

A toy collector attended a flea market at which a variety of second-hand goods were sold. A seller who specialized in dolls also displayed a mechanical bank for sale at a price of \$50. Although the collector had no knowledge of the seller, the collector was an expert in such banks and knew that this particular bank was actually worth \$10,000. He paid the seller her asking price without any discussion regarding the bank or its value.

If the seller, upon learning of the bank's true value, asserts a tort claim against the collector based on fraud, will the seller be likely to prevail?

- A. No, because fraud requires an active misrepresentation.
- B. No, because the collector had no duty to disclose the worth of the bank to the seller.
- C. Yes, because the bank's true value was 200 times the price paid by the collector.
- D. Yes, because the collector was aware of the seller's mistake.

Explanation:

Fraud (ie, intentional misrepresentation) can occur when a defendant actively misrepresents or conceals a material fact. It can also occur when a defendant **fails to disclose a material fact**—but **only if** the defendant had a **duty to disclose** it. There is an affirmative duty to disclose a material fact in three limited circumstances:

The plaintiff has a **fiduciary relationship** with the defendant.

The plaintiff is **likely to be misled** by the defendant's **prior statements**.

The plaintiff is **mistaken about a basic fact** of the transaction that the defendant is aware of and should disclose (in a minority of jurisdictions).

Here, the collector did not know the seller (no fiduciary relationship) and did not discuss the bank or its value with the seller before purchasing it (no prior misleading statements). And though the collector was aware of the seller's mistake about the bank's worth, he would not be expected to correct it—even in a minority jurisdiction—since people are generally entitled to use their superior knowledge or expertise while bargaining (**Choice D**). Therefore, the collector had no duty to disclose the bank's worth to the seller, and the seller is unlikely to prevail.*

*The outcome would likely be the same even if the collector did have a duty to disclose the bank's true value to the seller because fraud also requires proof that the plaintiff relied on the defendant's misrepresentation. Here, there was no reliance since the seller set the price for the bank before the collector approached her.

(Choice A) Fraud can occur absent an active misrepresentation if the defendant has an affirmative duty to disclose a material fact to the plaintiff (not seen here) but fails to do so.

(Choice C) The difference between the price paid by the collector and the bank's true value has no bearing on the collector's duty of disclosure (or lack thereof).

Educational objective:

An affirmative duty to disclose a material fact exists if the plaintiff is (1) in a fiduciary relationship with the defendant, (2) likely to be misled by the defendant's prior statements, or (3) mistaken about a basic fact of the transaction that the defendant is aware of and should disclose (minority of jurisdictions).

References

Restatement (Second) of Torts § 551 (Am. Law Inst. 1981) (liability for nondisclosure).

Duty to disclose material facts

Fiduciary relationship
(attorney-client)



Misled by prior statements
(car for sale "in mint condition"
later sustains damage)



Mistaken about basic facts
(seller must disclose that
house has termites)

