

18.6 Securities—Justifiable Reliance Generally

The plaintiff [name] must prove by a preponderance of the evidence that [he] [she] [other pronoun] justifiably relied on the alleged misrepresentation or omission in deciding to engage in the [purchase] [sale] of the [security] [securities] in question. The plaintiff [name] may not intentionally close [his] [her] [other pronoun] eyes and refuse to investigate the circumstances or disregard known or obvious risks.

Comment

Use this instruction unless the plaintiff relies on a fraud-on-the-market theory, in which case Instruction 18.7 (Securities—Justifiable Reliance—Fraud-on-the-Market Case) should be used. Even in a fraud-on-the-market theory case, however, this instruction may become applicable if the jury finds that the defendant rebutted the presumption of reliance on the market.

The element of “reliance [is] often referred to in cases involving public securities markets . . . as transaction causation.” *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341 (2005).

In *Atari Corp. v. Ernst & Whinney*, 981 F.2d 1025, 1030 (9th Cir. 1992), the court held that an investor cannot claim reliance on a misrepresentation if the investor already possessed information sufficient to call the representation into question.

A rebuttable presumption of reliance is deemed to arise when the fraud involves a material omission. *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 153-54 (1972). In a “mixed case of misstatements and omissions,” the presumption will only apply if the case primarily alleges omissions. *Binder v. Gillespie*, 184 F.3d 1059, 1063-64 (9th Cir. 1999) (involving a case resolved on summary judgment). At trial, the court may resolve whether the presumption is applicable after considering the evidence.

To provide guidance to jurors required to determine whether the plaintiff’s reliance was justifiable, the judge may consider adding the following to this instruction:

In deciding whether the plaintiff [name] justifiably relied on the defendant [name]’s alleged misrepresentation[s] or omission[s,] you may consider evidence of:

1. whether the plaintiff [name] was sophisticated and experienced in financial and securities matters;

1. whether the plaintiff [name] and the defendant [name] had a long-standing business or personal relationship, or a relationship in which the defendant [name] owed a duty to the plaintiff [name] to not interfere with or adversely affect the plaintiff [name]’s interests;

1. whether the plaintiff [name] ignored or refused to investigate the circumstances surrounding the transaction;

(4) whether the plaintiff [name] disregarded risks so obvious that they should have been known or risks so great as to make it highly probable that harm would follow;

(5) whether the defendant [name] concealed the fraud;

(6) whether the plaintiff [name] had access to the relevant material information;

(7) whether the misrepresentation was general or specific;

(8) whether the plaintiff [name] initiated or sought to expedite the transaction;

(9) whether the defendant [name] prepared or provided to the plaintiff [name] materials that contained adequate warnings about the risks associated with the investment or adequate disclaimers describing limitations on the scope of the defendant [name]'s representations or the defendant's involvement; and

(10) any other evidence you find helpful in deciding whether the plaintiff [name] justifiably relied on the defendant [name]'s misrepresentation[s] or omission[s].

For out-of-circuit cases listing these factors, see, e.g., *Brown v. E.F. Hutton Grp., Inc.*, 991 F.2d 1020, 1032 (2d Cir. 1993); *Davidson v. Wilson*, 973 F.2d 1391, 1400 (8th Cir. 1992); *Myers v. Finkle*, 950 F.2d 165, 167 (4th Cir. 1991); *Jackvony v. RIHT Financial Corp.*, 873 F.2d 411, 416 (1st Cir. 1989); *Bruschi v. Brown*, 876 F.2d 1526, 1529 (11th Cir. 1989); *Zobrist v. Coal-X, Inc.*, 708 F.2d 1511, 1518-19 (10th Cir. 1983).

To establish that a defendant adequately warned the plaintiff of the attendant risks in a transaction, the defendant's disclosures must have been precise and relate directly to what the plaintiff alleges was misleading. See *In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1414-15 (9th Cir. 1994).

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