### IDJI 6.27.3 - Defense of non-disclosure

INSTRUCTION NO. \_\_\_

 A party is not obligated to perform a contract if that party establishes the defense of non­disclosure. To establish the defense of non-disclosure, the defendant has the burden of proving each of the following propositions by clear and convincing evidence.

 1. The plaintiff was aware of a fact vital to the essence of the contract;

 2. The defendant was unaware of the fact, and could not reasonably learn of it;

 3. The plaintiff knew that the defendant was unaware of the true fact and knew that disclosure of the true fact would correct a basic assumption upon which the defendant was making the contract;

 4. The plaintiff did not disclose the fact to the defendant, intending that the defendant would act in ignorance of the fact;

 5. The failure to disclose the true fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing; [and]

1. The defendant entered into the contract upon the reasonable assumption that the non-disclosed fact did not exist; and

 7. [Defendant returned or offered to return to the plaintiff any benefit received under the contract which the defendant should not, in fairness, retain if defendant is to be relieved from the contract.]

 If you find from your consideration of all the evidence in the case that each of the foregoing propositions has been proved, your verdict should be for the defendant. If you find that any of the propositions has not been proved, then your verdict should e for the plaintiff.

Comment:

 There is not definitive Idaho authority on point. This instruction is felt to be superior to the previous IDJI 651. *See*, Restatement (Second) of Contracts, Section 161; *obiter dicta* in Janinda v. Lanning, 87 Idaho 97 (1964).

The subject of duty to speak was tangentially addressed in Bethlahmy v. Bechtel, 91 Idaho 55, and Tusch Enterprises v. Coffin, 113 Idaho 37, with references to Restatement (Second) of Torts, Section 551. The committee feels the above instruction is consistent with those cases and the tort restatement, although cast in light of the Restatement of Contracts provisions.