

66 From the Committee on Model Civil Jury Instructions

The Committee solicits comment on the following proposals by October 15, 2017. Comments may be sent in writing to Timothy J. Raubinger, Reporter, Committee on Model Civil Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCJI@courts.mi.gov.

PROPOSED

M Civ JI 3.03

Admission of Evidence

~~The evidence you are to consider consists of testimony of witnesses *(and exhibits offered and received) ***(and your view of the [premises/scene/object]). When you discuss the case and decide on your verdict, you may only consider the evidence that has been admitted in this case. Evidence includes only the sworn testimony of witnesses [, the exhibits admitted into evidence, and anything else I told you to consider as evidence].~~ The admission of evidence in court is governed by rules of law. From time to time it has been my duty as judge to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings, and you must not consider *(any exhibit to which an objection was sustained or) any testimony *(or exhibit) which was ordered stricken.

Notes on Use

*Omit the references to exhibits if there are no exhibits.

**The phrase in parentheses should be read to the jury if the court has permitted a jury view and has determined that the view constitutes evidence. Appropriate designation of the kind of view may be selected instead of the bracketed words. If the court determines that the view is not evidence, this phrase in parentheses should not be read, and in lieu of it M Civ JI 3.12 should be given.

Michigan cases are in conflict on whether a jury view constitutes evidence. Generally the jury can consider information obtained by them from the view only to assist them in understanding evidence presented in open court, *Valenti v Mayer*, 301 Mich 551; 4 NW2d 5 (1942); but in some cases, the view itself may be evidence. *Sunday v*

Wolverine Service Stations, 265 Mich 19; 251 NW 402 (1933).

Comment

Although some rulings on evidence are made out of the jury's hearing, the great bulk of such rulings are made in the presence of the jury, who hear not only the reasons for objections but often the reasons for rulings as well. Whether offered evidence is admitted or excluded, the jury may be influenced by what it hears, and, consequently, it is proper to tell them of the Court's duty in these matters and admonish them to ignore stricken or excluded evidence and the reasons for the rulings.

History

M Civ JI 3.03 was SJI 1.01(4). Amended January 1992.

PROPOSED

M Civ JI 60.01

Jury Deliberations

You will be given a written copy of the final jury instructions for your use in the jury room for deliberation. [I will also provide you with an electronically recorded copy of these instructions.]

When you go to the jury room, your deliberations should be conducted in a businesslike manner. You should first select a foreperson. She or he should see to it that the discussion goes forward in an orderly fashion and that each juror has full opportunity to discuss the issues.

When at least five of you agree upon a verdict, it will be received as your verdict. In your deliberations, you should weigh the evidence with an open mind and consideration for each other's opinions.

If differences of opinion arise, you should discuss them in a spirit of fairness and frankness. You should express not only your opinion but also the facts and reasons upon which you base it.

In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if you are convinced that it is wrong. However, none of you should surrender your honest conviction as to the weight and effect of the evidence or lack of evidence solely because of

the opinion of your fellow jurors or for the mere purpose of returning a verdict.

During your deliberations, and before you reach a verdict, you must not disclose anything about your discussions to others outside the jury room, not even how your voting stands. Therefore, until you reach a verdict, do not disclose that information, even in the courtroom.

During your deliberations you may not communicate with persons outside the jury room (other than the judge), or seek information by any means, including cellular telephones or other electronic devices. In other words, you cannot talk to anyone on the phone, correspond with anyone, or electronically communicate with anyone about this case. You can only discuss the case in the jury room with your fellow jurors during deliberations. You may not use these electronic means to investigate or communicate about the case because it is important that you decide the case based solely on the evidence presented in the courtroom and my instructions on the law. Information from the Internet or available through social media might be wrong, incomplete, or inaccurate.

If you discover a juror has violated my instructions, you should report it to me right away.

That concludes my instructions on the law. If you have any questions about these instructions at this point, please write them down and give them to the bailiff. The bailiff will then give them to me, and after consulting with counsel, I will address your questions.

~~[There being no further questions/No questions having been asked], it is now time for you to go into the jury room and begin your deliberations. [Having addressed the questions/No questions having been asked,] I have approved a verdict form for your use in the jury room. The verdict form reads as follows: [review verdict form]~~

If you wish to communicate with me or examine the exhibits while you are deliberating, please have your foreperson write a note and give it to the bailiff. If you have any questions about my instructions on the law, please place those particular questions in a sealed envelope. Any questions or communications with me must be given

to the bailiff, who will then pass them to me, and I will address the questions or communications with counsel and respond as appropriate.

Note on Use

If, after reasonable deliberation, the jury reports an inability to agree or fails to return a verdict, then the court may also give M Civ JI 60.02. The court may give the jurors copies of the instructions before the instructions are read to the jury.

Comment

MCL 600.1352 and MCR 2.514(A) now provide for trial by a jury of six in civil cases, with a verdict to be received when five jurors agree. An exception is made for civil actions for commitment of a person to a mental, correctional, or training institution, which require a unanimous verdict. MCR 5.740(C); MCL 600.1352.

The 2011 amendment reflects the amendment to MCR 2.513(N) ordered by the Michigan Supreme Court on June 29, 2011, which became effective September 1, 2011. This amendment requires that certain procedures be followed with respect to questions raised by the jurors and that the jurors be given a written copy of the instructions.

History

M Civ JI 60.01 was SJI 1.05. Amended January 1982, April 1986, October 1993, March 2006, October 2011, January 2014.

The Committee has adopted the following new model civil jury instructions effective July 20, 2017.

ADOPTED

The Committee has adopted the following new instructions for use in cases alleging a violation of the Michigan Franchise Investment Law.

M CIV JI CHAPTER 112 FRANCHISE INVESTMENT LAW

M CIV JI 112.01 FRANCHISE INVESTMENT LAW; PROHIBITED PRACTICES— EXPLANATION

We have a state law known as the Franchise Investment Law, which provides that a person shall not, in connection with the filing, offer, sale, or purchase of any franchise, directly or indirectly:

(a) employ any device, scheme, or artifice to defraud;

(b) make any untrue statement of a material fact or omit to state a material fact that makes the statement misleading in light of the circumstances under which it was made; and

(c) engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any person.

When I use the phrase “scheme or artifice to defraud,” I mean any plan or pattern intended to deceive others in order to obtain something of value.

When I use the phrase “material fact” I mean that the statement cannot be an opinion, belief, speculation, or prediction. It must relate to something past or present that can be proved or disproved. Additionally, it must be of enough importance in the matter that a reasonable person would be likely to rely on it.

When I use the word “rely,” I mean that plaintiff would not have [entered into the contract/*describe other action*] if defendant had not [created the false impression/made the [representation/promise]], even if the [false impression/representation/promise] was not the only reason for plaintiff’s action.

Comment

MCL 445.1505. A private right of action is permitted by MCL 445.1531. *United States v Goldblatt*, 813 F2d 619 (CA 3, 1987). The definitions of “material fact” and “rely” are taken from M Civ JI 128.10 and 128.11.

M CIV JI 112.02 FRANCHISE—DEFINITION

When I use the term “franchise,” I mean a contract or agreement, either express or implied, whether oral or written, between two or more persons to which all of the following apply:

(a) A franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor.

(b) A franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services substantially associated with the franchisor’s trademark, service mark, trade name, logotype, advertising, or other commercial symbol designating the franchisor or its affiliate.

(c) The franchisee is required to pay, directly or indirectly, a franchise fee.

Comment

MCL 445.1502(3)(a)–(c).

M CIV JI 112.03 FRANCHISEE AND FRANCHISOR— DEFINITION

When I use the term “franchisee,” I mean a person to whom a franchise is granted. When I use the term “franchisor,” I mean a person who grants a franchise and includes a subfranchisor.

Comment

MCL 445.1502(4)–(5).

M CIV JI 112.04 OFFER OR OFFER TO SELL— DEFINITION

The terms “offer” or “offer to sell” include an attempt to offer to dispose of a franchise or interest in a franchise for value. It also includes solicitation of an offer to buy a franchise or interest in a franchise for value. It does not include the renewal or extension of an existing franchise where there is no interruption in the operation of the franchised business by the franchisee.

Comment

MCL 445.1503(3).

M CIV JI 112.05 PERSON—DEFINITION

When I use the term “person,” I mean an individual, corporation, partnership, joint venture, association, joint stock company, trust, or unincorporated organization.

Comment

MCL 445.1503(5).

M CIV JI 112.06 SALE OR SELL—DEFINITION

The terms “sale” or “sell” include a contract or agreement of sale of a franchise or

interest in a franchise for value. It also means a contract to sell or disposition of a franchise or interest in a franchise for value.

Comment

MCL 445.1503(8).

M CIV JI 112.07 FRANCHISE FEE—DEFINITION

“Franchise fee” means a fee or charge that a franchisee or subfranchisor is required to pay or agrees to pay for the right to enter into a business under a franchise agreement, including, but not limited to, payments for goods and services.

Comment

MCL 445.1503(1).

M CIV JI 112.08 PAYMENT FOR GOODS AND SERVICES AS FRANCHISE FEE

If a franchisee is forced to pay a price in excess of a bona fide wholesale price for goods or if the franchisee is required to purchase excess goods for which there is no well-established market in this state, the excess costs borne by the franchisee in favor of the franchisor constitutes the payment of an indirect franchise fee.

Comment

Hamade v Sunoco, Inc., 271 Mich App 145, 157; 721 NW2d 233 (2006).

M CIV JI 112.09 PAYMENTS THAT DO NOT CONSTITUTE A FRANCHISE FEE

The following are not the payment of a franchise fee:

(a) The purchase or agreement to purchase goods, equipment, or fixtures directly or on consignment at a bona fide wholesale price.

(b) The payment of a reasonable service charge to the issuer of a credit card by an establishment accepting or honoring the credit card.

(c) Amounts paid to a trading stamp company by a person issuing trading stamps in connection with the retail sale of merchandise or service.

(d) Payments made in connection with the lease or agreement to lease of a fran-

chised business operated by a franchisee on the premises of a franchisor as long as the franchised business is incidental to the business conducted by the franchisor at such premises.

Note on Use

Use only those subsections that are applicable.

Comment

MCL 445.1503(1).

M CIV JI 112.10 FRANCHISE INVESTMENT LAW— BURDEN OF PROOF

Plaintiff has the burden of proving each of the following:

(1) In connection with the filing, offer, sale, or purchase of any franchise, the defendant:

(a) employed any device, scheme, or artifice to defraud; or

(b) made any untrue statement of a material fact or failed to state a material fact that was necessary to prevent the statements that were made from being misleading under the circumstances; or

(c) engaged in any act, practice, or course of business that operated as a fraud or deceit upon any person; and

(2) The plaintiff justifiably relied on the alleged misrepresentation or omission; and

(3) The plaintiff suffered damages.

Your verdict will be for the plaintiff if you decide that all of these have been proved.

Your verdict will be for the defendant if you decide that any one of these has not been proved.

The Committee has amended the comment to the following model civil jury instruction effective July 20, 2017.

AMENDED

M CIV JI 113.09 Unfair, Unconscionable, or Deceptive Methods, Acts, or Practices— Burden of Proof

Plaintiff has the burden of proving that:

(a) Defendant engaged in trade or commerce;

(b) Defendant committed one or more of the prohibited methods, acts, or practices alleged by plaintiff; and

(c) Plaintiff suffered a loss as a result of defendant's violation of the act.

Your verdict will be for the plaintiff if the plaintiff has proved all of those elements. Your verdict will be for the defendant if the plaintiff has failed to prove any one of those elements.

Comment

When the particular statutory provision the plaintiff is proceeding under includes an element of fraud, the Court should include an instruction defining that element. *Brownlow v McCall Enterprises*, 315 Mich App 103 (2016).

History

M Civ JI 113.09 was added July 2012. Amended July 2017.

The Michigan Supreme Court has delegated to the Committee on Model Civil Jury Instructions the authority to propose and adopt Model Civil Jury Instructions. MCR 2.512(D). In drafting Model Civil Jury Instructions, it is not the committee's function to create new law or anticipate rulings of the Michigan Supreme Court or Court of Appeals on substantive law. The committee's responsibility is to produce instructions that are supported by existing law.

The members of the Committee on Model Civil Jury Instructions are:

Chair: Hon. Mark T. Boonstra

Reporter: Timothy J. Raubinger

Members: Benjamin J. Aloia; Robert L. Avers; Hon. Jane M. Beckering; Mark R. Bendure; Hon. Kathleen A. Feeney; Gary N. Felty Jr.; William B. Forrest III; Donald J. Gasiorek; James F. Hewson; Hon. Michael L. Jaconette; Amy M. Johnston; C. Thomas Ludden; Daniel J. McCarthy; Daniel J. Schulte; Hon. Douglas B. Shapiro; Judith A. Susskind; Hon. Donald A. Teeple; Thomas Van Dusen; Hon. Michael D. Warren Jr.; Thomas W. Waun.