

## IN PRACTICE

# Is a Higher Standard Needed for Proof of Fraud?

In the past, a party was required to prove legal fraud by the mere preponderance of the evidence and equitable fraud by clear and convincing evidence.

It appears, however, that a recent trend in the case law now requires a party to prove fraud — whether legal or equitable in nature — by the higher standard of clear and convincing evidence. This article will examine this trend.

First, a statement of the elements of both legal and equitable fraud is appropriate. Legal fraud consists of (1) a material representation of a presently existing or past fact, (2) made with knowledge of its falsity and (3) with the intention that the other party rely thereon, (4) resulting in reliance by that party (5) to his detriment.

Equitable fraud, however, does not require proof of scienter, meaning knowledge of the falsity of the representation and an intention that the other party rely thereon (elements (2) and (3) above). See *Jewish Center of Sussex County v. Whale*, 86 N.J. 619, 624-25 (1981).

There are two standards of proof in civil cases. The preponderance of the evidence standard requires a party to "establish that a desired inference is more probable than not. If the evidence is in equipoise, the burden has not been met. It is often said that [this standard] means the greater weight of credible evidence in the case." *Biunno*, *Current New Jersey Rules of Evidence* (Gann 1994-1995), Comment 5 to N.J.R.E. 101(b)(1) at 65-66 (and cases cited therein).

The higher standard of clear and convincing evidence requires a party to "produce in the mind of a trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." *Aiello v. Knoll Golf Club*, 64 N.J. Super. 156, 162 (App. Div. 1960). See also *Biunno*, *Current New Jersey Rules of Evidence* (Gann 1994-1995), Comment 6 to N.J.R.E. 101(b)(1); *Model Jury Charges-Civil* (4th ed.) § 1.19 (ICLE 1992).

The case law has provided that a party's burden of proof on a fraud claim depends on whether the claim was for equitable or legal fraud. See, e.g., *Armel v. Crewick*, 71 N.J. Super. 213, 216-18 (App. Div. 1961); *Batka v. Liberty Mutual Fire Ins. Co.*, 704 F.2d 684, 687-89 (3d Cir. 1983).

### Distinction Between Burdens

In *Batka*, the Third U.S. Circuit Court of Appeals noted the distinction between the burdens of proof on equitable and legal fraud claims as follows:

In a suit for money damages for fraud, the plaintiff need only prove a case by a preponderance of the evidence. In order to obtain equitable relief such as rescission, however, clear and convincing proof is required. A leading case recognizing the distinction is *Armel*

.... New Jersey authorities applying the clear and convincing proof standard in equity in fraud cases are legion. ....

## LITIGATION

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On the other hand, the preponderance of the evidence standard is applied only when a remedy at law for fraud is sought. ... While none of these cases, with the exception of *Armel*, explicitly articulate the law/equity distinction, such an understanding is implicit in those cases which cite to *Armel*. Moreover, New Jersey's highest court applied a clear and convincing evidence standard in *Connelly v. Weisfeld*, [142 N.J. Eq. 406 (E. & A. 1948)] but a preponderance of the evidence standard in *Fischetto* [*Paper Mill Supply, Inc. v. Quigley Co.*, 3 N.J. 149 (1949)]. Clearly, New Jersey has long recognized the distinction articulated in *Armel*.

*Batka*, 704 F.2d at 688-89 (and cases cited therein).

In a more recent case, the Third Circuit explained the distinction:

Depending on the remedy sought, an action for fraud may be either legal or equitable in nature. A plaintiff asserting a claim of legal fraud must show that the defendant acted with scienter, but only need prove the elements of fraud by a preponderance of the evidence. In contrast, a plaintiff advancing a claim of equitable fraud need not demonstrate scienter, but must establish the other elements of fraud by clear and convincing evidence.

*Lightning Lube, Inc. v. Wisco Corp.*, 4 F.3d 1153, 1182-83 (3d Cir. 1993)(citations omitted).

Notwithstanding the foregoing, it appears that the recent trend in the New Jersey state courts is that a party's burden of proof on a fraud claim is clear and convincing evidence, regardless of whether the claim is for legal or equitable fraud. See *Baldassarre v. Butler*, 254 N.J. Super. 502, 521 (App. Div. 1992), modified on other grounds, 132 N.J. 278 (1993); *Stochastic Decisions v. Di-Domenico*, 236 N.J. Super. 388, 395 (App. Div. 1989), cert. denied, 121 N.J. 607 (1990); *Albright v. Burns*, 206 N.J. Super. 625, 636 (App. Div. 1986); *R. A. Intile Realty Co., Inc. v. Raho*, 259 N.J. Super. 438, 475 (Law Div. 1992).

Although one may argue that these cases ignore the law/equity distinction espoused by the earlier cases, a strong argument can be made that the law/

equity distinction has been abandoned.

In 1986, in *Albright v. Burns*, the Appellate Division of the Superior Court of New Jersey noted that "[f]raud of course is never presumed; it must be clearly and convincingly proven." *Albright*, 206 N.J. Super. at 636 (and cases cited therein).

Three years later, in *Stochastic Decisions*, the Appellate Division held that "[t]he party asserting a fraud bears the burden of proving that fraud. Fraud is not presumed; it must be proven through clear and convincing evidence." *Stochastic Decisions*, 236 N.J. Super. at 395 (and cases cited therein). *Stochastic Decisions* involved an action for legal fraud; that is, the plaintiff sought money damages.

In 1992, in *Baldassarre*, the Appellate Division set forth the elements of both legal and equitable fraud and then ruled that "[f]raud, of course, is never presumed; it must be established by clear and convincing evidence." *Baldassarre*, 254 N.J. Super. 521 (citation omitted).

No Error?

The *Baldassarre* case involved both

legal and equitable fraud. Yet the court made no distinction regarding the plaintiff's burden of proof. The burden of proving fraud by clear and convincing evidence therefore was not dependent on whether the claim was one for legal or equitable fraud. See *Baldassarre*, 254 N.J. Super. at 520-21.

The New Jersey Supreme Court reviewed and modified the Appellate Division decision, but did not address the burden-of-proof issue. See *Baldassarre v. Butler*, 132 N.J. 278 (1993). Query: Wouldn't the Supreme Court, or at least the parties, have addressed the burden of proof issue if the Appellate Division's ruling was clearly erroneous?

Finally, in *R. A. Intile Realty Co., Inc. v. Raho*, the trial court ruled that "[w]ith respect to the common law fraud claim against the Raho defendants, plaintiff has the burden of proving that claim by clear and con-

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vincing evidence; fraud will not be presumed." *R. A. Intile Realty*, 259 N.J. Super. at 475 (and cases cited therein). Again, the case involved a plaintiff seeking money damages under a legal fraud claim.

Moreover, the model jury charge for fraud, which sets forth the elements of legal fraud, states that "[t]he burden of proof is on the plaintiff to establish by clear and convincing evidence each of the following elements. ... " *Model Jury Charges - Civil* (4th ed.) Section 3.19 at 1 (ICLE 1992). Therefore, the Supreme Court Committee on Model Civil Jury Charges has recognized that the standard of proof on a legal fraud claim is clear and convincing evidence.

Finally, at least one prominent commentator on the rules of evidence

has noted that a claim of fraud requires proof by clear and convincing evidence. In his comments to N.J.R.E. 101(b)(1), Richard Biunno notes that "[o]ther causes of action and issues requiring proof by clear and convincing evidence include: Proving fraud." *Biunno*, *Current New Jersey Rules of Evidence* (Gann 1994-1995), Comment 6 to N.J.R.E. 101(b)(1) at 77 (and cases cited therein). Biunno does not make a distinction between legal and equitable fraud.

Based on the foregoing case law and authorities, it would appear reasonable to conclude that the New Jersey courts have moved away from the legal/equitable fraud distinction and now require a party to prove a claim fraud — whether equitable or legal — by clear and convincing evidence. ■