

700.12G [7] Undue Influence--Fiduciary Relationship Arising Under Law:

The law provides, if [defendant's name] entered into the contract only because a party subjected [defendant's name] to undue influence, the [plaintiff's name] cannot enforce the contract against [defendant's name]. This court has decided [defendant's name] is a fiduciary.

[plaintiff's name] claims and has the burden of proving the following by clear and convincing evidence in order to enforce the contract:

- (1) the contract was fair;
- (2) the contract did not result from any undue influence over the defendant(s); and
- (3) [defendant's name] had independent advice.

The law is that undue influence exists where one person wrongfully exercises control over another so as to substitute that person's will for the will of the other.

Undue influence is more than just advice or persuasion or an appeal to [defendant's name]'s(s') own reasoning. In deciding whether there was undue influence, you may consider whether, before the contract was made, there was full disclosure to [defendant's name] of all the material circumstances surrounding the contract whether the contract was fair and whether [defendant's name] had the opportunity to obtain independent advice.

Plaintiff denies that there was any undue influence exerted upon defendant.

You will address these issues in question ____ on your verdict.

Notes on Use

The claimed affirmative defenses from these instructions must be inserted into Instruction 700.02. The instructions on Affirmative Defenses assume all of the itemized/numbered issues are contested, and, if an issue is not contested, it should be eliminated from this instruction and the corresponding questions on the Verdict forms. Contract cases often include multiple defendants who should all be added by name to this instruction.

Notes on use specific to 700.12F: This instruction should be used where the fiduciary relationship does not arise as a matter of law, and therefore must be proved by the plaintiff. If the relationship between the plaintiff and the defendant is such that the fiduciary relationship arises as a matter of law (e.g., attorney and client), use Instruction 700.12G instead.

In the rare case in which the undue influence is claimed to have been exerted by a third person, use proper names in the instruction wherever appropriate. The set of instructions must end with 700.18V.

Notes on use specific to 700.12G: This instruction should be used in cases where the fiduciary relationship arises as a matter of law (e.g., attorney and client). If the relationship

between the plaintiff and the defendant is such that the fiduciary relationship must be proved by evidence, use Instruction 700.12F instead.

Comment

Undue influence exists where one person wrongfully exercises control over another so as to substitute that person's will for the will of the other. *Britton v. Esson*, 260 Ill. 273, 103 N.E. 218 (1913). Undue influence cases involve the existence of a fiduciary relationship (arising as a matter of law or fact) where a special confidence is reposed in one who in equity and conscience is bound to act in good faith and with due regard to the interest of the other party. A fiduciary relationship exists as a matter of law between attorney and client, guardian and ward, and principal and agent, and may exist in other cases where one party is heavily dependent upon the advice of another. *Carey Elec. Contracting, Inc. v. First Nat'l Bank*, 74 Ill.App.3d 233, 392 N.E.2d 759, 30 Ill.Dec. 104 (2d Dist. 1979). The existence of a fiduciary relationship that does not exist as a matter of law must be proven by clear and convincing evidence in order to establish a constructive trust. *Ray v. Winter*, 67 Ill.2d 296, 367 N.E.2d 678, 10 Ill.Dec. 225 (1977); *Cunningham v. Cunningham*, 20 Ill.2d 500, 170 N.E.2d 547 (1960); *Kester v. Crilly*, 405 Ill. 425, 91 N.E.2d 419 (1950). There are no cases, however, discussing the burden of proof of establishing a fiduciary relationship in the context of these instructions. Once a fiduciary relationship has been established, there is a presumption that any transaction that benefits the dominant party at the expense of the other party is the result of undue influence. The burden is then on the fiduciary to prove by clear and convincing evidence that the transaction was not the result of undue influence. *Franciscan Sisters Health Care Corp. v. Dean*, 95 Ill.2d 452, 448 N.E.2d 872, 69 Ill.Dec. 960 (1983); *Brown v. Commercial National Bank*, 42 Ill.2d 365, 247 N.E.2d 894 (1969); *Turner v. Black*, 19 Ill.2d 296, 166 N.E.2d 588 (1960); *Works v. McNeil*, 1 Ill.2d 47, 155 N.E.2d 320 (1953).