* 1. **NONDISCLOSURE**

The plaintiff alleges that [he][she] was harmed because the defendant failed to disclose information related to a transaction. To win on this claim, the plaintiff must prove it is more likely true than not true that:

(1) the defendant had a duty to disclose information to the plaintiff regarding the transaction;

(2) the defendant failed to take reasonable steps to disclose this information to the plaintiff;

(3) the information was known to the defendant before the transaction was completed;

(4) the defendant knew that the information could affect the plaintiff’s decision about the transaction;

(5) the plaintiff justifiably relied on an understanding of the transaction that was based on the absence of the information;

(6) the plaintiff suffered a monetary loss; and

(7) the defendant’s failure to disclose the information was a substantial factor in causing the plaintiff’s loss.

Use Note

Instructions 17.07 (Duty to Disclose), 17.03 (Justifiable Reliance) and 3.07 [Substantial Factor] must be given with this instruction. If it is appropriate to instruct the jury on nominal damages, see 24.11 (Nominal Damages).

Comment

This instruction is based on the Restatement (Second) of Torts § 551. This provision of the Restatement recognizes an action for nondisclosure on the same basis as liability for an affirmative false statement if 1) the defendant has a duty to exercise reasonable care to disclose the matter; and 2) the defendant knows that the undisclosed fact may justifiably induce the plaintiff to act or fail to act. Alaska cases following Restatement § 551 include *Deptula v. Simpson*, 164 P.3d 640, 645-46 (Alaska 2007); *Arctic Tug & Barge Inc. v. Raleigh*, *Schwarz & Powell*, 956 P.2d 199, 202 (Alaska 1998); *Matthews v. Kincaid*, 746 P.2d 470 (Alaska 1987) and *Turnbull v. LaRose*, 702 P.2d 1331, 1334 (Alaska 1985).

A person with a duty to disclose only has the duty to exercise reasonable care to disclose the information. Thus, the defendant is not liable if the defendant exercises reasonable care to disclose the information, but the information does not reach the person who is entitled to it. Restatement § 551, comment d.

The rule stated in section 551(1) reflects the traditional rule that if the undisclosed fact is patent, or the plaintiff has an equal opportunity to obtain the fact, or the defendant has no reason to think that the plaintiff is acting under a misapprehension, the defendant has no obligation to disclose the fact. See Restatement § 551, comments k & l. *See* *Deptula v. Simpson*, 164 P.3d 640, 645-46 (Alaska 2007); *Arctic Tug & Barge Inc. v. Raleigh, Schwarz & Powell*, 956 P.2d 199, 202 (Alaska 1998); *Matthews v. Kincaid*, 746 P.2d 470 (Alaska 1987).

In *Anchorage Chrysler Center, Inc. v. DaimlerChrysler Corp*., 221 P.3d 977 (Alaska 2009), the supreme court held that the loss in a fraudulent misrepresentation case must be a pecuniary loss caused by the plaintiff’s reliance on the misrepresentation. 221 P.3d at 991-92. A plaintiff who can prove pecuniary loss but not the extent of the loss may still be entitled to an award of nominal damages. *Id*.