JURY INSTRUCTIONS UNDER SECURITIES LAWS

INTRODUCTION

The following jury instructions have been compiled from cases where the instruction itself withstood appellate scrutiny. To the extent the Enforcement Publications Committee believed necessary to create a complete publication, additional instructions have been included based on the Uniform Act and case law.

The committee has included commentary to assist the reader in understanding the particular application of the instruction, however this is not recommended as a substitute for a full review of the case or sources cited. The committee also attempted to make the instructions neutral as to jurisdiction, thus there are blanks in some drafts for prosecutors to complete.

The committee owes thanks to Mark Griffin, Utah, who spearheaded this project, with assistance from law clerks, Christopher Laurent and Kelly Noor (now both in private practice).

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Table of Contents

Jurisdiction

As to each and every count of the indictment, if you decide there is sufficient proof beyond a reasonable doubt to convince you that the offense charged was committed, you must then decide beyond a reasonable doubt whether the offense charged was committed in this state or in another state. If you do not find beyond a reasonable doubt that the offense was committed in this state, you must find the defendants not guilty of that particular offense.

People v. Mason, 7 Cal. Rptr. 627, 660 n.25, 184 Cal. App.2d 317 (Cal. App. 2d Dist. 1960).

Statute of Limitations

Members of the jury, the Court instructs you that this suit was not brought within two years from April 27, 1959, and that the Statute of Limitations will bar all recoveries against the defendant unless you find from a preponderance of the evidence in this cause, that the extension agreement was in fact made at a point of time so close to the original transaction or in such a manner as to constitute one continuous transaction. Unless one of those two is your finding, you will find for the defendant. This is the main issue of fact you are to determine, the time of the making of the sale. If you find the sale was complete as of April 27, 1959, then this suit was not brought within the two year period. But, if you find there was a continuing transaction until the extension agreement of June 15, then this suit was brought within the two year period, as the suit was actually filed May 18, 1961.

Hughes v. Bie, 183 So.2d 281, 283 (Fla. Dist. Ct. App. 1966).

Comment

This instruction is from a civil case. Statutes of limitations may vary in length from state to state.

Security Defined

> The term "security" means any note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit sharing agreement; collateral trust certificate; preorganization certificate or subscription; transferable share; investment contract; voting trust certificate; certificate of deposit for a security; oil, gas or other mineral lease, right or royalty, or any interest therein; or, in general, any interest or instrument known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, guarantee of, or warrant or right to subscribe to or purchase any of the foregoing.

Ascher v. Commonwealth, 408 S.E.2d 906, 916 (Va. Ct. App.*), cert. denied*, 113 S. Ct. 190 (1991).

Comment

The definition from the Virginia Code is similar, although not identical to, the Uniform Securities Act.

Investment Contract

> An "investment contract" means a contract where an individual invests his or her money . . . in an undertaking or venture of two or more people or entities . . . with an expectation of profit . . . based primarily on the efforts of others. An "investment" is the use of money to make more money.

State v. Danek, 878 P.2d 326, 328 (N.M. 1994).

Comment

See *S E C v. W. J. Howey Co*., 328 U.S. 293 (1946) and *SEC v. Glenn W. Turner Enterprises, Inc.*, 474 F.2d 476 (9th Cir. 1973) for the historical development of "investment contract." In addition, the use of the words "undertaking or venture…." is more commonly seen in case law as "common enterprise", for which a substantial body of interpretation is available (see NASAA Enforcement Manual at 3-11).

Common Enterprise

> You are instructed that under the investment contract definition, a "common enterprise" is defined as an enterprise in which the fortunes of the investor are interwoven with and dependent upon the efforts and success of those offering or selling the investment or of third parties.

SEC v. Glenn W. Turner Enterprises, Inc., 474 F.2d 476 (9th Cir. 1973).

Common Enterprise (cont.)

Comment

A "common enterprise" as required to meet the definition of an "investment contract" security under *SEC v. W. J. Howey Co*., 328 U.S. 293 (1946), is one that is common because it either is shared among a group of investors, or is common to an investor and a promoter who share the goals or economic risks associated with the venture. Courts and commentators generally refer to two principal forms of the common enterprise element in *Howey*: "horizontal commonality" and "vertical commonality." Federal circuits are split as to which form of common enterprise satisfies the commonality requirement; most state have adopted one or both tests.

Horizontal commonality requires that there be two or more investors who join in seeking a common goal, and is usually found where there is a pooling of investors' interests into a common fund used to finance the venture. It has been held to require (1) the pooling of assets, (2) the sharing of profits, and (3) the sharing of losses. Horizontal commonality generally is sufficient to meet the common enterprise requirement.

Vertical commonality only requires a single investor joining in the enterprise with the promoter or a third party; it is broken into "broad-form" or "narrow-form" depending upon whether the promoter shares the risks. Broad-form vertical common enterprise, probably the test most frequently used by both the state and federal courts, is found if two people, an investor and the promoter of the enterprise, join together to accomplish a common undertaking. The most widely-cited formulation of this test is that: "the fortunes of the investor are interwoven with and dependent upon the efforts and success of those seeking the investment or a third party." *SEC v. Glenn W. Turner Enterprises, Inc*., 474 F.2d 476, 482 n.7 (9th Cir. 1973). The broad-form test does not require any sharing of the profits or risks of that enterprise. Under the more restrictive narrow-form test of vertical commonality, the investor and promoter must both share in the profits or economic risks of the investment goal.

Horizontal commonality generally is easily shown; investment schemes typically involve more than one investor, and all investor funds are pooled in a single enterprise. In addition, in many schemes the promoter or third party joins with investors. Consequently, broad vertical commonality will usually be present in any case where horizontal commonality is found.

Investment Defined

> You are instructed that under the "investment contract" definition, "investment of money or money's worth" means only that the investor must commit his assets to the enterprise in such a manner as to subject himself to a financial loss.

Hector v. Wiens, 533 F.2d 429 (9th Cir. 1976).
Cordas v. Speciality Restaurants, Inc., 470 F.Supp. 780 (D. Oregon 1979).

Comment

This instruction was not at issue, but is supported by the cases cited.

Risk Capital Test

> The term Security includes an investment contract. An investment contract is a contract or transaction in which a person entrusts money or other capital to another, with the expectation of deriving a profit, income or some financial benefit from a business enterprise, the failure or success of which is dependent upon the managerial efforts of the other person.

People v. Smith, 263 Cal. Rptr. 684, 686 (Cal. Ct. App. 1989), *reh'g denied*.

Comment

The "risk capital test" is an alternative to the test articulated in *S.E.C. v. W.J. Howey Co*., 328 U.S. 293 (1946). It is useful where the benefit to the investor is nonmonetary. The "risk capital test" defines investment contract as: (1) any investment of money or money's worth, (2) in the risk capital of a venture, (3) with the expectation of some benefit to the investor. *Silver Hills Country Club v. Sobieski*, 361 P.2d 906 (Cal. 1961). *See also Hawaii v. Hawaii Market Center*, 485 P.2d 105 (Haw. 1971) (combining the *Howey* and risk capital tests).

Some states have formally adopted the risk capital or *Hawaii Market* test as an alternative definition of investment contract. *See, e.g*., Alaska Stat. § 45.55.130(12) (1980); Ga. Code Ann. § 10-5-2(16) (Michie 1981); Mich. Comp. Laws §451.801(1) (1979); N.D. Cent. Code § 10-04-02(12) (1985); Okla. Stat. Tit. 71, § 2(20)(P) (1981); Wash. Rev. Code § 21.02.005(12) (19xx) [all adopting by statute]. Other states have adopted this test by rule, order, or policy statement.

Definition of a Security – Notes

> Security means any note as further defined in this instruction. Not all promissory notes are securities. The term "security" is meant to include, most generally, investment instruments marketed under a plan in which the seller of such instruments seeks the use of money of others on the promise of profits. Thus, where a promissory note is acquired by a merchant in the context of a sale of consumer goods or services, it is not a security. A promissory note is a security, however, where the factual circumstances surrounding its acquisition establish:
>
> 1. That the purchase of the note involved a risk of loss to the investor;
>
> 2. That the note was acquired as an investment with the expectation of profit;
>
> 3. That there exists a common enterprise wherein the investor depends for his profits on the success of a party other than the borrower in performing his part of the venture; and
>
> 4. Wherein the efforts of the third party (one other than the borrower or the investor) are undeniably significant ones, such as essential managerial efforts that affect the failure or success of the enterprise.

State v. Philips, 725 P.2d 627, 629 (Wash. Ct. App. 1986), *aff'd en banc*, 741 P.2d 24 (1987).

Definition of a Security – Notes (cont.)

Comment

This instruction appears to follow an investment contract analysis to define "note". Many jurisdictions would not utilize this format.

For an additional discussion on promissory notes as securities, see *Reves v. Ernst & Young*, 494 U.S. 56 (1990).

Non-Exempt Notes

> If you find that the defendant intended to renew the notes issued by him rather than to pay them upon maturity and that he did renew several notes for additional years in accordance with his intention, then you may conclude that the notes had a maturity exceeding one year, even though the notes recited that they were payable one year after the date of issue.

State v. Goetz, 312 N.W.2d 1, 13 (N.D. 1981), *cert. denied,* 455 U.S. 924 (1982).

Comment

The following definition of an exempt note was included in a footnote to the case:

Any note, draft, bill of exchange, or banker's acceptance which arises out of a current transaction or the proceeds of which have been or are to be used in a current transaction, is not the subject of a public offering, has at the time of issuance a definite maturity (after all days of grace, if any) of not exceeding one year, payable in cash only, and is not convertible into and does not carry an option or right to receive payment or any bonus in any other security.

Cf. Reves v. Ernst & Young, 494 U.S. 56 (1990).

Joint Venture

> You are instructed that an interest in a "Joint Venture" is within the definition of a security if the arrangement meets the basic test for determining that it is an investment contract.
>
> If the person making the investment, called the joint venturer, invested money or money's worth in a common enterprise with the expectation of a benefit and took little or no part in the management of the enterprise, the interest held by the joint venturer is a "security" under [state] law, even though it is called a "joint venture".

Williamson v. Tucker, 645 F.2d 404 (5th Cir. 1981).
McGill v. American Land & Exploration Co., 776 F.2d 923 (10th Cir. 1985).

Joint Venture (cont.)

Comment

This instruction was not at issue, but is supported by the cases cited.

Limited Partnership

A limited partnership interest generally is a security if it involves investment in a common enterprise with profits to come solely from the efforts of others.

SEC v. Murphy, 626 F.2d 633 (9th Cir. 1980).
SEC v. W.J. Howey Co., 328 U.S. 293, 301 (1946).

Comment

Most states rely on an investment contract analysis to determine whether or not a limited partnership is a security. These cases support that analysis, and the instruction itself was not at issue.

Evidence of Indebtedness Defined

The term "evidence of indebtedness" is defined under the _____ Securities Act as "all contractual obligations to pay in the future for consideration presently received."

Thomas v. State, 919 S.W.2d 427, 428-29 n.5 (Tex. Crim. App. 1996) (en banc).

Security: a Question of Fact

Whether or not the limited partnership interests here were securities was a question of fact for the jury, *see United States v. Johnson*, 718 F.2d 1317, 1323 (5th Cir. 1983), and it was error for the judge to decide this question as a matter of law.

State v. Williams, 581 A.2d 78, 80 (N.H. 1990).

Comment

In some states, the law may be to the contrary. Whether an investment is a security may be a question of law, or a mixed question of fact and law.

Substance Over Form

The characterization of a particular investment as a "security" within the purview of the securities laws does not depend upon the form of the enterprise or the name given to the enterprise by an offeror or seller. The substance and economic reality of the transaction is to be considered by you in reaching a decision about whether one item sold or offered for sale is a security.

McCown v. Heidler, 527 F.2d 204 (10th Cir. 1975).
United Housing Foundation, Inc. v. Forman, 421 U.S. 827 (1975).
Vincent v. Moench, 473 F.2d 430 (10th Cir. 1973).
State ex rel. Day v. Petco Oil & Gas, Inc., 558 P.2d 1163 (Okla. 1977).

Comment

This instruction was not at issue, but is supported by the cases cited.

Offer or Sale Defined

"Sale" or "sell" includes every contract for sale of, contract to sell, or disposition of, a security or interest in a security for value. "Sale" or "sell" includes any exchange of securities and any change in the rights, preferences, privileges, or restrictions of or on outstanding securities. "Offer" or "offer to sell" includes every attempt or offer to dispose of, or solicitation of an offer to buy, a security or an interest in a security for value.

The fact that a person encourages a transaction that results in a sale does not necessarily make that person a seller.

People v. Corey, 41 Cal. Rptr.2d 540, 548 n.17 (Cal. Ct. App. 1995). *7547 Corp. v. Parker & Parsley Development Partners, LP*, 38 F.3d 211, 223 (5th Cir. 1994).

Sale of Unregistered Securities

To convict the defendant of the offense of Unlawful Sale of Unregistered Securities, the State must have proved beyond a reasonable doubt, each of the following elements:

The defendant:

(1) Offered or sold;

(2) A security;

(3) In this state; and

(4) Such security was not registered under the law, and such security or transaction was not exempted by the law.

Clarkson v. State, 486 N.E.2d 501, 507 (Ind. 1985).

Comment

The original instruction left out "in this state" as an element of proof. It has been added to this suggested instruction to complete the required elements. Also, in most states, the burden would not fall on the state to prove that no exemption existed.

Uniform Securities Act:

Section 414(c). An offer to sell or to buy is made in this state, whether or not either party is then present in this state, when the offer either originates from the state, or is directed by the offeror to this state and received at the place to which it is directed, or at any post office in this state in the case of a mailed offer.

Sale of Unregistered Securities (cont.)

Section 414(d). An offer to buy or to sell is accepted in this State when acceptance (1) is communicated to the offeror in this state, and (2) has not previously been communicated to the offeror, orally or in writing, outside this state; and acceptance is communicated to the offeror in this state, whether or not either party is then present in this state, when the offeree directs it to the offeror in this state reasonably believing the offeror to be in this state and it is received at the place to which it is directed.

See Burden of Proof, p. 58.

Unlawful Acts in Connection With the Sale of Security

Defendant is charged with the crime of Unlawful Acts in Connection with the Offer, Sale or Purchase of Securities.

To establish this charge, each of the following claims must be proved:

(1) that the defendant did one or more of the following:

(a) willfully and intentionally employed a device, scheme, or artifice to defraud _____; or

(b) willfully made an untrue statement of material fact, or omitted to state a material fact; or

(c) engaged in an act, practice, or course of business which would operate as a fraud upon _____;

(2) that the unlawful act occurred in connection with a sale of _____;

(3) that _____ was a security;

(4) that if the unlawful act was an omission to state a material fact, that the material fact was necessary in order to make other statements made to _____, in the light of the circumstances under which they were made, not misleading; and

(5) that the act occurred on or about _____, in _____.

State v. Ribandeneira, 817 P.2d 1105, 1114 (Kan. 1991).

Sale of a Security Without Qualification

> Section _____ makes it unlawful for any person to offer or sell a security in an issuer transaction without first having obtained a qualification of such security from the Commissioner of Corporations of the State of _____, unless such security is exempted. In order to prove the commission of such crime, each of the following elements must be proved: 1. That a security was offered or sold in this state; 2. That such conduct was willful; and 3. That at the time the security was offered or sold, such offer or sale had not been qualified with the Commissioner of the State of _____.

People v. Corey, 41 Cal. Rptr.2d 540, 548 (Cal. Ct. App. 1995).

Comment

The burden of proof for exemptions is on the defendant (see Burden of Proof). Thus, the jury does not receive an instruction on that element unless proposed by the defendant.

In most states, qualification means that the securities have been approved for a type of registration.

Public Solicitation

> The term "solicitation" is defined in Black's Law Dictionary, 4th Ed., as "Asking: enticing: urgent request: any action which the relation of the parties justifies in construing into a serious request." "Public solicitation" does not mean that the offer must be made to the whole world . . .. It is considered that a sale of securities is offered to the public when several people are asked if they will buy and are urged to buy such stock.

Koah v. State, 604 S.W.2d 156, 162 (Tex. Crim. App. 1980).

Issuer, Issuer Transaction Defined

> An "Issuer" is any person or corporation who issues or proposes to issue any security. An "Issuer Transaction" is a transaction done for the benefit of the issuer, and the consideration is paid directly to the issuer.

People v. Corey, 41 Cal. Rptr.2d 540, 548 n.18 (Cal. Ct. App. 1995).

Comment

> In most states, the consideration need not be paid directly to the issuer.

Non-Public Offering

You may consider four factors to determine the validity of an asserted non-public offering exemption. The factors are:

1. the number of offerees;

2. the sophistication of the offerees;

3. the size and manner of the offering; and

4. the relationship of the offerees to the issuer.

SEC v. Murphy, 626 F.2d 633, 644-645 (9th Cir. 1980).
Western Federal Corporation v. Erickson, 739 F.2d 1439, 1442 (9th Cir. 1984).

Comment

This instruction was not at issue, but is supported by the cases cited.

Integration

To decide whether the defendants' offer of securities was a nonpublic or a public offering, you must first determine whether the offerings were integrated ones. The doctrine of integration forbids issuers of securities from avoiding the requirements of the _____ Securities Act by dividing one large offering into smaller offerings which then purportedly meet the limitations on number of investors. Therefore, in considering the defendants' offers to investors, you must decide whether (a) the defendants made one or more integrated offering(s), in which case the number of offerees should be cumulated, or (b) whether defendants made separate offerings, in which case the number of offerees for each offering is limited to the investors in each single partnership.

In determining whether defendants made an integrated offering rather than separate offerings, there are five factors that you may consider:

1. Whether the offerings are part of a single plan of financing;

2. Whether the offerings involve issuance of the same class of securities;

3. Whether the offerings are made at or about the same time;

Integration (cont.)

4. Whether the same kind of consideration is to be received; and

5. Whether the offerings are made for the same general purposes.

SEC v. Murphy, 626 F.2d 633 (9th Cir. 1980).

Comment

This instruction was not at issue, but is supported by the case cited.

Disclosure

If an issuer is attempting to rely upon the non-public offering exemption to the registration provisions of securities law, information is deemed "available" to offerees only if it is in fact disclosed, or if the offerees have effective access to it. If an issuer relies on "access" rather than actual disclosure, the issuer must show that the offerees occupied a privileged position, relative to the issuer, that afforded them an opportunity for effective access to the information registration would otherwise provide. That is, there must be "a relationship based on factors such as employment, family, or economic bargaining power that enables the offeree effectively to obtain such information.

Western Federal Corporation v. Erickson, 739 F.2d 1439, 1443 (9th Cir. 1984).
Doran v. Petroleum Management Corp., 545 F.2d 893, 903, 906 (5th Cir. 1977).
McDaniel v. Compania Minera Mar de Cortes, 528 F.Supp. 152, 164 (D. Ariz. 1981).

Comment

This instruction was not at issue, but is supported by the cases cited. The standard is applied if the issuer has not followed the safe harbor provisions of Regulation D, in attempting to effect a non-public offering.

Information Required

> The non-public offering exemption has been held to be applicable only where offerees do not need the protection of securities laws. Lack of need of this protection exists only if all of the offerees have available the sort of information about the issuer that registration reveals. At a minimum, this includes accurate information concerning the use of investor funds, the benefits to be derived by the issuer, and relevant financial statements.

SEC v. Ralston Purina, 346 U.S. 119, 125 (1953).
SEC v. Murphy, 626 F.2d 633, 644, 647 (9th Cir. 1980).
Western Federal Corporation v. Erickson, 739 F.2d 1439, 1443 (9th Cir. 1984).
Koehler v. Pulvers, 614 F.Supp. 829, 842 (D.C. Cal. 1985).

Comment

This instruction was not at issue, but is supported by the cases cited. If the issuer is relying on Regulation D to effect a non-public offering, the requirement for information is the same as a registered offering would require. This standard does not vary if the issuer chooses not to rely on regulation D, as evidenced above.

Broker-Dealer Defined

Broker-dealer means any person engaged in the business of effecting transactions in securities

(a) for the account of others; or,

(b) for his own account.

Uniform Securities Act § 401(c)(1956).

Comment

Under § 401(c), the term broker-dealer does not include:

(1) an agent,

(2) an issuer,

(3) a bank savings institution or trust company, or

(4) a person who has no place of business in the particular state if

(A) he effects transactions in this state exclusively with or through

(i) the issuers of the securities involved in the transactions,

(ii) other broker-dealers, or

(iii) banks, savings institutions, trust companies, investment companies as defined in the Investment Company Act of 1940, pension or profit-sharing trusts, or other financial institutions or institutional buyers whether acting for themselves or as trustees, or

(B) during any period of twelve consecutive months he does not direct more than fifteen offers to sell or buy into this state in any manner to persons other than those specified in clause (A), whether or not the offeror or any of the offerees is then present in this state.

Duty Owed to Customer

A broker-dealer [or agent] owes a customer the following duties:

1. To recommend an investment only after studying it sufficiently to become informed as to its nature, price and financial prognosis.

2. To carry out the customer's orders promptly in a manner best suited to serve the customer's interests.

3. To inform the customer of the risks involved in purchasing or selling a particular security.

4. To refrain from self-dealing or refusing to disclose any personal interest the broker-dealer [agent] may have in a particular recommended security.

5. Not to misrepresent any fact material to the transaction.

6. To transact business only after receiving prior authorization from the customer.

Cody v. Edward D. Jones & Co., 502 N.W.2d 558, 563 (S.D. 1993).

Comment

This instruction is from a civil case. Although this instruction was deemed unnecessary because breach of fiduciary duty was not alleged in this case, it was found be a correct statement of the law. The instruction has been revised to include agents as well as broker-dealers.

Agent Defined

You are instructed that the term "agent," means any individual other than a broker-dealer who represents a broker-dealer or issuer in effecting or attempting to effect purchases or sales of securities.

State v. Tenney, 913 P.2d 750, 758 (Utah Ct. App. 1996).

Unlawfully Transacting Business as an Agent

To convict the defendant of the offense of Unlawfully Transacting Business as an Agent, the State must have proved beyond a reasonable doubt, each of the following elements:

The defendant:

(1) Transacted business in the State of _____;

(2) As an agent; and,

(3) In doing so, the defendant was not registered as required by [statute].

Clarkson v. State, 486 N.E.2d 501, 507 (Ind. 1985).

Customer Repudiation

You are instructed that, where the stockbroker or commodities broker fails to execute the customer's orders, or executes them improperly or at variance with instructions given, the customer may rescind his agreement or treat the transaction as a nullity, and the customer may recover back any money he has deposited with the broker, regardless of whether or not the customer has sustained a loss. You are further instructed that, if the customer elects to, and does, repudiate such a transaction, he is entitled to immunity from liability to the broker.

B. C. Christopher & Co. v. Danker, 244 N.W.2d 79, 82 (Neb. 1976).

Comment

This instruction is from a civil case. It was derived from 12 Am. Jur.2d Brokers, § 121 at 868.

The term "stockbroker" or "commodities broker" may be interchangeable with broker-dealer, for purposes of this instruction.

Principal Liability for Agent's Act

> Whatever a person is legally capable of doing himself can be done through another as agent. If the acts of an employee or other agent are willfully ordered or directed, or willfully authorized or consented to by the defendant, the law holds the defendant responsible for such acts as though he personally committed them.

State v. Markham, 697 P.2d 263, 271-72 (Wash. Ct. App. 1985).

Acting as an Agent

> You are not to consider for any purpose, testimony and evidence of transactions and conversations outside the presence of the defendant, unless you believe beyond a reasonable doubt, that at the time and place such transactions and conversations took place, that the said [witness] was then and there acting as the agent of the defendant.
>
> The term agent means one who acts for or in place of another by authority from the other. The mere declarations of an alleged agent, standing alone, with nothing more, are incompetent to establish either the existence of the alleged agency or the scope or extent of the alleged agent's authority.

Schneider v. State, 594 S.W.2d 415, 418-19 (Tex. Crim. App. 1980).

Ratification of Agent's Act

> A person may be bound by his agent's unauthorized act if the person later ratifies or accepts that act. Ratification occurs when the principal, knowing of the act, neglects promptly to disavow the allegedly unauthorized act or contract of his agent; and a failure to promptly repudiate the act or agreement would reasonably be expected to impose loss or injury upon the party who relied upon the agent.
>
> In deciding whether a principal has ratified his agent's act, whether or not the agent had original authority to act for the principal is immaterial. The principal ratifies the act when he accepts the benefits of the agent's action, fails to offer to return to the other party the benefits of the transaction, and fails to bring prompt legal action to nullify the transaction. Where a principal has knowledge of facts which would lead him to believe that his agent has exceeded his authority and the principal fails to investigate the situation, the principal cannot assert that lack of knowledge. Receipt of the benefits of the agent's act may be considered a ratification of the agent's act.

Paragano v. Gray, 870 P.2d 837, 841 (Or. Ct. App. 1994).

Comment

> This instruction is from a civil case.

Fiduciary Duty

You are instructed that in the state of _____ the relationship between a licensed broker-dealer or agent and its customers is a fiduciary relationship.

Where a confidential or fiduciary relationship exists, it is the duty of the person in whom the confidence is reposed to exercise the utmost good faith in the transaction, to make full and truthful disclosures of all material facts, and to refrain from abusing such confidence by obtaining any advantage to himself at the expense of the confiding party.

Cody v. Edward D. Jones & Co., 502 N.W.2d 558, 563 (S.D. 1993).

Comment

This instruction is from a civil case. The instruction has been revised to make it applicable to agents as well as broker-dealers.

Fiduciary Relationship

A fiduciary relationship is a relationship of trust and confidence in another. A person is a fiduciary when that person voluntarily assumes a relationship of personal confidence with another whereby another person reposes trust and confidence in the integrity and fidelity of that person.

Every person or entity who voluntarily assumes a relationship of personal confidence with another is a fiduciary not only as to the person who reposes such confidence, but also as to all persons over whose affairs that person, by such confidence obtains any control.
The relationship between broker and principal is fiduciary in nature and imposes on the broker the duty of acting in the highest good faith towards the principal.

Duffy v. Cavalier, 264 Cal. Rptr. 740, 753 n.11 (Cal. Ct. App. 1989).

Comment

This instruction is from a civil case.

Fiduciary Relationship

A fiduciary relationship, as that phrase is used in these instructions, exists when there has been a special confidence reposed in someone who, under the circumstances, is required to act in good faith and with due regard to the interests of the one imposing the confidence. A fiduciary relationship can arise when a person entrusts his business affairs to another person and reasonably relies on that person to manage his business affairs in his best interests.

Vogel v. A.G. Edwards & Sons, Inc., 801 S.W.2d 746, 751 (Mo. Ct. App. 1990).

Comment

This instruction is from a civil case.

Breach of Fiduciary Duty

In order for plaintiff . . . to recover from the defendants . . . on a claim of breach of fiduciary duty, you must find all of the following have been proved by a preponderance of the evidence:

1. One or more of defendants either failed to disclose, or misrepresented one or more material facts affecting the value of _____ stock owned by [plaintiff];

2. The undisclosed fact(s) were known to the defendant(s) by virtue of their positions as directors of _____ , but were not made known to plaintiff as a shareholder and were not otherwise matters of public knowledge;

3. Said undisclosed fact(s) were unknown to [plaintiff] at the time of the sale;

4. Said undisclosed fact(s) or misrepresentation was material;

5. One or more defendants' failure to disclose, or misrepresentation of material fact(s) caused the plaintiff to suffer damages.

Van Schaack Holdings v. Van Schaack, 867 P.2d 892, 899-900 (Colo. 1994).

Comment

This instruction is from a civil case.

Fraud Defined

Fraud is malfeasance, a positive act resulting from a willful intent to deceive. Fraud may consist of words, acts, or the suppression of material facts, with the intent to mislead or deceive. There has to be intent, and that intent has to be put into practice, either directly or through an agent.

If you find that the defendant, or those under his direction and control with his consent or knowledge, in furtherance of a preconceived idea or plan formulated to dispose of personal stock, used methods, wherein the use of misrepresentations or failure to disclose material facts relative to such stock were resorted to in order to effect such sales, this fact may be considered by you in determining the guilt or innocence of the defendant.

If you find that the defendant knowingly participated in or accepted an option to buy shares of stock or a subscription to purchase shares of stock with no obligation on him to pay for such stock, this fact may be considered by you in determining whether or not a scheme was used to perpetrate a fraud on creditors and such other stockholders of the corporation in the sale of stock of the company.

State v. Homewood, 128 S.E.2d 98, 106-7 (S.C. 1962).

Comment

Several jurisdictions would not require the level of intent set forth in this instruction, but would apply a strict liability standard to a fraud charge.

Fraud, Deceit, and Willful Defined

The third prohibited act set out under the statute, to engage in any act, practice, or course of business that operates or would operate as a fraud or deceit on any person, sets out the words "fraud" or "deceit." I charge you that a fraud is a false representation of a material fact, whether by words or by conduct, by false or misleading allegations or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury. Fraud is misrepresentation of a material fact made willfully to deceive, or recklessly without knowledge, where the misrepresented fact is acted on by the opposite party; a misrepresentation made by mistake and innocently, and acted on by the opposite party, would constitute legal fraud.

The word "deceit" means a fraudulent and cheating misrepresentation, artifice, or device, used by one or more persons to deceive or trick another who is ignorant of the true facts, to the prejudice and damage of the party imposed upon. A deceit is either the suggestion, as a fact, of that which is not true by one who does not believe it to be true, or an assertion, as a fact, of that which is not true by one who has no reasonable ground for believing it to be true; or the suppression of a fact by one who is bound to disclose it, or who gives information of other facts that are likely to mislead for want of communication of that fact. Deceit could also be a promise made without any intention of performing it.

Fraud, Deceit, and Willful Defined (Cont.)

> The elements of deceit are the willful misrepresentation of a material fact, made to induce another to act, and upon which he does act to his injury. Mere concealment of such a fact, unless done in such a manner as to deceive and mislead, would not be deceit. In all cases of deceit, knowledge of a falsehood constitutes an essential element. A fraudulent or reckless representation of facts as true, which the party may not know to be false, if intended to deceive is equivalent to knowledge of falsehood.
>
> . . .
>
> The penalty section that I have just read to you sets out that the violation must be willful. I charge you that willful means proceeding from a conscious motion of the will, or voluntary. Willful means intending the result that actually comes to pass. Willful means designed, and willful means intentionally as opposed to accidentally or involuntarily. A willful act has been defined as being one done intentionally, knowingly and purposely, without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, heedlessly, or inadvertently.
>
> The definition of "willful" has the word "intentional." I charge you that what "intend" means is the design or resolve or determination with which a person acts. Intent, being a state of mind, is rarely susceptible of direct proof, but must ordinarily be inferred from the facts.
>
> I charge you that willfulness could exist where an ordinary person under similar circumstances should have known or could have known by the exercise of reasonable diligence that the statements were false, or willfulness could exist where a defendant has demonstrated a reckless disregard or an indifference to representing the truth or did not use the means at hand to determine the true facts.

Van Antwerp v. State, 358 So.2d 782, 785-86 (Ala. Crim. App.), *cert. denied,* 358 So.2d 791 (Ala. 1978), *overruled in part on other grounds*, *Ex Parte Marek*, 556 So.2d 375, 379 (Ala.), *reversed and remanded,* 556 So.2d 383 (Ala. Crim. App. 1989).

Comment

The reverse and remand did not relate to jury instructions.

An issue on appeal was whether the trial court erred in instructing that innocent mistake could support a criminal conviction for fraud. The appeals court recognized that, for the protection of society, a statute could forbid an act and make its commission criminal without regard to the intent or knowledge of the doer. 358 So.2d 782, 785. The court continued, however, that under the language of the antifraud provision of the state Securities Act, the state had the burden of showing that the conduct was willful and unlawful. *Id.* Thus the statute required proof of the guilty knowledge or mens rea, and excluded the concept of criminal liability for a misrepresentation made innocently and by mistake in a prosecution for securities fraud. Reviewing the entire charge, the court concluded that the jury was properly instructed that they could convict only if they found that the fraud was willful. *Id.* at 786.

Fraud in the Offer or Sale of a Security

To convict the defendant of the offense of Fraud in the Offer or Sale of a Security, the State must have proved, beyond a reasonable doubt, each of the following elements:

The defendant did:

(1) In connection with the offer, sale or purchase of any security, directly or indirectly:
(a) employed a device, scheme or artifice to defraud; or,
(b) made an untrue statement or statements of material fact or omitted to state a material fact necessary in order to make the statements made in light of the circumstances under which they were made, not misleading; or,
(c) engaged in any act, practice or course of business which operated or would operate as a fraud or deceit upon the alleged victims.

Clarkson v. State, 486 N.E.2d 501, 507 (Ind. 1985).

Comment

The instruction in this case referred only to a sale of a security. This instruction has been revised to be used for offers as well as sales.

Fraud in Connection With an Offer, Sale or Purchase of a Security

For you to find the defendants guilty of fraudulent practices with regard to the sale and offer to sell securities, the State must prove to your satisfaction beyond a reasonable doubt each of the following elements:

1. The defendants, directly or indirectly, intentionally and willfully:
   a. employed a device, scheme or artifice to defraud; or,
   b. made a false statement of material fact, or omitted to state a material fact necessary in order to make the statement made true in the light of circumstances under which they were made; or,
   c. engaged in an act, practice or course of business which would operate or would have operated as a fraud or deceit upon purchasers or offerees.

2. This conduct occurred in connection with an offer, sale or purchase of a security, namely _____;

3. This happened in [state], between the dates of _____ and _____.

State v. Shade, 726 P.2d 864, 871 (N.M. Ct. App. 1986), *overruled on other grounds*, *State v. Olguin*, 879 P.2d 92, 99 (N.M. Ct. App. 1994), *modified*, 906 P.2d 731 (N.M. 1995).

Omission of a Material Fact

> Your verdict must be for the plaintiffs if you believe that in connection with the sale of securities to plaintiff, defendant, directly or indirectly, omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.

Bayne v. Jenkins, 593 S.W.2d 519, 531 (Mo. 1980).

Comment

An omitted fact is material if there is substantial likelihood that a reasonable investor would consider it important in deciding whether to invest. *TSC Industries v. Northway*, 426 U.S. 438 (1976).

Untrue Statements of a Material Fact

> Your verdict must be for the plaintiff if you believe that defendant, in connection with the sale of securities to defendant, directly or indirectly made an untrue statement of a material fact.

Bayne v. Jenkins, 593 S.W.2d 519, 531 (Mo. 1980).

Comment

An "active" misrepresentation need not be shown. There is a misrepresentation whenever the combination of what is said, what is half-said and what is not said results in misrepresenting the nature of the transaction. *State v. Haas*, 675 P.2d 673, 684 (Ariz. 1983).

Material Misstatement or Omission

(a) Any person who:

(1) Sells or offers to sell a security in violation of any provision of this article or of any rule or order imposed under this article, or any condition imposed under this article; or

(2) Offers or sells a security by means of any untrue statement of material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; the buyer not knowing of the untruth or omission, and who does not sustain the burden of proof that he did not know and in the exercise of reasonable care could not have known of the untruth or omission, is liable to the person buying the security from him . . .

Grayco Resources, Inc. v. Poole, 500 So.2d 1030, 1034 n.1 (Ala. 1986).

Comment

This instruction is from a civil case. The full instruction includes language on damages.

False Statement Defined

False means "not true, erroneous, incorrect." A written statement is made false not only by reason of what it stated but also by reason of what it omitted to state, or by what is concealed or implied.

State v. Woodington, 142 N.W.2d 810, 823 (Wis.), *reh'g denied*, 143 N.W.2d 153, *cert. denied*, 386 U.S. 9 (1966).
State v. Haas, 675 P.2d 673 (Ariz. 1983).

Untrue Statement

. . . the term "untrue statement" as used herein means a statement of fact which is not in fact true. This term may also include statements of judgment or opinion if the same are intended to be accepted as statements of fact by the person making the statement, and the judgment or opinion is not honestly believed to be true by the maker and is made by the maker for the purpose of deception and is accepted by the person to whom it is communicated as fact.

Bierschwale v. Oakes, 497 S.W.2d 506, 514 (Tex. Ct. App. 1973), *rev'd on other grounds*, *Meadows v. Bierschwale*, 516 S.W.2d 125 (Tex. 1974).

Comment

This instruction is from a civil case.

Materiality Defined

> A fact is material if a reasonable shareholder under the circumstances would attach importance to it in determining whether or not to sell shares of stock and in determining the price at which to sell those shares.

Van Schaack Holdings, Ltd. v. Van Schaack, 867 P.2d 892, 900 n.8 (Colo. 1994).
TSC v. Northway, 426 U.S. 438 (1976).

Comment

This instruction is from a civil case. As an alternative definition of materiality, see *Basic Inc. v. Levinson*, 485 U.S. 224, 231-232 (1988), where the court stated: "[A fact is material] if its disclosure would change the total mix of facts available and there is substantial likelihood that a reasonable shareholder would consider the facts important to her investment decision." *See also United States v. Mayberry*, 913 F.2d 719, 723 (9th Cir. 1990) ("A representation or omission is material if it has a propensity or capacity to influence or affect another person's decision").

Materiality Defined

> If you find beyond a reasonable doubt, that this balance sheet was submitted by the defendants for the purpose of obtaining permission to issue stock of the corporation to the public, then the cash item must be found by you to be material to the question of whether or not permission to issue stock should be given by the Department of Securities, or to the question of whether or not a prospective purchaser should purchase such stock.
>
> In order for the statement to be material, it must have some weight and reference to the determination of either of those two questions [permission to issue and prospective purchase]. If the cash item on the balance sheet was relevant to the question of whether or not the Department of Securities would allow the corporation to issue stock, then it is a material statement. If the cash item was relevant to the issue of whether or not a purchaser would purchase such stock, then it is a material statement.
>
> The test of materiality is whether a false or misleading statement could influence the Department of Securities or a prospective purchaser, not whether it does in fact do so. The degree of materiality is unimportant.

State v. Woodington, 142 N.W.2d 810, 823 (Wis.), *reh'g denied*, 143 N.W.2d 153, *cert. denied*, 386 U.S. 9 (1966).

Materiality Defined

> Your determination of whether there was a misstatement of a material fact or an omission of a material fact should not depend on whether plaintiffs are gullible buyers or sophisticated investors. The only issue is whether a reasonable investor would consider the statement of fact or the omission important in making his investment decision.

TSC Industries v. Northway, 426 U.S. 438 (1976).

Comment

This instruction was not at issue, but is supported by the case cited.

Plaintiff's Burden of Proof

> The plaintiff has the burden of proving each of the following propositions:
>
> First, that the defendant violated one or more of the legal duties owed by him to the plaintiff, which duties are described in these instructions;
>
> Second, that plaintiff suffered damages;
>
> Third, that the defendant's violation of one or more of the described legal duties caused the plaintiff's damages.
>
> If you find from your consideration of all the evidence that each of these propositions has been proved, your verdict should be for the plaintiff. On the other hand, if any of these propositions has not been proved, your verdict should be for the defendant.

Shermer v. Baker, 472 P.2d 589, 593 nn.4-5 (Wash. 1970).

Comment

This instruction is from a civil case. Note that this is a private lawsuit where duties, damages and causation are elements. The state may not be required to prove these elements. The defendant in this case owed the plaintiff the legal duty to obey all provisions of this statute.

Exemptions

> The burden of proving an exemption is upon the person claiming it. In this case, if the defendant claims an exemption, then he has the burden of proving that exemption. The effect is to shift the burden of going forward with evidence to the defendant. It does not, however, remove from the state the burden of establishing every element of the offense by proof beyond a reasonable doubt.

People v. Feno, 201 Cal. Rptr. 513, 518 (Cal. Ct. App. 1984).

Comment

See also Kahn v. State, 493 N.E.2d 790, 798 (Ind. Ct. App. 1986).
State v. Kershner, 801 P.2d 68 (Ka. 1990).
State v. Tober, 841 P.2d 206, 209 (Ariz. 1992).

Circumstantial Evidence

The state relies (in part) for a conviction upon circumstantial evidence. In order to warrant conviction of a crime upon circumstantial evidence, each fact necessary to prove the guilt of the defendant must be established by the evidence beyond a reasonable doubt. All the facts necessary to such proof must be consistent with each other and with the conclusion of guilt the state seeks to establish. All of the facts and circumstances, taken together, must be inconsistent with any reasonable theory or conclusion of the defendant's innocence. All of the facts and circumstances taken together, must establish to your satisfaction the guilt of the defendant beyond a reasonable doubt.

Comment

Oklahoma Uniform Jury Instruction (OUJI-CR 804) (1981).

Knowledge Defined

> Knowledge may be inferred where the lack of knowledge consists of ignorance of facts which any ordinary person under similar circumstances should have known.
>
> If you find, beyond a reasonable doubt, that defendant, or both defendants, were actively engaged in the management and domination of the affairs of the corporation, then either or both of them, as you so find, are chargeable with knowledge of its financial condition.

State v. Woodington, 142 N.W.2d 810, 823 (Wis.), *reh'g denied*, 143 N.W.2d 153, *cert. denied*, 386 U.S. 9 (1966).

Comment

The court held in *U.S. v. Dockter*, 58 F.3d 1284, 1286 (8th Cir. 1995) that lack of knowledge was not limited to ignorance of facts.

"An act is done knowingly if the defendant is aware of the act and does not act [or fails to act] through ignorance, mistake or accident. The government is not required to prove that the defendant knew that his/her acts or omissions were unlawful. You may consider evidence of the defendant's words, acts or omissions along with other evidence, in deciding whether the defendant acted knowingly."

Actual Knowledge

> Knowledge of the actual falsity of any particular representation made to promote the scheme is not required to convict. Provided the intent is to deceive, it is immaterial whether the individual knew the representation was false or simply did not care and was indifferent to the truth.

State v. Haas, 675 P.2d 673 (Ariz. 1983).

Comment

This instruction was not at issue, but is supported by the case cited.

Willfully Defined

> Willfully . . . means knowingly, as distinguished from accidentally or involuntarily, and bears on the intent required. All that is required is proof beyond a reasonable doubt that the defendant intended to commit the acts with which he is charged, that is, that he was aware of what he was doing. Proof is not required that the defendant acted with evil motive or with a specific intent that he knew that his conduct violated the law.

State v. Fries, 337 N.W.2d 398, 404 (Neb. 1983).

> You are instructed that a person engages in conduct intentionally or with intent or willfully, with respect to the nature of his conduct or to the result of his conduct, when it is his conscious desire to engage in the conduct or cause the result.

State v. Larsen, 828 P.2d 487, 495 (Utah Ct. App.), *aff'd*., 865 P.2d 1355 (1992).

Willfully Defined

> The word 'willfully' denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental.
>
> In this connection you are instructed that one is presumed to have intended the natural and probable consequences of his voluntary acts.

State v. Hodge, 460 P.2d 596, 604 (Kan. 1969).

> A 'willfull' act or omission may be described as an intentional act or omission to perform an act in that the person was aware of what he was doing or failing to do. Proof of evil motive, intent to violate the law, or knowledge that the law was being violated is not required.

State v. Dumke, 901 S.W.2d 100, 101 (Mo. Ct. App. 1995).

Evidence of Similar Acts

Evidence of other offenses or acts allegedly similar to that charged is relevant and admissible to show a common scheme or plan or to show particular criminal intent and knowledge on the part of the accused, but not to prove the offense charged. You are not to consider it except for the purpose of showing guilty knowledge and intent.

Kahn v. State, 493 N.E.2d 790, 798 (Ind. Ct. App. 1986).

Strict Liability

The crime of sale of unregistered securities is a strict liability offense. This crime does not require proof of a specific criminal intent, an evil motive, or knowledge that the law was being violated in order to find a criminal violation. If the evidence shows that the defendants committed any of these crimes, it is no defense that they did not know that their actions were unlawful.

State v. Burrow, 474 P.2d 849 (Ariz. App. 1970).

Comment

This instruction was not at issue, but is supported by the case cited. Several states apply strict liability to securities violations, while others require a level of intent.

Conspiracy Defined

A conspiracy is an agreement entered into between two or more persons with the specific intent to agree to commit the crime of _____ [[or] _____] and with the further specific intent to commit that crime [[or] _____], followed by an overt act committed in this state by one [or more] of the parties for the purpose of accomplishing the object of the agreement. Conspiracy is a crime.

In order to find a defendant guilty of conspiracy, in addition to proof of the unlawful agreement and specific intent, there must be proof of the commission of at least one of the acts alleged in the _____ [information] [indictment] to be [an] overt act[s] and that the act committed was an overt act. It is not necessary to the guilt of any particular defendant that defendant personally committed the overt act [, if [he] [she] was one of the conspirators when the alleged overt act was committed].

Cal. Jury Instr. – Crim. 6.10 (6th ed. 1996).

Conspiracy - Elements in General

The defendant has been charged with the crime of conspiracy to offer or sell a security with the intent to defraud the purchaser.

The Commonwealth [State] must prove beyond a reasonable doubt each of the following elements of the crime:

(1) that the defendant entered into an agreement with one or more other persons; and

(2) that the agreement between the defendant and at least one other person was that they unlawfully offer or sell a security with the intent to defraud the purchaser of such security; and

(3) that such agreement continued during some period between _____ and _____; and

(4) that the agreement was made, in whole or in part, or an act in the furtherance of this agreement took place, in whole or in part, in [State].

If you find that the Commonwealth [State] has failed to prove beyond a reasonable doubt any one or more of the elements of the offense then you shall find the defendant not guilty.

Conspiracy - Elements in General (cont.)

If you find that the Commonwealth [State] has established beyond a reasonable doubt that the defendant was a member of a conspiracy, the defendant is responsible for the acts of the other members of that conspiracy that are committed in the furtherance of the conspiracy, even if such acts were committed without the defendant's direct knowledge. A conspiracy cannot exist unless criminal intent is shared by the minds of at least two people.

Ascher v. Commonwealth, 408 S.E.2d 906, 920 n.8 (Va. Ct. App. 1991).

Comment

The level of intent in this instruction may not be applicable to all jurisdictions.

Aiding and Abetting – Elements in General

Before you can find defendant A guilty of the crime of Unlawful Sale of Securities, you must find from the evidence beyond a reasonable doubt all of the following elements:

1. That defendant B, in the county of _____, State of _____, on or about between [date] and [date], then and there being, did then and there willfully and unlawfully, either

(a) Employ any device, scheme or artifice to defraud, or

(b) Make any untrue statement of material fact or omit to state a material fact necessary in order to make the statement made, in light of the circumstances under which it was made not misleading, or

(c) Engage in any act, practice, or course of business which operated or would operate as a fraud or deceit upon any person;

2. That said act or acts were done in connection with the offer or sale of securities to [victim];

3. That defendant A, in the county of _____, State of _____, on or about between [date] and [date], then and there being, did then and there, willfully and unlawfully aid, abet, counsel and encourage defendant B in the commission of the crime of Unlawful Sale of Securities as aforesaid.

If the state has failed to establish by the evidence in this case, beyond a reasonable doubt, any one of the foregoing elements, then you must acquit defendant A of the crime of Unlawful Sale of Securities, as charged in count B of the information.

On the other hand, if the state has established by the evidence beyond a reasonable doubt all of the foregoing elements, it will be your duty to find defendant A guilty of the crime of Unlawful Sale of Securities.

State v. Cox, 566 P.2d 935, 938 n.3 (Wash. Ct. App. 1977), *cert. denied*, 439 U.S. 823 (1978).

Entrapment

> The Court instructs the jury that the law does not tolerate a person, particularly a law enforcement officer, generating in the mind of a person who is innocent of any criminal purpose, the original intent to commit a crime, thus entrapping such person into the commission of a crime which he would not have committed, or even contemplated but for such inducement; and where a crime is committed as a consequence of such entrapment, no conviction may be had of the person so entrapped as his acts do not constitute a crime.
>
> If the intent to commit the crime did not originate with the defendant and he was not carrying out his own criminal purpose, but the crime was suggested by another acting with the purpose of entrapping and causing the arrest of defendant, then the defendant is not criminally liable for the acts so committed.

People v. Mills, 328 P.2d 1049, 1058 n.5 (Cal. Ct. App. 1958).

Theft by False Pretenses

The crime of theft by false pretenses requires proof of the following things:

1. That the defendant knowingly and intentionally made a false statement to another person; and

2. That the statement concerned a past or present fact, rather than an opinion or promise to be performed in the future; and

3. That the statement was made before the other person parted with his or her money in reliance on the statement; and

4. That defendant intended to defraud the other person.

State v. Agnew, 647 P.2d 1165, 1172 (Ariz. Ct. App. 1982).

Comment

This instruction was found to be clearly erroneous because it omitted the necessary element that the fraud was accomplished in that the victim gave his money to the defendant. The court held this to be harmless, however, because the facts of the case made clear that the victim's money had been given to the defendant.

Criminal Liability for Conduct of Others Defined

> You are instructed that under the laws of the State of _____ a person is criminally liable for conduct constituting an offense which he performs or causes to be performed in the name of or on behalf of a corporation or association to the same extent as if such conduct were performed in his own name or behalf.

State v. Tenney, 913 P.2d 750, 758 (Utah Ct. App. 1996).

Mistaken Belief

> You are instructed that it is a defense to prosecution for securities fraud that the defendant formed a reasonable but mistaken belief about a matter of fact that negates the type of culpability required for the commission of securities fraud. A reasonable belief is one that would be held by an ordinary and prudent person in the same or similar circumstances as the defendant. Therefore, if you find from the evidence, beyond a reasonable doubt, that in connection with the sale of a percent interest in the oil and gas lease on Lenoree No. 1, in Caldwell County, Texas, and the venture had not in fact been formed on July 15, 1985, but you find further from the evidence that the defendant had, prior to July 15, 1985, formed a reasonable but mistaken belief that the venture had been formed through a combination of investors' subscriptions and participation agreements by the contractor, or if the prosecution has failed to persuade you beyond a reasonable doubt that these facts aren't true, you will acquit the defendant and say by your verdict not guilty.

Gant v. State, 814 S.W.2d 444, 451 (Tex. App. 3 Dist. 1991).

Comment

But see United States v. Benny, 786 F.2d 1410, 1417 (9th Cir. 1986), where the court said, "an honest belief in the ultimate success of a plan is not in itself a defense to fraud prosecutions. A belief in future success does not justify baseless, false or reckless representations or promises." *Accord, United States v. Diamond*, 430 F.2d 688 (5th Cir. 1970); *United States v. Stull*, 743 F.2d 439, 446 (6th Cir. 1984).

Estoppel

> The Court instructs the jury that regardless of all other findings or instruction, if you believe that the plaintiff, by reason of his own acts, conduct, knowledge, and business relationship that occurred at or about the time of the sale of the security, is now inconsistent with such acts, conduct and knowledge in the bringing of this suit; and that the defendants did rely upon the past acts, conduct and knowledge of the plaintiff to their detriment, and that they would be, therefore, wrongfully injured by now allowing the plaintiff to recover upon this inconsistent action at law, then you must find that the plaintiff cannot prevail, having so conducted himself, and your verdict must be for the defendants.

Dokken v. Minnesota-Ohio Oil Corp., 232 So.2d 200, 203 (Fla. Dist. Ct. App. 1970).

Comment

This instruction is from a civil case. It was derived from 31 CJS Estoppel § 108, p. 548.

Jury Unanimity on a Particular Act

> Where … a single offense may be committed in a number of different ways and there is evidence to support each of the ways, the jury need only be unanimous in its conclusion that the defendant violated the law by committing the act and need not be unanimous in its conclusion as to which of the several consistent theories it believes resulted in the violation.

State v. Buckman, 468 N.W.2d 589, 592 (Neb. 1991) (*quoting State v. Parker*, 379 N.W.2d 259, 261 (Neb. 1986)).

INDEX