

2720 HOME IMPROVEMENT PRACTICES ACT VIOLATION; WISCONSIN ADMINISTRATIVE CODE CHAPTER ATCP 110; WIS. STAT. § 100.20

Wisconsin has administrative rules known as the Home Improvement Practices Act. This act prohibits persons engaged in the business of making or selling home improvements from engaging in unfair methods of competition or unfair trade practices including [insert each specific prohibited conduct from Wis. Admin. Code Ch. ATCP 110.02 alleged by (plaintiff), for example (for a detailed list of examples, see Comment):

- (• Making any false, deceptive or misleading representation to induce a person to enter into a home improvement contract;)
- (• Soliciting or accepting payment for home improvement material or services which the seller does not intend to provide according to the terms of the contract)]

In this case, (insert project) is a home improvement.

Question _____ asks: (insert question based on prohibited conduct, e.g.

Did (_____) made a false, deceptive, or misleading representation to induce (_____) to enter into the home improvement contract?)

(Insert explanation(s) of the prohibited conduct alleged by (plaintiff) e.g. definition of “false, deceptive, or misleading representation”; “soliciting.”)

VERDICT

1. Did (defendant) make a false, deceptive, or misleading representation to induce (plaintiff) to enter into the home improvement contract?

Answer: _____
Yes or No

If you answered question 1 “yes,” answer question 2. If you answered question 1 “no,” go to question 3.

2. Did (plaintiff) suffer a monetary loss because of the false, deceptive, or misleading representation?

Answer: _____
Yes or No

3. Did (defendant) solicit or accept payment for a home improvement material or service which (he) (she) did not plan to provide according to the terms of the home improvement contract?

Answer: _____
Yes or No

If you answered this question “yes,” answer question 4. If you answered question 3 “no,” go to question 5.

4. Did (plaintiff) suffer a monetary loss because of the solicitation or acceptance of payment?

Answer: _____
Yes or No

If you answered question Nos. 2 or 4, “yes,” answer question 5, otherwise, do not answer it.

5. What sum of money will fairly and reasonably compensate (plaintiff) for damages suffered because of (defendant)'s actions?

\$ _____

COMMENT

This instruction and comment were approved in 2009.

The Home Improvement Practices Act lists 11 categories of prohibited practices. The instruction and verdict will need to be adapted to explain the alleged conduct described in the subsections of ATCP 110.02.

Definitions. "Home improvement" and "home improvement contract" are defined at Wis. Admin. Code ATCP § 110.01(2)

Prohibited Acts. ATCP 110.02 prohibits a seller from making any false, deceptive or misleading representation in order to:

- Get a buyer to enter into a home improvement contract.
- Obtain or keep any payment under a home improvement contract.
- Delay performance under a home improvement contract.

ATCP 110 also prohibits a seller from engaging in a number of specific practices, such as:

- Misrepresenting that the buyer's home will be used as a "model" or "advertising job."
- Misrepresenting that products or materials meet certain standards or specifications.
- Misrepresenting that the buyer's home contains a defective or dangerous condition requiring repair.
- Engaging in "bait and switch" sales tactics.
- Misrepresenting the seller's identify, status or affiliation.
- Misrepresenting that the seller is licensed, bonded or insured. If a seller claims to be licensed, bonded or insured, the seller must provide the buyer with a written statement describing the type of license, bond or insurance that the seller possesses.
- Advertising any free, gift or bonus offer without specifying the terms and conditions of that offer.
- Misrepresenting that the buyer is getting a special price or offer because of a closeout, factory sale, survey, leftover materials or other specific circumstances.
- Misrepresenting the contract price or other contract terms and obligations.
- Pressuring a buyer into a home improvement contract by delivering materials or starting work before the buyer has entered into a contract.
- Making false statements about a competitor, or the competitor's products or services.
- Misrepresenting that a home improvement contract will aid any charity or other organization.
- Encouraging the buyer to misrepresent the buyer's financial condition in order to obtain financing.

- Falsifying the contract price, or encouraging the buyer to falsify the contract price, in order to obtain financing.
- Asking the buyer to sign a completion slip or make final payment before the job is completed.

For a complete list of prohibited practices, see Wis. Ad. Code ATCP § 110.02(1)-(11).

Who May Sue under HIPA? “Buyer” means either of the following persons who is a party or prospective party to a home improvement contract:

(a) The owner of residential or noncommercial property to which the home improvement contract pertains.

(b) The tenant or lessee of residential or noncommercial property to which the home improvement contract pertains if the tenant or lessee is or will be obligated to make a payment under the home improvement contract. Wis. Admin. Code DATCP § 110.01(3)

Who Can Be Sued under HIPA? Individuals personally liable under the definition of “seller” in Wis. Admin. Code § ATCP 110.01(5) include “person[s] engaged in the business of making or selling home improvements and includes corporations, partnerships, associations and any other form of business organization or entity, and their officers, representatives, agents and employees.”

Formulating a Verdict. First, the verdict should contain a “yes or no” question for each of the alleged HIPA violations; and there could be several complained about under the same contract. Second, for each of the “yes” answers, the verdict should ask a separate “cause” question, such as, “did the plaintiff suffer a monetary loss as a result of the violation,” or did the defendant’s violation “cause” plaintiff to suffer a monetary loss. Third, ask a damage question.

Damages. Violation of administrative code regulations for trade practices allow plaintiffs suffering pecuniary loss to seek damages as set forth in Wis. Stat. § 100.20(5), including double damages and attorney fees. Wisconsin case law holds that these “pecuniary losses” as defined in Wis. Stat. § 100.20(5) are contractual in nature. Benkoski v. Flood, 2001 WI App 84, ¶¶ 26, 32, 242 Wis. 2d 652, 626 N.W.2d 851.

In Benkoski, the plaintiff sued under ATCP 125 (another administrative code enabled under Wis. Stat. § 100.20(5)) to curb unfair trade practices relating to the sale of a mobile home. In concluding that the damages were contractual in nature, the trial court stated:

Although this is not a contract case, we find additional support for our holding in the law of contracts. [The defendant’s] *unfair trade practices* thwarting [the plaintiff’s] potential sale caused damages akin to those caused by a breach of contract. WISCONSIN JI-CIVIL 3735, entitled “Damages: Loss of Expectation” states,

[t]he measure of damages for a breach of contract is the amount which will compensate the plaintiff for the loss suffered because of the breach. A party who is injured should, as far as it is possible to do by monetary award, be placed in the position in which he or she would have been had the contract been performed.

We conclude that the “*pecuniary loss*” concept set out in Wis. Stat. § 100.20(5) is *similar to* this concept of *damages set out in the law of contracts*.

Benkoski, 2001 WI App 84, ¶ 32

In instructing the jury on damages, the trial court can include the following explanation which is a modified version of Wisconsin JI-Civil 3735, entitled “Damages: Loss of Expectation:

Damages: Loss of Expectation (JI-Civil 3735 as modified for Home Improvement Act Violations under Wis. Stat. § 100.20(5)):

The measure of damages for violations of the Home Improvement Act is the amount which will compensate the plaintiff for the loss suffered because of the violation. A party who is injured should, as far as it is possible to do by monetary award, be placed in the position in which he or she would have been had the violation not occurred. The fundamental basis for an award of damages for a violation is just compensation for losses necessarily flowing from the violation.

A party seeking to enforce a Home Improvement Act violation is not entitled to be placed in a better position because of the violation than that party would have been had the violation not occurred. The injured party is entitled to the benefit of his or her agreement, which is the net gain he or she would have realized from the contract but for the Home Improvement Act violation by the other party.

This instruction is consistent with contractual approach to measure damages in an ATCP violation.