.2d 1167, 1168.

Neb.2000. Cit. in headnotes, cit. and quot. in sup., cit. in case cit. in sup., subsec. (2)(a) cit. in case cit. in sup., subsec. (2)(e) cit. in sup. and cit. in case cit. in sup. Family corporation that grew seed potatoes sued seed potato seller for fraudulent concealment based on seller's failure to disclose certain information about the potato seed. Trial court entered judgment on jury verdict for plaintiff. This court affirmed, holding, inter alia, that the seller had a duty to disclose the reclassification of the seed potatoes to plaintiff. Seller knew it was basic to the transaction that the seed be classified as Generation II; the seller did not disclose the fact that the seed had been downgraded to Generation V; plaintiff planted the seed, mistakenly believing it was classified as Generation II; and it was a standard industry practice to disclose any reclassification of seed. Streeks, Inc. v. Diamond Hill Farms, Inc., 258 Neb. 581, 605 N.W.2d 110, 118-121.

N.J.Super.1998. Subsec. (2) quot. in disc. and cit. in headnote, com. (h) cit. in disc. A store manager was fired and became the

subject of a police investigation after the bank did not receive the store's deposit receipt for $1,325.52. The missing receipts were later found. The manager sued the bank and the store for negligence, defamation, and intentional and negligent infliction of emotional distress. The defamation and emotional distress claims were dismissed, and the jury awarded plaintiff damages for negligence. This court affirmed in part, reversed in part, and remanded, holding, inter alia, that plaintiff did not have a cause of action for negligence for the bank's failure to notify her when the deposit bag was found. The bank did not have a legal obligation to notify plaintiff because its business relationship was not with her, but with the store. Schillaci v. First Fidelity Bank, 311 N.J.Super. 396, 709 A.2d 1375, 1376, 1379.

N.J.Super.2000. Com. (l) quot. in part in ftn. Purchasers of condominium units sued developer for failure to disclose condominium building's proximity to hazardous-waste sites, alleging fraud, misrepresentation, and violation of the Consumer Fraud Act. Reversing in part the trial court's dismissal of the action and remanding, this court held, inter alia, that an intentional and knowing failure to disclose material off-site conditions actionable under the Consumer Fraud Act, as opposed to an innocent or negligent failure, was not embraced by the immunity of the New Residential Construction Off-Site Conditions Disclosure Act. Nobrega v. Edison Glen Associates, 327 N.J.Super. 414, 424, 743 A.2d 864, 870, modified and remanded 167 N.J. 520, 772 A.2d 368 (2001).

Ohio App.1999. Subsec. (2)(a) and com. (e) cit. in disc. Remaindermen of a trust sued the trust grantor's business partner, a cotrustee bank, and another cotrustee for breach of fiduciary duty to the trust. Trial court granted defendant partner summary judgment, holding that the discovery rule did not apply to extend the statute of limitations applicable to plaintiffs' claims. This court reversed and remanded, holding, inter alia, that the discovery rule did apply, because the fundamental nature of plaintiffs' claims was fraud, and those claims fell within the legislature's provision that fraud claims did not accrue until the fraud was discovered. Although plaintiffs' breach-of-fiduciary-duty claims against bank and cotrustee appeared to be based on their status as trustees, their claims against partner appeared to be based upon his status as an agent for the trusts and the trustees. Orvets v. National City Bank, Northeast, 131 Ohio App.3d 180, 722 N.E.2d 114, 120.

Ohio Com.Pl.2002. Com. (j) cit. in disc. After buyers discovered that there were bats in the house they had purchased on an "as is" basis, they sued the sellers for, in part, fraud and misrepresentation. Granting summary judgment for defendants, the court held that plaintiffs failed to prove that defendants actively misrepresented or concealed the presence of the bats in the house. Donnelly v. Taylor, 122 Ohio Misc.2d 24, 29, 786 N.E.2d 119, 123, judgment affirmed 2003 WL 356316 (Ohio App.2003).

Pa.Super.1998. Cit. in headnote, cit. in disc. and in sup., subsec. (2)(c) quot. in sup. Borrowers who obtained a commercial loan from a bank to subdivide and develop their property sued the bank and its chief executive officer, who had recommended a developer to them, for material nondisclosure under Restatement (Second) of Torts § 551, based on defendants' failure to disclose their knowledge of the developer's business troubles. The trial court sustained defendants' demurrer. Affirming, this court held that the parties consummated their loan transaction, for purposes of § 551, when defendants distributed the loan proceeds to plaintiffs, and that § 551 imposed no duty on defendants to disclose information they learned thereafter. Baribault v. Peoples Bank of Oxford, 714 A.2d 1040, 1041-1043.

S.D.1999. Cit. in diss. op., com. (l) quot. in part in diss. op. Buyers of financially troubled grocery store sued their bank, which had encouraged them to purchase store from another customer of bank, alleging misrepresentation and failure to disclose store's financial problems. Reversing the trial court's entry of judgment for bank and remanding, this court held, inter alia, that special circumstances created fiduciary duty on part of bank to disclose store's financial history. The dissent argued that bank had no duty to disclose, since no fiduciary relationship existed here. Buxcel v. First Fidelity Bank, 1999 SD 126, 601 N.W.2d 593, 602.

S.D.2002. Cit. in disc., subsec. (2)(b) cit. in ftn. but dist., com. (k) quot. in ftn. in sup. Physician sued employer for misrepresentations allegedly made during negotiation of his employment contract. Affirming trial court's grant of summary judgment for employer, supreme court held that any alleged oral promise of full equal partnership was superseded by written contract, and that employer had no duty to disclose shareholders' voting agreement shifting control to one partner, since parties were not in a fiduciary relationship and were dealing at arms' length. Schwaiger v. Mitchell Radiology Associates, P.C., 652 N.W.2d 372, 380.

Tex.2001. Cit. in disc., com. (k) quot. in disc. (erron. cit. as § 511, com. (k)). Purported buyer of sports memorabilia store in shopping mall brought suit for, in part, fraud against seller, mall manager, and mall owners. The trial court entered judgment on a jury verdict awarding plaintiff damages, and the court of appeals affirmed in part. Reversing in part and rendering judgment that plaintiff take nothing, this court held that there was no evidence that mall manager knew that plaintiff was ignorant of the lease terms, or that plaintiff did not have an equal opportunity to discover them, so that manager's assurance that he would "take care of" plaintiff's long-term-lease concerns did not amount to fraud for failing to advise plaintiff that the lease was nonassignable, that additional rent was due, or that plaintiff would be required to apply for a new lease. Bradford v. Vento, 48 S.W.3d 749, 755,

756.

Utah, 2001. Illus. 9 quot. in sup. Home buyer sued sellers for fraudulent nondisclosure, alleging that defendants failed to disclose the existence of leaks in their backyard swimming pool. The trial court granted summary judgment for defendants, and the court of appeals affirmed. Reversing and remanding, this court held, inter alia, that defendants had a legal duty to disclose the leaks in their swimming pool prior to the sale of their property to plaintiff, since the leaks could not have been discovered through reasonable care. Mitchell v. Christensen, 31 P.3d 572, 575.

Wash.App.2002. Cit. and quot. in sup. School custodian's employer sued previous employer for negligent misrepresentation and nondisclosure, after discovering that custodian resigned from previous job in exchange for county's dismissal of child molestation charges. The trial court granted defendant summary judgment. Affirming, this court held that, as a matter of first impression, defendant did not owe plaintiff a duty to disclose information regarding molestation charges where letters of recommendation did not constitute business transaction involving a quasifiduciary relationship between buyers and sellers and current employer did not show reliance on letters. Richland School District v. Mabton School Dist., 111 Wash.App. 377, 385, 386, 45 P.3d 580, 585, 586.

W.Va.1998. Subsec. (1) quot. in sup. Biological father sued child's mother, mother's family members, and mother's attorney for, inter alia, fraud and tortious interference with parental relationship in connection with defendants' actions in placing plaintiff's newborn son for adoption. The trial court entered judgment on a jury verdict for plaintiff. Affirming, this court held, in part, that defendants' concealment of information in response to plaintiff's inquiries about the post-birth whereabouts of his child supported an action for fraud where defendants affirmatively, intentionally, and willfully failed to provide the requested information, thereby unduly hindering plaintiff's ability to establish a parent-child relationship; that plaintiff could maintain an action for tortious interference with parental relationship against all defendants but mother, with whom he shared equal or substantially equal parental rights; and that, under the applicable law of West Virginia, the forum state, the fraud exception to the rule of attorney-client confidentiality negated mother's ability to assert the privilege. Kessel v. Leavitt, 204 W.Va. 95, 511 S.E.2d 720, 745, cert. denied 525 U.S. 1142, 119 S.Ct. 1035, 143 L.Ed.2d 43 (1999).

Wis.2002. Com. (b) cit. in case cit. in sup. Cable-television customers sued cable company for damages and declaratory and injunctive relief, arguing that a late-payment fee imposed by defendant constituted unlawful liquidated damages. The trial court granted defendant's motion for dismissal, and the court of appeals affirmed. Reversing in part and remanding, this court held, inter alia, that the voluntary-payment doctrine barred plaintiffs from recovering monetary damages for their payment of allegedly unlawful fees without objection or protest, absent properly pled allegations of fraud, duress, or mistake of fact. Putnam v. Time Warner Cable of Southeastern Wisconsin, Ltd. Partnership, 255 Wis.2d 447, 649 N.W.2d 626, 634.

Wis.App.1999. Cit. in disc., subsec. (2)(e) and coms. (l) and (m) quot. in sup. Executive involved in buyout arrangement with parent corporation sued parent's president for intentional and negligent misrepresentation, alleging that president made last-minute revisions to the terms of executive's compensation package. Executive also sought reformation of the compensation contract. The trial court dismissed for insufficient evidence. Reversing and remanding, this court held, in part, that material factual issues existed as to whether, in light of the parties' conduct during negotiations, president had a duty to disclose that he had redefined the phrase "net equity realized" in the final draft of the document at issue, and whether executive justifiably relied on president's failure to inform him of the change, and that executive's unilateral mistake as to his expected compensation, coupled with president's possibly fraudulent or inequitable conduct, could form the basis for a claim for contract reformation. Hennig v. Ahearn, 230 Wis.2d 149, 601 N.W.2d 14, 22, 22-23.

Wis.App.1999. Cit. in headnote, cit. in case cit. in disc. Adhesive-film-product processor sued product developer for intentional misrepresentation. Affirming the trial court's entry of judgment on a jury verdict awarding plaintiff damages, this court held, in part, that the economic-loss doctrine did not bar plaintiff's intentional-misrepresentation claim, since plaintiff was fraudulently induced to enter into the parties' contract by defendant's intentional misrepresentation. Douglas-Hanson Co. v. BF Goodrich Co., 229 Wis.2d 132, 598 N.W.2d 262, 263, 268.

Wis.App.2000. Subsec. (2)(e) cit. in case quot. in disc. Former employee sued employer and supervisor for, inter alia, intentional misrepresentation that led him to continue his employment. Trial court entered judgment on jury verdict for plaintiff. This court affirmed in part and reversed in part, holding, inter alia, that plaintiff's misrepresentation claim failed, because creation of an employer's duty to disclose information potentially affecting an employee's decision to continue employment would undermine sound public policy and reduce the at-will employment flexibility so valuable to both employers and employees. Mackenzie v. Miller Brewing Company, 234 Wis.2d 1, 608 N.W.2d 331, 343.

Wis.App.2002. Subsec. (2)(b) quot. in case quot. in sup. Purchasers of commercial property sued seller, seller's real estate firm,

and seller's real estate broker, alleging breach of contract, intentional misrepresentation, and violation of false-advertising statute for failing to disclose that one of the property's tenants had a history of delinquency in rent payments and was in default both at the time the offer to purchase was accepted and at the time of closing. The trial court granted summary judgment for the defendants. Reversing in part and remanding, this court held, inter alia, that insofar as the claim for intentional misrepresentation was based on seller's failure to disclose tenant's arrearages before the purchasers accepted the offer to purchase, an issue of fact existed as to whether there was a duty to disclose to prevent a partial statement of the facts from being misleading. Kailin v. Armstrong, 252 Wis.2d 676, 702, 643 N.W.2d 132, 146.

Wyo.1999. Cit. and quot. but not fol. Brother sued sister, alleging existence of contract settling their dispute over disposition of parent's estate, and seeking enforcement of contract. Sister argued that brother had breached his duty to disclose to her that underlying lawsuit between him and parent had been decided against him. Affirming the trial court's grant of summary judgment for brother, this court refused to adopt a cause of action for negligent nondisclosure, and held, in part, that, even if such a cause of action existed in Wyoming, sister failed to prove existence of duty or fiduciary relationship triggering obligation on part of brother to disclose. Givens v. Fowler, 984 P.2d 1092, 1097.

Wyo.2000. Cit. in headnote, cit. in case cit. in disc. Ranch purchaser sued the seller's broker-agent and its subagent for fraud, negligent misrepresentation, and fraudulent concealment, relating to the disclosure of the existence and the extent of coal surface-mining agreements affecting the purchaser's grazing rights. Trial court directed a verdict for defendants. This court affirmed in part as to the agent, holding that the evidence that he had fraudulently misrepresented the title exceptions to the ranch before and after execution of the contract was legally insufficient. Plaintiff failed to show that the agent had a duty to disclose the pertinent information. However, the court reversed in part and remanded to determine whether the subagent fraudulently concealed material title exceptions before execution of the contract and caused damages. Sundown, Inc. v. Pearson Real Estate Company, Inc., 8 P.3d 324, 331-332.

Wyo.2001. Cit. in disc., cit. in case quot. in disc. Purchasers of ranch property sued, among others, real-estate brokerage for negligent misrepresentation and fraud, alleging that they were never informed that the easement allowing access to the property was restricted to noncommercial use. The trial court granted defendant summary judgment. Vacating in part and remanding, this court held, inter alia, that a genuine issue of material fact, precluding summary judgment on the negligent-misrepresentation claim, existed as to whether defendant's agent exercised such care, skill, and diligence as others who were engaged in the profession would ordinarily exercise under similar circumstances in fulfilling the duties imposed on him by statute. Hulse v. First American Title Co. of Crook County, 33 P.3d 122, 138, 140, appeal after remand 71 P.3d 262 (Wyo.2003).

Case Citations July 2003 -- November 2003:

C.A.5, 2003. Cit. in case cit. and quot. in disc. Distributor sued manufacturer of plumbing products for breach of contract and negligent misrepresentation. District court entered judgment on jury verdict for distributor. This court reversed and rendered judgment that distributor take nothing, holding, inter alia, that Texas law did not recognize a duty to avoid negligent misrepresentations arising from an arm's-length, at-will relationship. The relationship between manufacturer and distributor did not give manufacturer a duty to disclose to distributor its negotiations with another distributor or its plans to terminate its at-will, nonexclusive distributor relationship with plaintiff. Coburn Supply Co., Inc. v. Kohler Co., 342 F.3d 372, 378.

N.D.Ohio, 2003. Quot. in ftn., subsec.(2) cit. in sup., subsec. (2)(d) quot. in sup. Former employee sued employer for fraudulent inducement to employment, promissory estoppel, and wrongful termination in violation of public policy after employer abandoned plan to start up its own airline and instead purchased existing airline. Granting employer's motion for summary judgment, this court held, inter alia, that employer did not fraudulently conceal its intention to purchase airline and did not owe employee duty to disclose its intention to purchase airline. Gouge v. BAX Global Inc., 252 F.Supp.2d 509, 515, 517, 518.

D.Utah Bkrtcy.Ct.2003. Cit. and quot. in sup., subsec. (2) and com. (f) quot. in sup. and cit. in ftn. Retirement fund sued to have bankrupt debtor's debt declared nondischargeable, alleging that debtor solicited, received, and refused to account for fund's assets through false representations and material omissions. This court denied debtor's motion to dismiss, holding that debt was nondischargeable under Bankruptcy Code. Debtor's role as principal of the company handling fund's investments placed him in a position of trust and confidence that heightened his duty of disclosure to fund. Debtor made fraudulent misrepresentations to fund's trustee and omitted a significant amount of information that was material to trustee's investment decisions on fund's behalf. Trustee justifiably relied on debtor's representations and omissions in making his investment decisions, and fund was harmed as a result. In re Perkins, 298 B.R. 778, 788, 789.

Conn.App.2003. Com. (j) cit. in sup. Purchaser of real property where a gas station had previously been located sued seller for, in part, fraudulent nondisclosure, seeking remediation and costs of removing environmental contamination on the property.

Affirming the trial court's grant of summary judgment for defendant, this court held, inter alia, that, despite defendant's failure to comply with the Hazardous Waste Transfer Act, defendant had no duty to disclose that the property was contaminated, since plaintiff assumed in the contract of sale the risk that the property might have environmental problems, and had the opportunity to investigate possible environmental hazards before transfer but chose not to make relevant inquiries. Visconti v. Petter Partners Ltd. Partnership, 77 Conn.App. 675, 686, 825 A.2d 210, 216.

Mass.App.2003. Cit. in sup. Shareholders sued corporation, its two founders, and others, claiming that defendants engaged in a scheme to defraud them by making misrepresentations and omissions on which plaintiffs relied to their detriment in buying and holding corporation's stock. The trial court granted summary judgment for defendants. Vacating in part and remanding, this court held, inter alia, that defendants' duty to disclose management problems arose when plaintiffs specifically inquired about the founders' departures and were given half-truths and misleading information, and that genuine issues of material fact existed as to the materiality of defendants' responses to plaintiffs' investment decisions and as to the reasonableness of plaintiffs' reliance on the responses. Stolzoff v. Waste Systems Intern., Inc., 58 Mass.App.Ct. 747, 763, 792 N.E.2d 1031, 1044.

N.M.App.2003. Cit. in sup., cit. in case cit. in disc., subsec. (2)(e) cit. and quot. in sup., com. (m) cit. and quot. in sup. Life-insurance policyholders sued insurer for damages, alleging that defendant failed adequately to disclose to them the additional cost of paying their premiums in installments. The trial court granted partial summary judgment for plaintiffs. Reversing in part and remanding, this court held, inter alia, that fact issues existed as to the materiality of the undisclosed information, since reasonable minds could differ as to whether a reasonable consumer in plaintiffs' position would find dollar-amount and annual-percentage-rate information significant in deciding how to act. Thus, additional relevant evidence had to be developed for the trial court to properly determine whether a duty to disclose existed as a matter of law. Azar v. Prudential Ins. Co. of America, 133 N.M. 669, 68 P.3d 909, 923, 928, 930, 932.

N.M.App.2003. Cit. in sup., subsec. (2)(e) quot. and cit. in sup., Buyers of home that lacked permits required by state law sued sellers, electrical and mechanical subcontractor, and public utility, asserting claims for, among other things, rescission and negligent misrepresentation. Trial court granted defendants summary judgment. Affirming in part and remanding, this court held, inter alia, that buyers could not recover on negligent-nondisclosure claim where sellers' actions sounded in fraud, not negligence. McElhannon v. Ford, 134 N.M. 124, 73 P.3d 827, 831.

Wyo.2003. Cit. in disc., quot. in ftn. Property owners sued mortgage company for, inter alia, negligent misrepresentation and breach of express and implied contract to obtain home-construction loan. Trial court granted defendant summary judgment. This court affirmed, holding, inter alia, that plaintiffs' negligent-misrepresentation claim failed, because defendant's loan officer's alleged misrepresentations could all be characterized as statements of his opinion as to progress of the loan or statements as to his expectation that loan would be made. The court stated that negligent misrepresentation did not apply to misrepresentations of future intent or to statements of opinion. It distinguished negligent misrepresentation from the tort of nondisclosure, which plaintiffs did not allege in their complaint. Birt v. Wells Fargo Home Mortg., Inc., 2003 WY 102, 75 P.3d 640, 656, 657.

Wyo.2003. Cit. in disc., cit. in case quot. in disc. Purchasers of real property sued seller's real-estate broker, alleging that defendant failed to disclose that sole access to the property was by way of a restricted easement that prohibited commercial use. On remand, the trial court granted summary judgment for defendant, holding that plaintiffs' claim was time-barred. Affirming, this court held that, despite the lack of any contractual or fiduciary duty between the parties, plaintiffs asserted a professional-negligence claim for breach of the statutory duty of care owed by real-estate professionals to nonclient buyers, rather than a negligent-misrepresentation claim, and thus the two-year statute of limitations applied. Hulse v. BHJ, Inc., 2003 WY 75, 71 P.3d 262, 265, 267.

Wyo.2003. Cit. and quot. in disc., cit. but not fol., subsec. (2)(a) cit. and quot. in disc. and cit. but dist., subsec. (2)(e) cit. in disc. and cit. but dist. After borrowers defaulted on a Small Business Administration loan, holder of promissory note sued guarantor for the amount of the loan plus interest, costs, and attorney's fees. Affirming the trial court's grant of summary judgment for plaintiff, this court held, inter alia, that, since no fiduciary or other similar relation of trust and confidence existed between defendant and creditor bank, bank had no duty to disclose to defendant that cash-flow projections prepared by bank revealed that business income would actually pay only loan amounts, leaving borrowers with less than half of their accustomed income. The court declined to adopt Restatement Second of Torts § 551. Lee v. LPP Mortgage Ltd., 2003 WY 92, 74 P.3d 152, 159-161, 163, 164.

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