Restatement of the Law Third
Torts: Liability for Economic Harm

Preliminary Draft No. 2
(September 3, 2013)

SUBJECTS COVERED

CHAPTER 1   Unintentional Infliction of Economic Loss (§§ 7-8)
CHAPTER 2   Liability in Tort for Fraud
APPENDIX  Black Letter of Preliminary Draft No. 2

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This document is submitted to the Advisers for their meeting on September 26 (at 9:00 a.m.), 2013, and to the Members Consultative Group for their meeting on September 27 (at 10:00 a.m.), 2013, both meetings at ALI Headquarters, 4025 Chestnut Street, Philadelphia, Pennsylvania. As of the date it was printed, it had not been considered by the Council or membership of The American Law Institute, and therefore does not represent the position of the Institute on any of the issues with which it deals.
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This project resumed in 2010. Sections 1 through 5 of Chapter 1 were approved by the membership at the 2012 Annual Meeting; there was insufficient time to consider § 6.

This is the first draft of the material contained in this Draft.

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Reporters Memorandum

To: Lance Liebman

From: Ward Farnsworth

Date: August 27, 2013

Re: Restatement Third, Torts: Liability for Economic Harm
    Preliminary Draft No. 2

Attached please find the next round of materials for Restatement Third, Torts: Liability for Economic Harm. The first two Sections here conclude the proposed treatment of liability for economic loss caused by negligence. Section 7 covers economic losses resulting from damage to a third party or to property not belonging to the plaintiff. Section 8 discusses economic losses resulting from a public nuisance.

The next five Sections belong to Chapter 2: Liability in Tort for Fraud. The first of those Sections—§ 9—is the longest; it presents and explains the basic elements of the tort claim for fraud. Sections 10-12 discuss some specialized branches of the tort: liability for nondisclosure, liability for opinions, and liability for so-called promissory fraud. Section 13 discusses damages. This draft’s most significant departure from the Second Restatement is the proposed use of an out-of-pocket measure for compensatory damages rather than a measure based on the loss of the plaintiff’s bargain.
TABLE OF CONTENTS

Section ........................................ Page

Reporters Memorandum ................................ xiii

CHAPTER 1

UNINTENTIONAL INFLICTION OF ECONOMIC LOSS

[The first six Sections of Chapter 1 are contained in Tentative Draft No. 1 (2012).]

§ 7. Economic loss from injury to a third person or to property not belonging to the claimant ................. 1

§ 8. Public nuisance resulting in pure economic loss .... 17

CHAPTER 2

LIABILITY IN TORT FOR FRAUD

§ 9. Fraud .......................................................... 33

§ 10. Duties to disclose; tacit misrepresentation ...... 71

§ 11. Liability for misrepresentations of opinion ....... 83

§ 12. Misrepresentation of intention; promissory fraud .. 93

§ 13. Damages ......................................................... 101

Appendix. Black Letter of Preliminary Draft No. 2 ....... 115
CHAPTER 1
UNINTENTIONAL INFLICTION OF ECONOMIC LOSS

§ 7. Economic loss from injury to a third person or to property not belonging to the claimant.

Except as provided in § 8, a claimant cannot recover for pure economic loss caused by

(a) unintentional personal injury to another party; or
(b) unintentional injury to property in which the claimant has no proprietary interest.

Comment:

a. Scope. The two limits on recovery stated in this Section are related applications of the same principle, and they apply to facts that usually have certain features in common. The plaintiff and defendant typically are strangers. The defendant commits a negligent act that injures a third party’s person or property, and indirectly—though perhaps foreseeably—causes various sorts of economic loss to the claimant: lost income or profits, missed business opportunities, expensive delays, or other inconvenience. The plaintiff may suffer losses, for example, because the defendant injured someone with whom the plaintiff had a contract and from whom the plaintiff had been expecting performance, such as an employee or supplier. See Illustration 1. Or the plaintiff may be
§ 7. Injuries to the person or property of third parties

1 unable to make new contracts with others, such as customers
2 who cannot conveniently reach the plaintiff’s business
3 because the defendant’s negligence has damaged property
4 that now blocks the way. See Illustration 4. The common
5 law of tort does not recognize a plaintiff’s claim in such
6 circumstances.
7

Illustrations:

1. Driver negligently runs over Goalie, who has
a contract to play for Employer’s hockey team. As a
result of the accident, Goalie is unable to perform
for the rest of the season, and Employer suffers lost
revenues from ticket sales. Employer has no tort
claim against Driver.

2. Owner buys a policy from Insurer to cover the
risk of damage or loss to Owner’s barge. Tortfeasor
negligently sinks the barge, forcing Insurer to pay
Owner under the terms of the policy. Insurer seeks to
recover those sums from Tortfeasor. Insurer may be
entitled to restitution as subrogee of the rights of
Owner. Insurer does not have a right to collect from
Tortfeasor in a direct action for negligence.

3. Carrier delivering toxic chemicals to Factory
negligently spills them on Factory’s property. The
spill forces Factory to shut down for a week, during
which time Employees of Factory go unpaid. Employees
have no tort claim against Carrier.
$7. Injuries to the person or property of third parties

4. Builder negligently performs construction on a building owned by Client. The building collapses as a result, forcing the closure of an adjacent street for several weeks. Delicatessen, which operates next door to the collapsed building, suffers no physical damage but loses profits because customers cannot reach the entrance while the street is closed. Delicatessen has no tort claim for negligence against Builder.

Statutes may provide a plaintiff with a right to recover for economic loss that results from the wrongful death of another. Common law in some jurisdictions may also provide a right to recover for loss of consortium, which this Section does not classify as economic injury. Those rights of action are outside the scope of this Restatement, and they are not impaired by the rule of this Section. Liability for intentional interference with contractual relations is discussed in Chapter [X].

b. Rationale. The rule of this Section is justified by several considerations. The first, as noted in § 1, economic losses can proliferate long after the physical forces at work in an accident have spent themselves. A collision that sinks a ship will cause a well-defined loss to the ship’s owner; but it also may foreseeably cause economic losses to wholesalers who had expected to buy the ship’s cargo, then to retailers who had expected to buy from the wholesalers, and then to suppliers, employees, and
§ 7. Injuries to the person or property of third parties

customers of the retailers, and so on. Recognizing claims for those sorts of losses would greatly increase the number, complexity, and expense of potential lawsuits arising from many accidents. In some cases recognition of such claims would also result in liabilities that are indeterminate and out of proportion to the culpability of the defendant. These costs do not seem likely to be justified by comparable benefits; courts doubt that threats of such open-ended liability would usefully improve the incentives of parties to take precautions against accidents. At the same time, the victims of economic injury often can protect themselves effectively by means other than a tort suit. They may be able to obtain “first-party” insurance against their losses, or recover in contract from those who do have good claims against the defendant.

The rationales just stated are general, and no one of them is conclusive. They prevail by their cumulative force. And while they do not apply with equal force to every claim that arises under this Section, most courts reject such claims categorically. They have concluded that distinctions allowing some plaintiffs to recover but not others, based on a case-by-case inquiry into the policies at issue, cannot be made in a sufficiently principled manner. Denying claims by rule undeniably works a hardship on plaintiffs with claims that fall outside the policies that make the rule attractive—claims that do not lend themselves to solution by contract, for example, or that produce no problems of indeterminacy. But a rule against recovery has other advantages: predictability, clarity,
§ 7. Injuries to the person or property of third parties

and economy of application for courts, lawyers, and those attempting to plan their affairs and anticipate their liabilities. In this area those values have been thought to outweigh the benefits of occasionally providing relief.

c. Proprietary interests. A claimant with a proprietary interest in property can recover for economic losses that result when the property is damaged. Simple ownership is the most familiar example of a proprietary interest, but there are other kinds as well. Proprietary interests can be divided into two types: those that arise from mere possession of property, and those that arise from ownership interests without need of possession. If a claimant possesses property without owning it, courts decide whether the resulting interest is “proprietary” by using a functional test: they ask whether the claimant has control of the property and is responsible for its maintenance and repair. Thus the law frequently allows a lessee of property to recover for damage to it, but does not allow recovery by a claimant who occupies or holds property under a license that confers less extensive powers and responsibilities.

If the claimant does not possess the damaged property, then any proprietary interest must arise from a formal right of ownership in it. Common examples of parties with ownership rights in property they do not possess include a lessor, a remainderman, a bailor, and the holder of an easement. Their rights are regarded as proprietary interests, so they can recover for economic losses they suffer when the property is damaged while out of their
§ 7. Injuries to the person or property of third parties

possession. By contrast, a claimant who does not possess
the property and has a merely contractual interest in it,
such as an option to purchase or a contract for future
delivery, cannot recover in tort when the property is
damaged. The rights of the buyer and seller in such a case
are defined by their contracts.

As is evident from these examples, more than one party
can have a proprietary interest in the same property at the
same time. When such property is damaged, each party has a
separate cause of action for its economic losses, so long
as their losses are distinct; the tortfeasor cannot be made
to pay twice for identical damage. See Illustration 8.

Illustrations:

5. Company hires Contractor to build an
underground pipeline. Unrelated Excavator negligently
damages the pipeline while it is under construction.
Contractor has control of the pipeline at the time the
incident occurs, and is responsible for repair of any
damage to the work until the project is completed.
Contractor can recover its losses from Excavator.

6. Vessel negligently damages a railroad bridge
that Railroad has a right to use. The bridge is owned
and maintained by another. The damage forces Railroad
to send its trains by an alternate route that is more
expensive than using the bridge. Railroad cannot
recover its losses from owner of Vessel.
§ 7. Injuries to the person or property of third parties

7. Manufacturer hires Factory to add dye to fabric. While Factory is performing the work, Contractor negligently severs a utility line carrying power to Factory’s machines. The fabric is ruined as a result. The court finds that Factory was acting as bailee of the fabric. Factory may recover in tort against Contractor.

8. Tortfeasor negligently causes physical harm to property belonging to A as lessor and B as lessee. Repairs are not feasible, and the damage reduces the income that the property can produce. B has an action against Tortfeasor for lost income during the remaining period of the lease. A has an action against Tortfeasor for lost income thereafter.

d. Damage to property. As already noted, economic loss can be recovered as an ordinary item of damages when it results from actionable physical harm to the claimant or the claimant’s property. But a plaintiff whose property suffers some harm does not necessarily gain the right to recover for pure economic loss that results from other features of the same general incident. Courts require a causal connection between the physical harm and the economic loss. See Illustrations 9-10. Where physical harm has occurred, traditional principles of causation determine whether the harm is connected closely enough to the claimant’s economic losses to permit recovery for them. See Restatement Third, Torts: Liability for Physical and Emotional Harm §§ —,—.
§ 7. Injuries to the person or property of third parties

Illustrations:

9. Contractor negligently severs a power line running from Utility to Farmer’s indoor mushroom nursery. The resulting loss of power causes Farmer’s mushrooms to die. The destruction of the crop causes Farmer to lose profits. Farmer may recover the lost profits from Contractor.

10. Barge Operator negligently causes an oil spill that forces the closure of a harbor and requires Contractor to delay work on a construction project there. The spilled oil also ruins an expensive piece of Contractor’s machinery, but the machinery can be swiftly replaced and is not the cause of Contractor’s delay. Contractor can recover from Barge Operator for the ruined machinery but not for the costs occasioned by the delay of the project.

e. Fishermen. Commercial fisherman have sometimes prevailed on claims that appear inconsistent with the rules of this Section. Those results occur in two different kinds of cases, and they are best considered separately.

(a) In the first pattern, a defendant’s negligence damages a ship, typically by collision. The accident causes economic losses to fishermen hired to work on the ship, and who were to be paid a percentage of the profits from the voyage—so-called “lay agreement,” which might be viewed as a type of joint venture with the owner. It is
§ 7. Injuries to the person or property of third parties

understood, as a background matter, that the owner likely can sue the tortfeasor for profits that were expected from the ship’s voyage and were lost to delays caused by the accident. It is further understood that the owner is liable in restitution to the fishermen for their share of what he recovers; the judgment in favor of the owner can be accompanied on the spot by recognition of a constructive trust in favor of the fishermen. In these circumstances, courts have also given fishermen the option of skipping the middleman and suing the tortfeasor directly.

Why fishermen are allowed this direct option is a matter of occasional debate. The same privilege is not extended to other parties who suffer economic harm when they have contracts with those whose property is damaged. The difference is probably best explained by the unusually clear and precise nature of the fishermen’s entitlement: though they do not own the damaged property, they are joint venturers with the party who does own it. Payment from the tortfeasor, if made to the owner, passes through to the fishermen in a manner that is unusually regular, clear-cut, and automatic. Allowing the fishermen to sue in their own right thus amounts to a convenient shortcut, not an expansion of substantive rights. Nobody is made worse off by it, since the tortfeasor merely pays one party rather than another.

Describing this state of affairs as a “fishermen’s exception,” or explaining it on the ground that fishermen are “favorites of admiralty,” is unfortunate and best avoided. Those phrases imply that fishermen are, by virtue of their trade, exempt from the rules of this Section and
§ 7. Injuries to the person or property of third parties

able to collect whenever they suffer economic harm on account of a defendant’s negligence. That is not so. In fact only certain fishermen have been subject to distinctive treatment: those who have lay agreements with the owner of a damaged ship. The distinctive treatment is justified not because they are fishermen but because features of their commercial arrangement make it unusually efficient to let them collect directly rather than indirectly. The difference is procedural in character. The allowance is not properly used to provide fishermen with a greater recovery than they would have received in the end without it, or to make a defendant pay more than would have been due without it.

(b) In a second pattern, a defendant causes harm to a natural resource, typically by spilling oil or other chemicals into a body of water that serves as a fishing ground. The affected fishermen sue and often win damages, though they had no proprietary interest in the contaminated waters or the uncaught fish. These cases are usually, and correctly, understood as suits to remedy a public nuisance. See Section X, which sometimes allows a plaintiff to recover for damage to a natural resource if the plaintiff’s injury differs from the injuries suffered by the community in general. Fishermen often qualify as plaintiffs under that rule, as do various others. Again, referring to the result as a “fisherman’s exception” to the rule of this Section is misleading. The right to sue belongs to anyone who satisfies the principles of Section X.
§ 7. Injuries to the person or property of third parties

f. Judge and jury. Most courts express the rule of this Section by describing it as a limitation of the defendant’s duty. Other courts have occasionally stated the principle as a matter of causation, or scope of liability, or as a rule about damages. The labeling of the issue usually is of no consequence so long as the rule’s applicability is understood to be a matter of law for the court, not a question for the jury. Treating the rule as a limitation on the defendant’s duty will generally be the clearest way to establish that distribution of labor.

Reporter’s Note


The types of recovery prohibited by this Section are sometimes described in some other countries as “relational economic loss.” That term does not appear in American case law, and is not advocated here because it is not likely to produce improved clarity; the meaning of the phrase is not evident from the words it employs. For comparative discussion, see Feldthusen, Economic Negligence ch. 5 (5th ed. 2008).

Claims for loss of consortium typically involve recovery for the society and affection of a spouse or parent who has been injured or killed. As noted in the
§ 7. Injuries to the person or property of third parties


Illustration 1 is based on Phoenix Professional Hockey Club v. Hirmer, 502 P.2d 164 (Ariz. 1972). Earlier common-law authorities that recognized liability on fact patterns of this kind have been abandoned; they are viewed as depending on an outdated view of the relation between master and servant. See Anderson Plasterers v. Meinecke, 543 N.W.2d 612 (Iowa 1996); Flynn Const. Co., Inc. v. Poulin, 570 A.2d 1200 (Me. 1990); Champion Well Service, Inc. v. NL Industries, 769 P.2d 382 (Wyo. 1989); Annot., 4 A.L.R.4th 504 (1981).


b. Rationale. For leading statements of the rule of this Section and the reasons for it, see 532 Madison Avenue Gourmet Foods, Inc., v. Finlandia Center, Inc., supra; Aikens v. Debow, 541 S.E.2d 576 (W.Va. 2000); Louisiana ex rel. Guste v. M/V Testbank, 752 F.2d 1019 (5th Cir.1985) (en banc); Barber Lines A/S v. M/V Donau Maru, 764 F.2d 50 (1st Cir. 1985); Stevenson v. East Ohio Gas Co., supra.

For academic discussion, see Rabin, Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment, 37 Stan. L. Rev. 1513 (1985); James, Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic

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§ 7. Injuries to the person or property of third parties

1 Appraisal, 25 Vand. L. Rev. 43 (1972); Godwin, Negligent
2 Interference with Economic Expectancy: The Case for
4 Economists have offered an additional rationale for
5 the rule of this Section: sometimes an economic loss to
6 one party may become a benefit to another. If a restaurant
7 loses customers because of damage to a nearby roadway,
8 other restaurants gain when the customers go there instead.
9 To the extent that economic losses are offset in this way
10 by benefits to others, there is no social loss; there is
11 just a shifting of wealth from one party to another. This
12 line of reasoning may have merit, but it has not been
13 pursued by the courts. The reason may be that the aims of
14 tort law are not limited to avoiding social costs; and even
15 if they were, separating private from social losses in any
16 given situation, and with respect to all parties involved,
17 is difficult. In the example just described, the
18 disappointment of patrons who wanted to dine at the first
19 restaurant remains a real loss even if a second restaurant
20 captures all of their business--though the scale of their
21 disappointment may bear little relationship to the lost
22 profits that the first restaurant seeks to recover.
23 For discussion of the economic arguments just
24 discussed, see Posner, Common-Law Economic Torts: An
25 Economic and Legal Analysis, 48 Ariz. L. Rev. 735 (2006);
26 Gilead, Tort Law and Internalization: The Gap Between
27 Private Loss and Social Cost, 17 Int'l Rev. L. & Econ. 589
28 (1997); Goldberg, Recovery for Economic Loss Following the
29 Exxon Valdez Oil Spill, 23 J. Legal Stud. 1 (1994); Bishop,
31
c. Proprietary interests. For discussion of
32 proprietary interests and how they are defined for purposes
33 of this Section, see Holt Hauling & Warehousing Systems,
34 Inc. v. M/V Ming Joy, 614 F. Supp. 890 (E.D. Pa. 1985), and
35 Texas Eastern Transmission Corp. v. McMoRan Offshore
36 Exploration Co., 877 F.2d 1214 (5th Cir. 1989).
37 Illustration 5 is based on J. Ray McDermott & Co. v.
38 S.S. Egero, 453 F.2d 1202 (5th Cir. 1972). Illustration 6
39 is based on Louisville and N. R. Co. v. M/V Bayou Lacombe,
40 597 F.2d 469 (5th Cir. 1979). For a different result on
41 similar facts, see Canadian National Railway v. Norsk
§ 7. Injuries to the person or property of third parties

Illustration 7 is based on Priority Finishing Corp. v. LAL Const. Co., Inc., 667 N.E.2d 290 (Mass. App. 1996); see also Paragon Oil Co. v. Republic Tankers, S. A., 310 F.2d 169 (2d Cir. 1962). The bailee’s recovery on these facts precludes suit by the bailor against the same defendant to collect the same damages. If the bailee recovers amounts that exceed its interest in the property, those amounts are held in trust for the bailor. See Associates Discount Corp. v. Gillineau, 78 N.E.2d 192 (Mass. 1948); The Winkfield, [1902] P. 42 (C.A.), [1900-03] All Eng. Rep. 346.

Illustration 8 is based on Rogers Terminal & Shipping Corp. v. International Grain Transfer, Inc., 672 F.2d 464 (5th Cir. 1982), but moving the case ashore.


The Comment mentions the rights of fishermen to recover restitution from the owner of their ship under certain circumstances. For discussion of the general principles, see Restatement Third, Restitution and Unjust Enrichment § 47 Comment c. illus. 7.

f. Judge and jury. For discussion of different ways to express the rule of this Section, and the practical equivalence of them, see Barber Lines A/S v. M/V Donau Maru, 764 F.2d 50 (1st Cir. 1985). The Comment’s recommendation that the rule be regarded as a matter of
§ 7. Injuries to the person or property of third parties

1 legal duty follows Sinram v. Pennsylvania R. Co., supra; see also Aikens v. Debow, supra, and 532 Madison Avenue Gourmet Foods, Inc., v. Finlandia Center, Inc., supra.
§ 8. Public nuisance resulting in pure economic loss

An actor whose wrongful conduct harms or obstructs public property or a public resource is subject to liability for resulting pure economic loss if the claimant’s losses are distinct from those suffered by the public at large.

Comment:

a. Scope. This Section discusses the liability in tort of defendant who creates a public nuisance that results in pure economic loss to the plaintiff. It thus does not attempt to restate the entire law of public nuisance. Many public nuisances cause physical harm, as when a defendant negligently leaves an obstruction in a road and the plaintiff collides with it, or as when a defendant’s pollution causes damage to property that the plaintiff owns. Those cases are outside the scope of this Section.

In addition to the common-law claims recognized here, public officials may bring civil or criminal actions against a defendant who creates a public nuisance. An action of that type is the most common response to a defendant’s invasion of a public right. The definition of “public nuisance” for those purposes is widely a matter of statute, and tends to be considerably broader than the
§ 8. Public nuisance

1 definition recognized by this Section as a basis for
2 private suit. Statutes also may provide citizens with
3 rights to litigate that are broader than the common-law
4 rights recognized by this Section.

5

b. General principles; rationale. A public nuisance
6 arises when a defendant’s wrongful act causes harm to a
7 public right: a right held in common by all members of the
8 community. The wrongfulness may be established by showing
9 that the defendant’s conduct violated a statute (and thus
10 was a public nuisance “per se”), or by showing that the
11 conduct was intentional and unprivileged, that it was
12 unreasonable, or that it was subject to strict liability.
13 When a public nuisance is thus established, a private
14 plaintiff generally can sue only to redress a distinctive
15 or “special” injury beyond the harm suffered by all members
16 of the affected community.
17
18 The propositions just stated are widely accepted, but
19 are phrased at a level of generality that has sometimes
20 caused confusion about their scope. Any dangerous act by a
21 defendant might, in the abstract, be described as invading
22 the rights of the public, and this way of speaking has
23 occasionally caused unsound claims of public nuisance to be
§ 8. Public nuisance

1 brought on facts that are distant from the traditional
2 meaning of the term. See Comment g. The actual scope of
3 tort liability for economic loss caused by a public
4 nuisance has generally and appropriately been confined to
5 the more limited circumstances stated in the blackletter of
6 this Section and discussed in the Comments.
7
8 Private liability for creation of a public nuisance is
9 an exception to the rule of § 7, which ordinarily prevents
10 a plaintiff from recovering for economic loss caused by
11 damage to property that the plaintiff does not own. That
12 background rule is justified in part because redress may
13 more appropriately be sought from the defendant by a better
14 plaintiff: the owner of the damaged property. When the
15 defendant does harm to resources that have no private
16 owner, however, it may be that no natural plaintiff exists
17 who can be counted upon to vindicate the injury. An action
18 by a public official will commonly lie to abate the
19 nuisance by injunction, but may not involve monetary
20 recovery for damage done. The social and private costs of
21 a public nuisance can nevertheless be large. Allowing
22 certain private parties a right of action can then provide
23 appropriate compensation for their losses and usefully
24 deter repetition of the wrong.
§ 8. Public nuisance

c. Special injury. Recovery in tort by everyone a public nuisance harms would raise the characteristic problems that give rise to the rules of this Chapter: defendants would be subject to potentially massive and unpredictable liabilities, and courts would be faced with an a large and unwieldy number of lawsuits. In response to these concerns, courts recognize liability for a public nuisance in tort only to a plaintiff who has suffered a “special injury”: that is, an injury distinct from the harm suffered by the community at large.

Which injuries are sufficiently distinctive to be considered “special” is unavoidably a matter of judgment rather than rule. Courts have reduced some of those judgments to the patterns explained in Comments d and e. In cases arising outside those patterns, decisions about recovery are best made by asking if liability would cause the problems that the requirement is meant to address: whether permitting the plaintiff’s claim would multiply the amount of litigation or the defendant’s liabilities unduly, and whether plaintiffs allowed to sue can be separated from those who are not in a principled fashion. These judgments may bear less resemblance to conventional decisions about
§ 8. Public nuisance

tort liability than they do to decisions that courts make in other settings about whether, as a prudential matter, a plaintiff should be found to have standing to bring a claim.

d. Harm to public resources. A public nuisance involving harm to a natural resource most often arises from contamination of waterways: a defendant spills toxic chemicals into the sea, causing economic injury to those who depend on it for commercial or recreational purposes. Courts typically recognize fishermen as a class of plaintiffs who suffer special injury in those circumstances, and allow them to recover in tort. As an original matter it might be questioned whether the injuries suffered by such fishermen are clearly distinct from the injuries suffered by the many other parties who are affected by a spill but whose claims tend to be denied. That conclusion is nevertheless repeated often, probably because it provides a familiar and convenient answer to a hard question.

The pattern just described is sometimes confused with the practice of allowing fishermen who work on lay agreements to recover when a defendant negligently damages
§ 8. Public nuisance

the ship they are using. Courts occasionally view these patterns together and infer the existence of a “fishermen’s rule” exempting that class from the usual rules governing recovery for economic loss. The inference is faulty. Fishermen recover in the two circumstances for distinct reasons. The reasons for recognizing the claims of fishermen on lay agreements are explained in Sec. 7, Comment e. When claims by fishermen to recover for public nuisance are allowed, it is on a different rationale—or should be: they are the class of victims most immediately and obviously affected by contamination of a waterway, and can be separated with tolerable clarity from other classes of affected plaintiffs. But claims by fishermen need not be allowed when they do not satisfy the criteria just noted, nor is there any impediment to recognizing claims by other groups who may satisfy the criteria in any given case.

Illustrations:

1. Carrier negligently spills toxic chemicals into a bay. Hotel located on a nearby beach sues to
§ 8. Public nuisance

1 recover for economic losses it suffers when its
2 customers, after hearing of the spill, cancel their
3 reservations. The court finds that Carrier created a
4 public nuisance, but that Hotel’s injuries are similar
5 in kind to injuries shared by all businesses in the
6 area. Carrier is not liable to Hotel.

7

8 2. Same facts as Illustration 1, but Carrier is
9 sued by fishermen and clam diggers for economic losses
10 that result from their inability to carry on their
11 work as a result of the contamination of the bay. The
12 court finds that these plaintiffs are directly
13 prevented from exercising their right to catch fish
14 and dig for claims. The court also finds that the
15 fishermen and clam diggers have suffered injuries
16 distinct in kind from those suffered by individuals
17 and businesses in the area generally, and that
18 permitting these plaintiffs to recover will result in
19 liability that is reasonably proportionate to the
20 defendant’s wrong and not indeterminate in scale.
21 Carrier may be held liable to the fishermen and clam
22 diggers for economic losses caused by the public
23 nuisance it created.
§ 8. Public nuisance

e. Obstruction of public property. A public nuisance that causes economic loss can also involve the obstruction of public property or similar interference with access to it, as when the defendant’s negligent conduct blocks a road. An obstruction of that kind may cause economic loss to plaintiffs who were accustomed to using the road for commercial purposes or who relied on it as a means of access for their customers. Suits to recover for such losses most often fail because the plaintiff cannot show a sufficiently distinctive injury. The court typically concludes that the hardships the plaintiff has suffered are similar to those suffered by others, and that recovery by none of them is a lesser evil than recovery by all. Courts have been willing to recognize such claims in certain narrow circumstances, however, as when the defendant’s wrongful conduct causes a substantial obstruction of access to the plaintiff’s business alone, or otherwise affects the plaintiff much more severely than others. Compare Illustrations 3 and 4.

The requirement that the plaintiff show a “special injury,” here as elsewhere in this Section, is a placeholder for the policies noted in Comment c. Courts
§ 8. Public nuisance

usually decline to impose liability for economic losses caused by obstruction of a public way because they see no end to it: countless businesses might show that a given disruption to nearby traffic reduced the number of visits they received from customers. On the other hand, liability may be unobjectionable and useful if the plaintiff can show an injury that is sufficiently distinct to allow principled separation of the resulting claim from the claims that others might bring.

Illustrations:

3. A building collapses in a city neighborhood.
   The collapse is caused by the negligence of Builder in performing renovations. The streets surrounding the building are closed to pedestrian traffic for several weeks. Nearby Delicatessen is obliged to close during that period but suffers no physical damage. Delicatessen sues Builder on a theory of public nuisance to recover the profits it lost during the closure. The court finds that Delicatessen’s injuries are indistinguishable in kind from injuries suffered
§ 8. Public nuisance

by large numbers of other businesses in the area.

Builder is not liable in tort to Delicatessen.

4. Restaurant on the bank of a river provides a
dock where customers can arrive by boat. Logger
wrongfully floats logs down the river in a loose
manner that allows them to become stuck near
Restaurant and block access to its dock. Restaurant
sues Logger on a theory of public nuisance to recover
profits it lost as a result of the blockage. The
court finds that Logger created a public nuisance and
that Restaurant suffered special damage as a result.
Logger may be held liable to Restaurant in tort.

f. Abatement. A plaintiff may seek to abate a public
nuisance by injunction. The usual requirement that such a
plaintiff show a special injury applies here as well, and
again it may be satisfied by plaintiffs who can show no
personal injury or property damage. The injuries in such a
case may be economic in character; in other instances they
can amount to inconvenience that cannot easily be reduced
to pecuniary terms. In any event, a plaintiff seeking
injunctive relief without damages may be held to satisfy
§ 8. Public nuisance

the requirement of “special injury” more easily than a plaintiff seeking to recover money, because the concerns in the background of the inquiry are then different. An injunction does not subject a defendant to indeterminate liabilities or threaten the court with an avalanche of lawsuits. The analysis still resembles inquiries into standing that seek the best plaintiff to bring a claim, but the different stakes of the decision sensibly can inform the outcome. See Illustration 5, where the types of injuries stated by the residents would not be enough to support liability if they were businesses seeking to recover for lost profits. In other cases the showing required to support abatement may be greater than the showing needed to recover damages. See Restatement Second, Torts § 821B Comment i; § 821C Comment j.

Illustration:

5. Company opens a granite quarry near a residential area. Residents sue to enjoin Company’s operations, claiming that Company has created a public nuisance. On the basis of evidence supplied by Residents, court finds that trucks Company uses to
§ 8. Public nuisance

serve the quarry violate size and weight limits specified by ordinance for adjoining roads. The court further finds that damage to the roads affects Residents more than others in the community, because Residents use the roads to come and go from their homes. Residents have a sufficiently special injury in prospect to allow them to sue, and to permit the court to enjoin Company’s use of the trucks at their request.

g. Products. Tort suits seeking to recover for public nuisance have occasionally been brought against the makers of products that have caused harm, such as tobacco, firearms, and lead paint. These cases vary in the theory of damages on which they seek recovery, but often involve claims for economic losses the plaintiffs have suffered on account of the defendant’s activities: the costs of removing lead paint, for example, or of providing health care to those injured by smoking cigarettes. Liability on such theories has been rejected by most courts, and is excluded by this Section, because the common law of public nuisance is an inapt vehicle for addressing the conduct at issue. Mass harms caused by dangerous products are better
§ 8. Public nuisance

addressed through the law of products liability, which has
been developed and refined with sensitivity to the various
policies at stake. Claims for reimbursement of expenses
made necessary by a defendant’s products might also be
addressed by the law of restitution. If those bodies of
law provide do not supply adequate remedies or deterrence,
the best response is to address the problems at issue
through legislation that can account for all the affected
interests.

As noted in Comment g, problems caused by dangerous
products might have seemed to be matters for the law of
public nuisance only because the term “public nuisance” has
sometimes been defined in broad language that appears to
encompass anything injurious to public health. The
traditional office of the tort, however, has been narrower
than those formulations suggest, and contemporary case law
has made clear that its reach remains more modest. The
rules of this Section reflect that modesty.
§ 8. Public nuisance

Reporters Note

a. Scope. Restatement Second, Torts § 821B-C defines and discusses liability for creating a public nuisance. Those Sections are more general than this one; they are not confined to liability for economic loss, and they contain a more extensive treatment of the standards for determining whether an invasion of a public right is wrongful. The interested reader is referred there for further discussion.

b. General principles; rationale. “Public nuisance” originally referred to an invasion of rights held by the Crown and punishable by criminal prosecution. The concept gradually evolved to protect against invasions of rights held by the public, such as blocking a road, with private plaintiffs allowed to seek damages or abatement upon a showing of “special injury.” On the development of the law of public nuisance generally, see Restatement Second, Torts § 821B; Abrams & Washington, The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years After Boomer, 54 Alb. L. Rev. 359 (1990); Prosser, Private Action for Public Nuisance, 52 Va. L. R. 997 (1966). For a skeptical view of the tort’s development, see Merrill, Is Public Nuisance a Tort? 4 J. Tort L. 1 (2011).


§ 8. Public nuisance


Illustration 4 is based on French v. Connecticut River Lumber Co., 14 N.E. 113 (Mass. 1887); see also Savannah, F. & W. Ry. Co. v. Gill, 45 S.E. 623 (Ga. 1903); In re One Meridian Plaza Fire Litigation, supra; Stop & Shop Companies, Inc. v. Fisher, 444 N.E.2d 368 (Mass. 1983).


§ 8. Public nuisance

1 Gifford, Public Nuisance as a Mass Products Liability Tort, 71 U. Cin. L. Rev. 741 (2003). On the application of the law of restitution to such cases, see Restatement Third, Restitution and Unjust Enrichment § 22.
CHAPTER 2
LIABILITY IN TORT FOR FRAUD

§ 9. Fraud

An actor who knowingly makes a misrepresentation of material fact is subject to liability for economic loss caused by another’s justifiable reliance on it.

[A different sort of possibility, based on R2T:

(1) A misrepresentation is fraudulent if the maker

(a) knows or believes that the matter is not as he represents it to be,

(b) does not have the confidence in the accuracy of his representation that he states or implies, or

(c) knows that he does not have the basis for his representation that he states or implies.

(2) One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.]
§ 9. Fraud

Comment:

a. Scope. This Section states the rules of liability for the tort of fraud, or deceit. The Comments below discuss the principal elements shown in the black-letter. Later Sections discuss variations on the basic tort: liability for nondisclosure (or tacit fraud) (§ 10), liability for false statements of opinion (§ 11), and liability for promises that the maker does not intend to keep (§ 12). Damages are treated in § 13.

The word “fraud” has two general meanings in law. It can refer simply to a knowing misrepresentation, without particular reference to the law of tort. Indeed, a fraudulent statement has consequences under many other different branches of law—most notably the law of contract, the law of restitution, and criminal law. Meanwhile “fraud” also is the name of a particular cause of action in tort: a claim that allows a plaintiff to recover for damage caused by reliance on a defendant’s knowing misrepresentation. This distinction is worth noting because the best legal response to the act of fraud is not necessarily a claim for fraud. Fraud most often does harm by causing a plaintiff to enter into a transaction and suffer losses as a result. The law of contract and the law of restitution supply remedies in such a case that may be superior to those provided in tort, and that have traditionally been a plaintiff’s first line of response. Thus most of the Illustrations in this Section that result in liability might also have been pressed successfully as contract claims. The plaintiff who pursues a tort claim for fraud typically means to avoid some limitation imposed
§ 9. Fraud

by another body of law, such as restrictions on the
recovery of punitive damages for breach of contract.

With that said, the availability of remedies for fraud
in contract or restitution does not limit a plaintiff’s
ability to recover in tort. As discussed in § 2, the
economic-loss rule generally does foreclose liability in
tort for negligence in the negotiation or performance of a
contract, but it does not impair the claims of fraud
discussed in this Chapter. Recognizing claims of fraud
does not interfere with the process of settling obligations
by contract in an orderly and final manner; on the
contrary, liability in tort for fraud helps to protect the
integrity of the contractual process and sometimes
furnishes useful remedies that the law of contract does not
as readily provide. Parties to a contract do not typically
treat the chance that they are lying to each other as an
ordinary subject for their contract to allocate; they
regard honesty as an assumed backdrop to their
negotiations.

For a brief comparison of the remedies available for
fraud under the law of tort, contract, and restitution, see
Comment j.

b. Types of misrepresentations. This Section
recognizes liability for misrepresentations of fact. The
simplest and most common examples involve straightforward
false statements, as when the seller of a house falsely
states that the roof does not leak. But the coverage of
this Section can also extend to some situations outside
that paradigm. First, a misrepresentation need not take
the form of a statement. It can arise from conduct rather
than words, as when the seller of a car turns back its
§ 9. Fraud

odometer. Second, a misrepresentation can be implied rather than explicit. A statement of opinion may falsely imply, for example, that its holder knows of no facts to the contrary; liability then attaches to that false implied statement, not to the opinion or prediction in itself. Doubtful cases are best resolved by asking whether the defendant’s claims included or implied any assertions that are capable of being proven false. See Illus. 1. (Liability for false statements of opinion as such, apart from any facts they might imply, is subject to the rules stated in § X.)

Liability also may be found under this Section for ambiguous statements and half-truths. Thus a speaker may make a statement and know that it is open to two interpretations, one true and one false. The statement is actionable if the speaker intends that it be understood in its false sense, or is indifferent to which way the statement is taken; a speaker who knowingly makes an ambiguous statement is obliged to take reasonable steps to ensure that the statement is understood accurately. See Illus. 2. Likewise, if a speaker believes a statement is true as far as it goes but knows that it is misleading because it is incomplete or not duly qualified, liability may be found under this Section. See Illus. 3. These specific points are merely applications of the same general principle: a defendant who knowingly misleads another may be held liable for fraud.

Illustrations:

1. Buyer of a building asks Seller what material lies behind the structure’s interior walls. Seller
§ 9. Fraud

replies that it’s “not a problem.” Upon later discovering asbestos behind the walls, Buyer sues Seller for fraud. Seller admits that he was aware of the asbestos, and knew that it might have affected Seller’s decision to buy the property; but he claims that his statement that the material was “not a problem” was simply an opinion and so was not actionable. The court finds that Seller’s statement of opinion falsely implied knowledge of facts to support it (and no knowledge inconsistent with it). Seller may be held liable for fraud.

2. Seller promises to deliver “new” specialty batteries to Buyer. Buyer discovers that the batteries already had been used, and sues Seller for fraud. Buyer claims that Seller’s description of the batteries as “new” meant that the batteries had never been used before. Seller contends that “new” meant the batteries are the most recent model of their kind, not part of an earlier series. Court finds that the word “new” was ambiguous, and that Seller knew Buyer was relying on an interpretation that Seller did not share. Seller’s failure to dispel the ambiguity subjects him to liability for fraud.

3. Retailer agrees to sell specialty cars made by Manufacturer. Retailer worries that its rights will not be exclusive; in response, Manufacturer represents that it has no intention of marketing the same specialty car through Rival, another dealership nearby. Two months later, Manufacturer opens a new dealership down the street from Retailer to sell the
same specialty car. Manufacturer admits that it had long intended to open the new dealership and deliberately hid its plans from Retailer, but points out that its statement to Retailer was technically accurate: it never did intend to market the specialty car through Rival. The court finds that Manufacturer’s representation, while not false on its face, was misleading, because it reasonably caused Retailer to believe that Manufacturer intended to give Retailer exclusive rights. Manufacturer may be held liable for fraud.

c. Scienter. To prevail on a claim of fraud, a plaintiff must prove that the defendant made a misrepresentation knowingly; in other words, the plaintiff must prove scienter. This requirement is the most important difference between cases of fraud and cases of negligent misrepresentation or breach of contract. The legal tests for negligence or breach of contract are both objective in character; they do not depend on whether a defendant consciously committed a wrong. Fraud involves a subjective inquiry. The defendant must be shown to have had a culpable state of mind. Thus a party who makes a false statement carelessly, but in good faith, is not liable for fraud, but may be liable for negligent misrepresentation under the rule of § 5. A party who promises an act but then decides not to carry it out may be liable for breach of contract or on a theory of promissory estoppel, but is not liable for fraud unless the statement of intention was false when made. See § 12. In short, the law of fraud is concerned with lies, not mistakes or broken promises.
§ 9. Fraud

1 A statement often includes several components to which the rule of this Section, and the requirement of scienter, might apply: the literal truth of the matter stated (the number of square feet in a house, the financial condition of a company, and so on), but also implied claims about the speaker’s confidence in the statement and basis for asserting it. These latter points are representations in their own right, even if they are not explicit. They can be true or false, just as the literal substance of the claim can be true or false. Thus a speaker may present a mere belief as if it were knowledge, or offer a statement as certain despite having doubts about it, or imply that a claim is founded on personal observation when in fact it is based on hearsay. In all such cases the speaker may think the substance of the claim is true, yet still commit a knowing misrepresentation with respect to the basis for the claim or the confidence it warrants. The speaker in all such cases has the necessary state of mind to support liability for fraud if the other elements of the tort are satisfied. See Illustration 4.

2 It is sometimes said that a statement is fraudulent if its maker believes it to be false or is reckless as to its truth or falsity. This last possibility must be treated with care because “reckless” has a range of meanings in law. The recklessness sufficient to support a claim of fraud occurs when a speaker acts in conscious disregard of a risk that a statement is false, as by offering it without qualification while knowing that it may be untrue. Such cases can be described as matters of recklessness if the word is found convenient, but they also can be viewed as straightforward cases of liability under the language of this Section. They involve knowingly false
§ 9. Fraud

representations, perhaps implied, about the speaker’s confidence in the statement or basis for making it. In other legal settings recklessness may be defined to resemble gross negligence, but a statement reckless in that sense does not subject its maker to liability under this Chapter. However negligent it may be, an utterance is not fraudulent if made in the belief that it is true and that it accurately reflects whatever confidence and basis for belief the speaker of it may possess. Liability for fraud requires a conscious discrepancy between some feature of a defendant’s representation and the truth.

Illustrations:

4. Buyer negotiates a purchase of property from Seller. Seller firmly states that the property consists of 130 acres. Seller believes this statement of the acreage is more likely true than false, but knows that he has not conducted a sufficient investigation of the point to support the sense of certainty that he implies. Buyer completes the purchase of the property in reliance on Seller’s claims, then discovers that the property consists of 90 acres. Seller is liable to Buyer for fraud.

5. Entrepreneur invites Investor to buy stock in his company. In the course of their negotiations, Entrepreneur grossly understates the company’s liabilities. Investor purchases stock in reliance on Entrepreneur’s false statements and suffers losses as a result. The court finds that Entrepreneur, while negligent, believed that his statements were true and
§ 9. Fraud

1 well-founded. Investor has no tort claim for fraud
2 against Entrepreneur. Nor does Investor have a claim
3 for negligent misrepresentation; the economic-loss
4 rule precludes it, because Investor’s complaint
5 involves Entrepreneur’s negligence in the negotiation
6 or performance of a contract. Investor may, however,
7 have a good claim against Entrepreneur for breach of
8 warranty, or for rescission, restitution, and
9 incidental damages.

10 Scien
er is often difficult to prove directly in a
11 suit for fraud. Mere evidence of a false or negligent
12 statement, without more, generally is not enough to support
13 liability; from either of those showings, no presumption
14 arises that the speaker knew the statement was false when
15 made. Successful claims of fraud typically are supported,
16 rather, by evidence that the defendant knew or must have
17 known the truth and made a statement inconsistent with it.
18 Compare Illustrations 6 and 7.

19 Whether the defendant had the necessary state of mind
20 is ordinarily a question for the jury. Like any such
21 question, however, it may be decided by the court if it
22 reasonably can be resolved in only one way.

23 Illustrations:

24 6. Buyer negotiates the purchase of a hotel from
25 Seller. Seller provides documents to Buyer showing
26 that the hotel has high occupancy rates and provides
27 consistent stated revenues. Buyer completes the
28 purchase of the hotel in reliance on Seller’s
29 documents. Buyer then examines the hotel’s internal
§ 9. Fraud

records, which were personally maintained by Seller. Buyer discovers that the hotel’s actual occupancy rates and revenues were half those claimed by Seller during the period in question. From this discrepancy between Seller’s records and representations, a jury may permissibly infer that Seller made knowing misrepresentations to Buyer.

7. Buyer negotiates a purchase of land from Seller. Buyer negotiates solely with Broker who serves as Seller’s agent. Broker provides a listing sheet and brochure stating that the land consists of “20 acres, more or less.” Buyer completes the purchase of the hotel in reliance on these statements. Buyer then discovers that the land consists of 15 acres. Buyer sues Seller. Broker testifies at trial that Seller provided the statement of acreage that was passed on to Buyer. Seller is elderly and infirm, and is not called to testify; nor is any other evidence provided to establish Seller’s relationship to the property or actual knowledge of it. Buyer’s tort claim for fraud fails as a matter of law because Buyer lacks evidence of scienter. Buyer may have a good claim against Seller for breach of warranty or for rescission, restitution, and incidental damages.

d. Materiality. Liability under this Section attaches only to misrepresentations that are material. A misrepresentation is material if a reasonable person would give weight to it in deciding whether to enter into the relevant transaction, or if the defendant knew that the plaintiff would give it weight (whether reasonably or not).
The question, in effect, is whether the defendant knew or should have known that the misrepresentation would matter to the plaintiff. If not, the plaintiff cannot collect damages in tort, though any resulting contract may still be voidable upon a showing that the plaintiff relied on the misrepresentation. See Restatement Second, Contracts § 164. This element of the tort is most likely to be important when one party to a negotiation makes false statements to the other about a matter collateral to the immediate subject of the bargain. See Illustration 8. It also excludes liability for statements amounting to “puffery”—that is, a seller’s broad and predictably exaggerated statements about the quality of an item, as distinct from particular claims of fact (claims based on such facts may be dismissed, in the alternative, for want of justifiable reliance). See Illustration 9.

Illustrations:

8. Contractor on a building project in an unincorporated area approaches neighboring Town to negotiate the purchase of a water supply. Town tells Developer that it lacks the capacity to provide all the water that Developer needs; Town agrees to meet Developer’s requirements only if Developer decreases the size of the project. Developer does so. Developer later learns that Town spoke falsely in the negotiations: Town did have the capacity to provide the water that Developer wanted, but preferred not to allocate it to him. Developer sues Town for fraud. Developer’s claim fails because Town’s misrepresentation was not material: a reasonable
§ 9. Fraud

person would not be expected to assign weight to Town’s particular reasons for its demands, and Town had no reason to believe Contractor regarded those reasons as important to his consent.

9. Buyer purchases a car from Seller. Seller tells Buyer during negotiations that the car is “top of the line” and provides an “outstanding ride.” Buyer later determines that the car is mediocre and provides a poor ride. Buyer sues Seller for fraud. Buyer’s claim fails because the court finds that Seller’s claims were “puffery”; even if they were misrepresentations, they cannot be considered material. In the alternative, Buyer’s claim may fail because his reliance on Seller’s words was unjustifiable.

10. Father approaches School about the possibility of enrolling his daughter there. Officer at School falsely tells Father that some of daughter’s friends have already enrolled; Officer knows that Father would consider this a significant fact in his deliberations. Father enrolls his daughter at School, then discovers that in fact her friends did not enroll. Officer’s misrepresentation was material, and he may be held liable for fraud.

e. Actual reliance. A plaintiff can recover only for damage caused by actual reliance on a defendant’s misrepresentation. Ordinarily this element is satisfied by a showing that the plaintiff gave weight to the defendant’s misrepresentation in making a decision that resulted in
losses. It need not be shown that the plaintiff would
necessarily have made a different decision if the defendant
had spoken truthfully. The plaintiff may have been
influenced by several sources, or by multiple statements—
some true, some false—made by the same party. It is enough
if the defendant’s misrepresentation was a substantial
factor influencing the plaintiff’s decision. On the other
hand, there can be no recovery if the plaintiff did not
believe the defendant’s misrepresentation, or was not aware
of it until after the transaction was complete, or if the
plaintiff would have been legally obliged to follow the
same course regardless of what the defendant said. In
those cases the claim fails because the plaintiff did not
rely on what the defendant said.

Illustrations:

11. Buyer makes investment in Firm. After the
purchase, Buyer discovers that Firm’s prospectus
contained misleading information. Buyer sues Firm for
fraud. Court finds that Buyer did not read Firm’s
prospectus until after making the investment. Buyer’s
claim fails for want of reliance.

12. Buyer negotiates the purchase of an antique
car from Seller. The car is advertised as having 500
miles of wear. Buyer does not believe the claimed
mileage is accurate but wishes it were. Seller says
that if the claimed mileage turns out to be wrong, he
will allow Buyer to return the car and will give Buyer
his money back. Buyer purchases the car, then
determines that the claimed mileage was wrong. Buyer
§ 9. Fraud

sues Seller for fraud. Buyer’s claim fails because he did not rely on Seller’s claims about mileage. Buyer doubted the claims were true, and was compensated for the doubts by Seller’s promise to undo the transaction if the claims were false. That promise is enforceable, but Buyer has no claim in tort.

13. Firm hires Worker to sell cars. Firm makes several representations that cause Worker to accept the job: a promised salary, attractive benefits, and an assurance that Worker will be paid a commission of 5% on the gross receipts from all sales he makes. Worker later learns that the last representation was fraudulent; in fact Firm deducts 15% from the receipts before calculating commissions. Worker sues Firm for fraud. It is not clear whether Worker would have accepted the job with Firm if the rules about his commissions had been truthfully stated. The court nevertheless finds that Firm’s false promise was a substantial factor in Worker’s decision. Firm is liable to Worker for fraud.

The requirement of actual reliance excludes liability at common law for “fraud on the market”—that is, claims that a defendant’s misrepresentations pushed up the price of a stock, causing the plaintiff to pay too much for it. To recover under this Section, plaintiffs must show that they themselves relied on what the defendant said, not that they were injured by the reliance of others. The result may be different in claims brought under federal statutes regulating securities. See Basic, Inc. v. Levinson, 485 U.S. 224 (1988).
§ 9. Fraud

Some special problems of causation are posed by “holder” claims, in which a plaintiff is persuaded not to sell shares of stock by the defendant’s fraudulent statements. There is no reason in principle why a plaintiff may not recover on those facts; no immunity arises from the mere fact that a defendant’s lies moved the plaintiff to inaction rather than action. The problems are matters of proof. A plaintiff may claim to have thought about selling, to have told nobody, but to have had a change of mind after reading something the defendant wrote; the defendant may then be peculiarly unable to argue the point, because the facts consist entirely of mental states in the plaintiff that produced no action and to which nobody else was privy. (The problem is similar if the plaintiff claims to have thought about buying stock but to have decided against it.) To protect against false claims in these circumstances, plaintiffs who base their claims on transactions not made must provide more than a recounted train of thought as proof of reliance. Typically there must be evidence of direct efforts by the defendant to dissuade the plaintiff from entering into the transaction, or evidence of action that corroborates the account the plaintiff gives of the decision—contemporaneous writings or conversations, for example, that show the specific terms of a sale the plaintiff would have made if not for the defendant’s fraud.

f. Justifiable reliance. Principles of comparative negligence do not apply to a claim of fraud, but liability does require a showing that the plaintiff’s reliance on what the defendant said was “justifiable.” Justifiable reliance is a less demanding showing than the “reasonable”
§ 9. Fraud

reliance discussed in § 5. Reasonable reliance is a type of freedom from negligence. Justifiable reliance amounts to freedom from recklessness: plaintiffs who close their eyes to a known or obvious danger that a statement is fraudulent cannot recover losses they suffer from reliance on it. Cf. Restatement Third, Torts, Liability for Physical and Emotional Harm § 2. The rules also differ because reasonable reliance is an objective standard; the plaintiff’s conduct is measured against community standards of behavior. Justifiable reliance has a subjective character. It is measured by reference to the plaintiff’s capabilities and knowledge. A plaintiff’s sophistication may affect a court’s judgments about what dangers were fairly considered obvious. Compare Illustrations 15 and 16.

Whether a plaintiff’s reliance was justifiable is ordinarily a question for the trier of fact, but may be decided as a matter of law when reasonable minds could reach only one conclusion. Compare Illustrations 14 and 15. Unlike the requirement of reasonable reliance found in § 5, the justifiable reliance required by this Section does not call for a comparison of the fault attributable to the plaintiff and defendant. It is a threshold requirement; if it is satisfied, incremental doubts about the plaintiff’s degree of care will not reduce the resulting recovery from the intentional tortfeasor.

Illustrations:

14. Buyer purchases a house from Seller. During their negotiations, Seller asserts that he “never had water problems in the house.” Buyer orders an
§ 9. Fraud

inspection prior to closing. The inspector informs Buyer that there is evidence of recent water damage in the basement. Buyer nevertheless goes through with the purchase. Buyer then discovers that the basement leaks. Buyer sues Seller for fraud. Buyer’s claim fails as a matter of law because his reliance on Seller’s statements was not justifiable; in view of the findings in the inspection report, it was reckless of Buyer to rely on Seller’s assertions without further investigation.

15. Insurer sells life-insurance policy to Consumer. Insurer misrepresents the effect of the policy, falsely assuring Consumer that the policy can serve as a vehicle for retirement savings. Consumer later discovers that the policy cannot function as described. Consumer sues Insurer for fraud. Insurer claims that Consumer’s reliance on its statements was unjustifiable because a reading of the written policy would have made its limits clear to her. Consumer did not read that part of the policy. The trier of fact may reasonably conclude that Consumer’s reliance was nevertheless justifiable.

16. Investor and Director of Company both sign a guaranty in which each agrees to be personally liable for repayment of Bank’s loan to Company if Company defaults. The agreement states prominently that Bank can collect the entire amount from either guarantor. Company defaults. Bank seeks recovery only from Investor. Investor sues Bank for fraud. Investor claims that during negotiations over the loan, an
§ 9. Fraud

officer of Bank said that Investor would not be held responsible for more than half of it in the event of default. The court finds that Investor was a sophisticated and experienced party represented by counsel, that the liability of Investor for the full amount was a carefully negotiated term of the agreement, and that the guaranty contract forbade Bank’s officer to alter its terms. Investor’s claim fails as a matter of law because his reliance on the oral assurances of Bank’s officer was unjustifiable.

g. No-reliance clauses. Sometimes a plaintiff claims to have been induced to sign a contract by false statements that the defendant made during their negotiations. The parol-evidence rule is a doctrine of contract law and is not, in itself, an impediment to a tort claim based on such facts. The contract itself, however, may contain language that is inconsistent with the plaintiff’s theory of recovery. It might include an integration clause stating that the written contract is the exclusive statement of the parties’ entire agreement, or it might contain a disclaimer of reliance on representations made outside the four corners of the document. Language of either type may undermine a plaintiff’s claim to have relied on fraudulent statements made before the contract was signed. Disclaimers serve a useful commercial purpose, not by shielding parties who lie but by protecting both parties from costly litigation about whether they lied. Disclaimers also may allow parties to usefully allocate responsibility for determining the truth about the subject of a transaction. But disclaimers also can serve as traps for parties who are content to treat a written contract as
§ 9. Fraud

final but do not mean to assume the risk that the other side has committed fraud. The effect of a “no-reliance” clause on a tort claim for fraud thus depends on two considerations: the specificity of its wording and the sophistication of the parties.

First, an ordinary integration clause, written in general language, will not be read to foreclose a claim that the plaintiff’s consent to the contract was procured by fraud. Nor is such a claim barred by a broad statement in the contract that neither party is relying on statements made by the other outside the contract. More specific disclaimers may be enforced, however, as when the plaintiff signs a writing that denies reliance on particular statements or on assurances the defendant has made about a given topic. Second, a disclaimer of reliance on a defendant’s statements will ordinarily be enforced only against a sophisticated party. Sophistication, for these purposes, typically means that the plaintiff was represented by counsel and was a commercial actor rather than a consumer. The two considerations just noted may bear on one another: the more sophisticated the plaintiff, the less specific the disclaimer need be to foreclose a claim. When close questions arise about whether a contract was specific enough, or a plaintiff sophisticated enough, to justify enforcement of a no-reliance clause, they may be resolved by reference to the policies that lie behind the requirements. Their purpose is generally to limit enforcement to cases in which the disclaimer was a deliberate choice made for considered reasons, not a piece of boilerplate that the plaintiff would be surprised to find was a waiver of the right to honesty from the other party to the agreement.
§ 9. Fraud

Whether to give effect to a disclaimer of reliance is a question for the court unless it depends on factual disputes on which reasonable minds could differ.

Illustrations:

17. Commercial Purchaser of real estate makes a contract to buy a building from Seller. Purchaser later sues Seller for fraud. Purchaser claims that during their negotiations, Seller made false statements about the expenses of operating the building. The contract between the parties states, "Seller makes no representations as to the expenses, operation or any other matter related to the premises, except as herein specifically set forth. Purchaser acknowledges that no such representations have been made or are relied upon." Purchaser's tort claim for fraud fails, because in view of the contractual language he cannot show that he justifiably relied on any statements the Seller might have made about the expenses of operating the building.

18. Homeowner buys a security system from Company. Homeowner relies on assurances offered orally by Company that the system will operate even after a general power failure affecting the house. Homeowner later discovers that Company's assurance was fraudulent, and incurs expenses to have the system replaced by another firm. The contract between Homeowner and Company did not mention the system's ability to withstand a power failure, and the contract contained an integration clause stating that the
written agreement was a complete expression of the parties’ understandings. Homeowner’s tort claim for fraud nevertheless survives because he is not a sophisticated party, and because the contract did not specifically disclaim reliance on Agent’s assurances.

h. Scope of liability. A plaintiff can recover only for the types of losses that might reasonably have been expected to result from the defendant’s fraud. This generally means that the fraud must have increased the risk of the kind of harm that the plaintiff suffered. Thus no liability results when a defendant’s lie causes the plaintiff to make an investment that fails for reasons unrelated to what the defendant said. On the other hand, a lie that causes a small increase in the likelihood of the loss that the plaintiff suffers is sufficient to support liability.

Illustrations:

19. Investor buys shares in Company. Investor is persuaded to make the purchase by Director’s false assurance that he will invest in Company to a comparable extent. Six months later, Company fails due to a decline in the demand for its products. Company might have failed even if Director had invested as heavily as he promised. Investor sought Director’s assurances, however, because the commitment they reflected would have reduced the risk that Company would fail in the way that it did. Investor’s losses are within Director’s scope of liability for fraud.
§ 9. Fraud

20. Investor buys shares in Company. Investor is persuaded to make the purchase by Director’s false assurance that Company is in compliance with various state regulations. Six months later, Company fails due to a decline in the demand for its products. Company’s failure to comply with the regulations raised the risk that Company would be subjected to various civil penalties, but the failure to comply did not raise the risk that Company would fail in the way that it did. The losses that Investor suffered as a result of Company’s failure are outside Director’s scope of liability for fraud.

Liability under this Section extends to damage suffered by those whose reliance the defendant intended to induce, or by others the defendant had reason to expect would rely on the statements at issue. The plaintiff need not have dealt directly with the defendant; it is enough if the defendant had reason to expect that the plaintiff would later receive the statement and rely on it. Nor need the defendant know the specific identities of those who were likely to rely; awareness of a class of potential victims is sufficient. If the defendant’s statement is embedded in a commercial document—a product label, for example, or a security—then reliance on it by any who deal with the document in the ordinary course of business is regarded as expectable. The same general principles apply to the types of decisions affected by the defendant’s statements: liability extends to transactions of the kind the defendant meant to influence by the fraudulent statement, or had reason to believe would be influenced by it. If a statute
§ 9. Fraud

requires a defendant to provide information, a defendant who speaks falsely may be held liable for losses suffered by those people, and in those types of transactions, that the statute was meant to protect.

The principles just stated, however, require more than just foreseeability of a risk that the plaintiff might someday rely on what the defendant says. They require, rather, that the defendant have reason to consider that reliance likely, even if the plaintiff’s identity is indistinct. It might seem peculiar to place such limits on the liability of a defendant who has, by hypothesis, acted with a culpable state of mind. But the limits reflect a reasonable solicitude for the potential defendant who commits no fraud but speaks often, or who employs others who speak often. Even when speaking truthfully, such a party must prepare for (and insure against) the risk of litigation, with its attendant expenses, risk of error, and other hardships. The limits explained here help such defendants measure their exposure in advance and act accordingly.

Illustrations:

21. Seller is considering a business arrangement with Buyer, and asks Bank that holds Buyer’s account for an opinion of Buyer’s financial stability. Bank replies that Buyer is “sound.” Eighteen months later, Seller enters into transaction with Buyer. Buyer goes bankrupt soon thereafter. Seller sues Bank, claiming its assurance of Buyer’s soundness was fraudulent. The court finds that Buyer’s business was highly

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§ 9. Fraud

volatile, that the soundness of an enterprise in its field will often change over the course of a few months, and that Bank could not reasonably have expected a statement it made to become the basis of reliance by Seller over a year later. Seller’s claim against Bank fails as a matter of law.

22. Accountant produces audit report for Company 1. Company 1 then merges with Company 2; the shareholders of both companies receive Accountant’s report. A few months later, Investor decides to buy bonds that had been issued by Company 2 before the merger. In deciding to buy the bonds, Investor relies in part on Accountant’s audit of Company 1. The report satisfies Investor that, with the companies now merged, the bonds issued by Company 2 are safe. The merged company soon fails and the bonds become worthless. Investor sues Accountant in tort for fraud. The court finds that Accountant prepared its audit of Company 1 to satisfy shareholders who would be approving the merger, and that Accountant had no reason to expect reliance on the report by someone buying Company 2’s bonds. Investor’s claim fails as a matter of law.

23. Buyer negotiates to purchase Rancher’s cattle. Rancher gives Buyer written assurances that the cattle are healthy; in fact Rancher knows that the cattle are diseased. Buyer takes Rancher’s assurances to Bank to obtain financing for the purchase. Bank provides it. Buyer acquires the cattle, they all die from their preexisting disease, and Buyer goes
§ 9. Fraud

bankrupt. Bank sues Rancher for fraud. Court finds that Rancher knew Buyer would seek financing from a bank, even if Rancher did not know which one, and that Rancher knew Buyer was likely to provide the bank with Rancher’s assurances that the cattle were healthy. Rancher may be held liable to Bank.

i. Standard of proof. The elements of a tort claim ordinarily must be proven by a preponderance of the evidence, but courts have frequently required clear and convincing evidence to establish liability for fraud. They typically reason that a claim of fraud is easy to allege and often has damaging side effects; it may injure the reputation of the defendant and entitle the plaintiff to seek punitive damages. Those points may be accurate, but in themselves they do not fully explain the higher standard of proof; they are true of many other intentional torts as well. The special treatment of fraud is better understood as a protection against encroachment into the law of contract by the law of tort. An allegation of fraud often arises from an exchange between the parties that the plaintiff believes was tainted by deceit. If successful, the claim may allow the plaintiff to obtain more aggressive remedies in tort than contract law would provide. The law generally prefers that disputed transactions be resolved by the law of contract, and so makes escape from that body of law a bit more demanding than the assertion of a claim that has no other legal home.

A majority of courts apply the more demanding standard of proof to all elements of a claim for fraud. A minority apply it to scienter and perhaps to certain other elements of the tort, but not to damages. The Institute favors the
§ 9. Fraud

latter approach. The heightened standard of proof should be applied only as far as the rationale for it will carry. The rationale plausibly applies to an assertion that the defendant made a false statement knowingly, because that element of the tort—scienter—distinguishes a fraud claim from a claim of negligence that would be extinguished by a contract between the parties. The need for a heightened standard in judging claims of reliance is far less clear; indeed, once a defendant’s culpable state of mind has been proven, it is difficult to see why the plaintiff should be put to a harder task in proving causation of any sort than would be necessary if the defendant were merely negligent. Applying a more demanding standard to the proof of damages is still harder to support. The best justification is probably that a jury might be confused by different standards of proof for different elements of a fraud claim, but juries are assigned more demanding tasks often enough. Because these issues have yet received only occasional judicial attention, the Institute leaves to developing case law the details of when clear and convincing proof ought to be used. It recommends, however, that the heightened standard be justified by good and specific reasons whenever it is employed.

j. Relation to restitutionary and contract remedies. If a defendant’s fraudulent statements induce a plaintiff to enter into a contract, the resulting facts may be addressed simultaneously by the law of tort, the law of contract, and the law of restitution. For clarity’s sake, it may be useful to summarize the differences between the remedies available to a plaintiff under those theories.
§ 9. Fraud

(1) **Restitution.** A plaintiff may rescind a contract if it was procured by fraud. Rescission is a remedy available under the law of restitution, not tort. See — . Both sides give back whatever they received from the other, to the extent such a return is feasible. Those acts of restoration may be supplemented by awards of incidental damages to make up for value that cannot be fully returned, or to reflect costs that the defrauded party incurred in reliance on the transaction. Many jurisdictions also allow the plaintiff to obtain punitive damages in an appropriate case.

(2) **Contract.** The law of contract responds to fraud in several ways. First, a court may find that the fraud prevented a contract from being formed at all, and so leave the parties to their remedies under the law of restitution. Second, a contract procured by fraud may be treated as voidable; in other words, the victim of the fraud either can elect to affirm and enforce the contract despite the fraud that induced it, or can disaffirm the contract and seek rescission. Third, in a case where the fraud took the form of a writing that did not reflect the parties’ actual agreement, the contract can be reformed to reflect the intentions of the parties and then enforced on its new terms.

But a misrepresentation, whether fraudulent or not, does entitle a plaintiff to contract damages if it amounts to a warranty that was breached. A warranty is a claim about the characteristics of a thing sold or service provided; the defendant is regarded as having guaranteed those characteristics, and to be answerable in damages if they do not exist. For breach of warranty a plaintiff may
§ 9. Fraud

obtain expectation damages, which commonly means recovery of whatever sums are needed to put the thing received into the condition the defendant promised. If the thing received cannot be put into the promised condition, the difference between its actual and promised value is another possible measure of recovery.

As this statement of options shows, fraud in itself gives a plaintiff no claim to damages under the law of contract. If a party is induced to enter a contract by fraud, the fraud will typically allow the party to escape the contract or have it reformed. And if the fraudulent statement amounted to a promise, it can be enforced to the same extent as any other promise. But the law of contract does not otherwise enable a victimized party to both enforce a contract and also seek additional sums that would have been received if the defendant’s fraudulent statement had been true. A plaintiff seeking that result might most closely achieve it by making a claim for punitive damages, which are available for breach of contract in some jurisdictions when the breach also amounts to tortious misconduct—a criterion satisfied when the defendant has engaged in fraud. See Restatement Second, Contracts § 355.

(3) A tort claim, unlike the other types of suit just described, permits recovery of damages for fraud as such. A claim under this Chapter entitles a plaintiff to affirm the contract but seek out-of-pocket damages: the difference between the value of what the plaintiff paid and received, along with other sums needed to restore the position the plaintiff would have occupied if the defendant had not committed the fraud. Such damages resemble a combination of reliance and consequential damages in the
§ 9. Fraud

law of contract. Punitive damages also are available in
tort (see § 14). Sometimes an award of punitive damages
may be calculated to give the plaintiff the benefit of the
bargain made with the defendant, much as a successful claim
for breach of warranty would. As a comparison of this
paragraph and the previous one will suggest, a plaintiff
with an enforceable claim for breach of warranty typically
has nothing to gain by also pursuing a tort remedy, except
perhaps incidental advantages such as a longer statute of
limitations due to idiosyncratic facts of the case. In
some jurisdictions an award of punitive damages may be more
readily available in tort than in a suit for breach of
contract.

A plaintiff can allege a right to recover under any of
these theories or all of them, but cannot be compensated
more than once. Moreover, the pursuit of multiple remedies
may be subject to rules of election. Rescission is
inconsistent with a claim for breach of contract or tort
damages, and so cannot be sought at the same time as relief
on those other theories; and rescission must be elected
promptly—typically before the case goes to a jury, and
often earlier—because a court’s ability to fully undo an
exchange deteriorates with the passage of time. Claims for
breach of contract and for tort damages are not
inconsistent with one another, and so typically may be
advanced together at trial without an election between them
so long as it is made clear to the jury that the plaintiff
can recover under one theory or the other, but not both.
§ 9. Fraud

Illustration:

24. Buyer offers to purchase Seller’s business for two installment payments of $450,000 spaced six months apart. Buyer is to receive half of Seller’s shares in the company in return for each payment. After paying the first installment, Buyer discovers that Seller fraudulently misrepresented the value of the business: he made it appear to be worth $1.5 million, but its actual value was $500,000. Buyer can rescind the contract, returning Seller’s shares and recouping his $450,000 payment. If Buyer instead affirms the contract and brings a tort claim for fraud, he owes Seller the remaining installment payment of $450,000, but can collect (or subtract), as out-of-pocket damages, the $400,000 difference between what he agreed to pay for the business and what it was worth. If Buyer wishes to collect the $1 million difference between what the Seller said the business was worth and what it was worth in fact, Buyer must pursue that sum as a contract remedy for breach of warranty or as punitive damages for the tort claim; it is not properly awarded as compensatory damages in tort. Nor can Buyer collect both out-of-pocket damages in tort and expectation damages in contract.

Reporter’s Note

a. Scope. This Section consolidates principles that were covered in Restatement Second, Torts §§ 525-529, 531-537, 539-542, and 546-548. On the perils of attempts to define “fraud” too precisely, see Howard v. Scott, 125 S.W. 1158 (Mo. 1910):
§ 9. Fraud

What is fraud? No statute and no judge has been so daring and unwise as to define it by hard and fast rules. That pre-eminent jurist who “perfected English equity into a symmetrical science,” who is deemed by no less an authority than Lord Campbell “the most consummate judge who ever sat in the court of chancery,” Lord Chancellor Hardwicke, he who as the lad, Phillip Yorke, was designed by his pious Presbyterian mother for some “honester trade” than the profession of an attorney (she longing to “see his head wag in the pulpit”), who gave his “days and nights to the volumes of Addison” in acquiring a luminous and chaste style, and at the bar with unremitting toil and pains, superadded to a happy temperament and facile and receptive mind, informed and grounded himself in all essentials to wisdom, learning, and virtue on the woolsack, so that his administration on that judgment seat is “fondly looked back upon as the golden age of equity,” laid down the precept, never since departed from, that fraud should be left undefined.


Illustration 3 is based on Level 3 Communications, LLC v. Liebert Corp., 535 F.3d 1146 (10th Cir. 2008).

c. Sciento. This Comment is the successor to Restatement Second, Torts § 526. For leading statements
§ 9. Fraud

and discussion of the scienter requirement for fraud, see
Derry v. Peek, 14 App.Cas. 337 (H.L. 1889); Nash v.
Minnesota Title Insurance & Trust Co., 40 N.E. 1039 (Mass.
1895); Donnelly v. Baltimore Trust & Guarantee Co., 61 A.
301 (Md. 1905); Morrow v. Franklin, 233 S.W. 224 (Mo.
1921); Nielsen v. Adams, 388 N.W.2d 840 (Neb. 1986);
Florenzano v. Olson, 387 N.W.2d 168 (Minn. 1986). Certain
features of Derry v. Peek are no longer representative of
English or American law, but its account of the mental
state needed to support liability for fraud retains
vitality. On the unimportance of a defendant’s motive for
making a knowing misrepresentation, see Beeck v. Kapalis,
302 N.W.2d 90 (Iowa 1981); Spiess v. Brandt, 41 N.W.2d 561
(Minn. 1950); McDonald v. McNeil, 104 A. 337 (Vt. 1918);
John V. Farwell Co. v. Nathanson, 99 Ill.App. 185 (1900);

Illustration 4 is based on Cabot v. Christie, 42 Vt.
121 (Vt. 1869); see also Ellerin v. Fairfax Sav., F.S.B.,
652 A.2d 1117 (Md. 1995); Cunningham v. Miller, 552 A.2d
1203 (Vt. 1988); Riley Hill General Contractor, Inc. v.
Tandy Corp., 737 P.2d 595 (Or. 1987); Beeck v. Kapalis,
516 (1916); Vincent v. Corbitt, 47 So. 641 (Miss. 1908).

Illustration 5 is based on Kountze v. Kennedy, 41 N.E.
414 (N.Y. 1895); see also Metro Communication Corp. BVI v.
Advanced Mobilecomm Technologies Inc., 854 A.2d 121 (Del.
Ch. 2004); Muhammad v. Strassburger, McKenna, Messer,
Shilobod and Gutnick, 587 A.2d 1346 (Pa. 1991); Florenzano
v. Olson, supra; B & B Asphalt Co., Inc. v. T. S. McShane
Co., Inc., 242 N.W.2d 279 (Iowa 1976); Reno v. Bull, 124
N.E. 144 (N.Y. 1919); Cahill v. Applegarth, 56 A. 794 (Md.
1904).

Illustration 6 is based on Follo v. Florindo, 970 A.2d
1230 (Vt. 2009). Illustration 7 is based on Cunningham v.
Miller, 552 A.2d 1203 (Vt. 1988). For the proposition that
fraud will not be presumed, see ServiceMaster Industries
1986); Gerschman v. Engelstad, 160 N.W.2d 80 (N.D. 1968);
For discussion of whether and when the determination of
scienter can be taken from the jury, see Quill v. Newberry,
518 S.E.2d 189 (Ga. App. 1999); In re Chavin, 150 F.3d 726
(7th Cir. 1998); the Chavin case involves the
interpretation of bankruptcy law, but the principles it
sets forth are applicable to common-law claims of fraud as
well.
§ 9. Fraud

From Massey v. Young, 73 Mo. 260 (Mo. 1880):

Fraud is rarely ever susceptible of positive proof, for the obvious reason that it does not cry aloud in the streets, nor proclaim its iniquitous purposes from the housetops. Its vermiculations are chiefly traceable by “covered tracks and studious concealments.” Cooley on Torts, 475; Hopkins v. Sievert, 58 Mo. 201; Burgert v. Borchert, 59 Mo. 80.

And though fraud is not to be presumed, yet it is as legitimate to infer its existence from surrounding circumstances pointing unmistakably to a wrongful purpose, as it is to thus infer under similar circumstances the commission of a crime; and this is done daily. Anything, therefore, which satisfies the mind and conscience of the existence of fraud is sufficient.


Difficult cases can arise when sellers falsely claim to have received other offers to purchase whatever they are selling, thus inducing buyers who hear the claim to make higher bids. Depending on the context, one might question the reasonableness of a buyer’s reliance on such statements; there nevertheless is authority for holding sellers liable on some versions of those facts. See Kabatchnick v. Hanover-Elm Bldg. Corp., 103 N.E.2d 692 (Mass. 1952); Beavers v. Lamplighters Realty, Inc., 556 P.2d 1328 (Oka. App. 1976); Kansas Mun. Gas Agency v. Vesta Energy Co., Inc., 840 F. Supp. 814 (D. Kan. 1993) (Oklahoma law). Compare cases where sellers lie about the minimum prices they would accept, on which see American Bar
§ 9. Fraud

Association, Model Rules of Professional Conduct, Rule 4.1(a), official comment (1983) ("Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are ordinarily in this category["].)


For the proposition that actual reliance cannot be shown when the plaintiff had a legal obligation to take the same course of action in any event, see Conroy v. Regents of University of Cal., 203 P.3d 1127 (Cal. 2009); Kitt v. Capital Concerts, Inc., 742 A.2d 856 (D.C. 1999). For discussion of the difference between the “actual reliance” required in suits based on tort and contract, see CBS Inc. v. Ziff-Davis Pub. Co., 553 N.E.2d 997 (N.Y. 1990).

On the treatment of holder claims at common law, see Holmes v. Grubman, 691 S.E.2d 196 (Ga. 2010); Grant...
§ 9. Fraud


Illustration 16 is based on Spreitzer v. Hawkeye State Bank, 779 N.W.2d 726 (Iowa 2009). See also Ex parte Ford Motor Credit Co., 717 So.2d 781 (Ala. 1997). For cases on the general importance of the plaintiff’s sophistication in determining whether the reliance made was justifiable, see 1001 McKinney Ltd. v. Credit Suisse First Boston Mortg. Capital, 192 S.W.3d 20 (Tex. App. 2005); Nader v. Allegheny Airlines, Inc., 626 F.2d 1031 (D.C. Cir. 1980).

On the treatment of justifiable reliance as ordinarily a question for the jury, see Spreitzer v. Hawkeye State Bank, 779 N.W.2d 726 (Iowa 2009); Anchorage Chrysler Center, Inc. v. DaimlerChrysler Corp., 129 P.3d 905 (Alaska 2006).

§ 9. Fraud

g. No-reliance clauses. Illustration 17 is based on Danann Realty Corp. v. Harris, 157 N.E.2d 597 (N.Y. 1959); see also RAA Mgmt., LLC v. Savage Sports Holdings, Inc., 45 A.3d 107 (Del. 2012); Barr v. Dyke, 49 A.3d 1280 (Me. 2012); Forest Oil Corp. v. McAllen, 268 S.W.3d 51, 60 (Tex. 2008); Extra Equipamentos e Exportação Ltda. v. Case Corp., 541 F.3d 719, 722-26 (7th Cir. 2008) (Posner, J.) (Illinois law); Slack v. James, 614 S.E.2d 636 (S.C. 2005). For the point that a disclaimer can be enforced even when less specific if the parties are sufficiently sophisticated, see Citibank, N.A. v. Plapinger, 485 N.E.2d 974 (N.Y. 1985).


On the role of judge and jury in deciding the effect of a no-reliance clause, see Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of America, 341 S.W.3d 323 (Tex. 2011); Novare Group, Inc. v. Sarif, 718 S.E.2d 304 (Ga. 2011); Extra Equipamentos E Exportacao Ltda. v. Case Corp., supra.


§ 9. Fraud

Illustration 21 is based on Dahlgren v. First Nat. Bank of Holdrege, 533 F.3d 681 (8th Cir. 2008).


j. Relation to restitutionary and contract remedies. On the use of rescission as a response to a claim of fraud, see Restatement Third, Restitution and Unjust Enrichment § 54. For cases discussing the availability of punitive damages when a plaintiff seeks rescission, see Medasys Acquisition Corp. v. SDMS, P.C., 55 P.3d 763 (Ariz. 2002); Seaton v. Lawson Chevrolet-Mazda, Inc., 821 S.W.2d 137 (Tenn. 1991); Ind. & Mich. Elec. Co. v. Harlan, 504 N.E.2d
§ 9. Fraud


§ 10. Duties to disclose; tacit misrepresentation

A misrepresentation that supports liability under § 9 may result from a failure to disclose information, but only when the person remaining silent has a duty to speak. Such a duty may exist where:

(a) the actor has made prior statements and knows that they will mislead another if not amended, even if they were not actionable when made; or

(b) the actor has a special relationship with another that obliges the actor to be forthcoming; or

(c) the actor knows that another party is about to enter into a transaction under a mistake about a basic assumption behind it, and that the other party, because of the relationship between them, the customs of the trade, or other circumstances, would reasonably expect a disclosure of what the actor knows.

Comment:

a. Scope; other actions compared. Liability for fraud ordinarily arises from misleading statements, not from silence. That is so because one party to a transaction has no general duty to make disclosures to the other. On occasions discussed in this Section, however, a plaintiff does have such a duty. In those cases silence
§ 10. Duties to disclose

...may be considered a form of deceit, and the nondisclosure of a fact treated the same as an assertion of its nonexistence.

The liability recognized by this Section is a species of deceit; indeed, this Section is best understood as detailing when silence can satisfy the "misrepresentation" element of § X. The discussion in § X of other elements of liability for fraud, such as materiality and causation, continue to be relevant to a claim that meets the requirements this Section. A statement that is misleading if not properly qualified may support liability under § 7 without reference to the principles stated here. This Section, rather, recognizes liability for nondisclosure as such—that is, for a failure to disclose unaccompanied by any statement that would support liability in itself.

On liability for omissions under a theory of negligent misrepresentation, see § 5, Comment e. If the cases treated in this Section were found to involve negligence rather than a more culpable state of mind, most of them would not be candidates for liability under § 5. The reason is that liability under § 5 cannot arise from negligence in the performance or negotiation of a contract; such claims are eliminated by the economic-loss rule of § 2. Thus § 5 mostly involves negligent misrepresentations between parties who do not have contracts. The claims treated in this Section, by contrast, typically do arise from the performance or negotiation of contracts. They survive the economic-loss rule because they involve more than negligence. They are varieties of deceit, to which the economic-loss rule does not apply. It follows that if a defendant lacks the state of mind needed to support a claim under this Section, the plaintiff’s likely fallback
§ 10. Duties to disclose

1 is not a negligence claim. It is a claim based on the law
2 of contract or restitution. Those bodies of law provide
3 rules that allow plaintiffs, on terms more liberal than
4 those found here, to rescind a transaction and seek
5 restitution of any benefits conferred because the defendant
6 failed to disclose information material to a bargain the
7 parties made. See Restatement Third, Restitution and
8 Unjust Enrichment §§ 5 and 34; Restatement Second,
9 Contracts § 303(b).

10

b. Prior speech. Nondisclosure can amount to deceit
11 if the defendant has spoken other words, or performed other
12 acts, that may not have been culpable at the time but will
13 become so if the defendant remains silent. Thus a
14 defendant may make a statement and believe it to be true
15 but later discover that it is false or misleading. Or a
16 defendant may make a statement in the belief that it will
17 not elicit reliance but later discover that it has. In
18 these cases the defendant is obliged to update the earlier
19 statements to prevent them from having fraudulent effect,
20 and may be held liable for failing to do so.

21 Illustrations:

22

1. Seller of property tells prospective Buyer
23 that the property’s septic system is in good working
24 order. Seller’s statement is true when he makes it,
25 but Seller learns a week later that the septic system
26 has failed. Seller signs a contract of sale with
27 Buyer without disclosing the failure of the system.
28 Seller may be held liable to Buyer for fraud.
§ 10. Duties to disclose

2. Worker offers to leave his job at Company and join Rival. Worker tells Rival that he will bring clients from Company to Rival if he moves there. Worker’s statements are true when made. Two weeks later, Company offers Worker a severance contract that requires him not to take Company’s clients elsewhere. Worker signs the agreement, then joins Rival without disclosing it. Rival later discovers that Worker cannot bring clients from Company as he had described. Worker may be held liable to Rival for fraud.

3. Retailer makes a six-month contract to distribute Manufacturer’s products. Manufacturer offers a friendly assurance that he hopes to work with Retailer for years to come. The statement is false, but Manufacturer has no reason to expect Retailer to rely on it. Retailer later informs Manufacturer that he plans to reject an alternative supplier in favor of the long-term relationship that Manufacturer has proposed. Manufacturer says nothing, but has no interest in a long-term relationship and ends their dealings a few months later. Manufacturer did not commit fraud when he first spoke, but had a duty to modify his statement when he learned that Retailer was relying on it. Manufacturer may be held liable to Retailer.

c. Special relationships. Silence may amount to deceit if it occurs against the backdrop of a special relationship between the parties that causes one of them to count on the other to be forthcoming. A defendant in a fiduciary relationship with the plaintiff, for example,
§ 10. Duties to disclose

expected to disclose anything the plaintiff might consider material to a transaction between them; if such a defendant deliberately keeps silent about such facts, and the plaintiff relies on their non-existence, the defendant may be held liable for fraud. “Confidential” relationships are defined less formally than fiduciary relationships but have similar consequences under this Section. They arise when one party justifiably comes to trust the other, creating a reasonable expectation that the other will act with the utmost good faith and disclose any facts material to their dealings. (For more discussion of fiduciary and confidential relationships, see Section X, Comment Y.)

Illustrations:

4. Tenant 1 and Tenant 2 hold a parcel of property as tenants in common. They agree to partition the property. Tenant 1, who has possession of the parcel, does not disclose to Tenant 2 that he has harvested most of the timber on the part of the land that Tenant 2 will receive. Tenant 2 later discovers that the timber is gone and sues Tenant 1. The court finds that Tenant 1’s possession of the land gave rise to a relationship of trust and confidence with Tenant 2, which in turn created a duty to disclose facts material to the proposed transaction. The court further finds that Tenant 1 did not disclose the information to Tenant 2 because he thought that it would affect Tenant 2’s willingness to consent to the deal. Tenant 1 may be held liable for fraud.
§ 10. Duties to disclose

5. Driller 1 owns a lease to extract minerals from tribal lands. Worker for tribe discovers that mineral deposits on the lands are more extensive than Driller 1 knows. Worker joins Driller 2 and passes on his knowledge. Driller 2 buys Driller 1’s mineral rights. Driller 1 then discovers that it sold the rights for much less than they were worth, and sues Worker and Driller 2 for fraud. The court finds that Worker obtained his knowledge lawfully, that Driller 1 and Driller 2 were engaged in an arm’s-length transaction, and that neither Worker nor Driller 2 had any obligation to disclose their knowledge to Driller 1. Driller 1’s fraud claim fails.

d. Superior knowledge. One party often knows more than the other about the subject of an exchange between them. That difference, without more, creates no obligation of disclosure. Better information is a legitimate advantage at the bargaining table, and the law means to encourage its acquisition. In some cases, however, an imbalance of knowledge creates a duty in the better-informed party to disclose it. Liability on this theory requires, first, a showing that the fact at issue was basic to the transaction. Second, the plaintiff must have a reason out of the ordinary to rely on an adversary to supply the information. Part of the reason usually is a difference in each party’s access to the facts. If one party knows something that the other cannot find out, letting the other suffer for its ignorance may not appeal to notions of fairness or usefully encourage the discovery of knowledge. See Illustrations 6 and 8. Even when two parties have different access to basic facts, however,
§ 10. Duties to disclose

rules to govern the defendant’s obligations are hard to state. Liability on this basis typically arises from conduct that represents a gross violation of business ethics and amounts to a swindling of one side by the other. Such conclusions depend in significant part on commercial customs, which vary in different settings.

Illustrations:

6. Buyer purchases a house from Seller. Buyer then discovers serious defects in the foundation that Seller did not disclose. The court finds that Seller knew of the defects before the sale, knew they would be of great importance to Buyer, and knew they were not discoverable by the use of reasonable care; Buyer had obtained a customary and competent inspection, and the defects were not found. Seller may be held liable to Buyer for fraud.

7. Employee and Employer negotiate a compensation agreement. After each side has reviewed the resulting document many times, Employer inserts a change without telling Employee. Employee signs the document, discovers the change a week later, and brings suit for fraud. The court finds that the transaction was made at arm’s length and that Employee had a full opportunity to reread the contract just before signing it. The court also finds, however, that Employer knew its last-minute change was important, and that Employee would not expect it and was not aware of it. Employer may be held liable in
§ 10. Duties to disclose

tort for fraud. (Reformation of their contract is another natural possibility.)

8. Wholesaler has an ongoing agreement to buy cereals from Producer for resale to various grocers. Producer decides to start selling its cereals to grocers directly, but does not disclose this plan to Wholesaler. The parties renew their contract. Wholesaler then discovers that it can no longer resell most of the cereals it has purchased because grocers are buying them directly from Producer. The court finds that when the parties renewed their contract, Producer knew that Wholesaler expected to resell the cereals but would no longer be able to do so; that Producer knew Wholesaler would consider Producer’s new plans important in deciding whether to renew; and that Wholesaler had no way to learn of Producer’s plans if Producer did not disclose them. Producer may be held liable for fraud.

9. Buyer purchases house from Seller, then discovers that its driveway encroaches on a neighbor’s property. The court finds that Seller knew of the encroachment and did not disclose it to Buyer. The court also finds, however, that the encroachment could have been discovered by a survey or by inspection of public records, neither of which Buyer performed. Seller had no obligation to disclose the encroachment to Buyer, and is not liable for fraud.

Rationales for these illustrations may be found in sound policy as well as in notions of fairness. Thus in
§ 10. Duties to disclose

Illustration 6, denying recovery would give future buyers an incentive to invest in more expensive inspections that would rarely be worth the cost. It is more efficient to require the seller to reveal what he knows in the sales contract, rather than in litigation afterwards. In Illustration 9, by contrast, requiring each side to inform itself of the facts—or even just requiring the buyer to put direct questions to the seller—is not unduly burdensome, and is consistent with the commercial customs that govern real-estate transactions.

e. Judge and jury. Liability under the logic of this Section requires a finding that the defendant had a duty to speak. The existence of that duty is a question for the court. If disputed facts bear on the existence of the duty, they may be submitted to the trier of fact for resolution. Examples may include the defendant’s knowledge of a fact, the other’s ignorance of it, the customs of a commercial situation, the defendant’s knowledge that the plaintiff expects disclosure, or the defendant’s state of mind.

Reporter’s Note

a. Scope; other actions compared. This Section is the successor to Restatement Second, Torts § 551. A majority of jurisdictions have adopted that Section or cited it with approval. See Richey v. Patrick, 904 P.2d 798 (Wyo. 1995). The wording of § 551 created possible ambiguities about whether it recognized liability for negligence or only for deceit. See U.S. Nat. Bank of Oregon v. Fought, 630 P.2d 337 (Or. 1981); cf. McElhannon v. Ford, 73 P.3d 827 (N.M. 2003); General Acquisition, Inc. v. GenCorp Inc., 766 F. Supp. 1460 (S.D. Ohio 1990). This Section makes clear that the liability it recognizes is for
§ 10. Duties to disclose

a type of fraud. One reason involves the scope of the
economic-loss rule, which was not clearly established when
§ 551 was drafted. The rule now makes clear that liability
in tort is not generally recognized for negligence in the
negotiation or performance of a contract. The economic-
loss rule does not preclude claims of deceit, however, such
as those recognized in this Section and elsewhere in this
Chapter.

In some jurisdictions a defendant held liable under
the principles of this Section is said to have committed a
tort with a distinct name: fraudulent concealment. See
Barr v. Dyke, 49 A.3d 1280 (Me. 2012); Anderson v. Kriser,
266 P.3d 819 (Utah 2011); Knights of Columbus Council 3152
v. KFS BD Inc., 791 N.W.2d 317 (Neb. 2010); Fuller v.

b. Prior speech. Illustration 1 is based on Bergeron
Illustration 2 is based on Refrigeration Indus., Inc.
v. Nemmers, 880 S.W.2d 912 (Mo. App. 1994). See also
Pearson v. Simmonds Precision Products, Inc., 624 A.2d 1134
(Vt. 1993); Mamas v. Oro Valley Townhouses, Inc., 638 P.2d
(N.H. 1978); Fischer v. Kletz, 266 F. Supp. 180 (S.D.N.Y.
Illustration 3 is based on Jones Distributing Co.,
(N.D. Iowa 1996). See also U. S. Fidelity and Guaranty Co.

c. Special relationships. Illustration 4 is based on
is based on Mallon Oil Co. v. Bowen/Edwards Associates,
Inc., 965 P.2d 105 (Col. 1998). See also Deptula v.
Simpson, 164 P.3d 640 (Alaska 2007); Lee v. LPP Mortg.
Ltd., 74 P.3d 152 (Wyo. 2003); Schwaiger v. Mitchell
Radiology Associates, P.C., 652 N.W.2d 372 (S.D. 2002);
105 (Col. 1998); Colonial Imports, Inc. v. Carlton

d. Superior knowledge. Illustration 6 is adapted
from Mitchell v. Christensen, 31 P.3d 572 (Utah 2001),
which involved leaks in a swimming pool. Illustration 7 is
Illustration 8 is based on Kaloti Enterprises, Inc. v.
Kellogg Sales Co., 699 N.W.2d 205 (Wis. 2005).
§ 10. Duties to disclose


For discussion of what facts and assumptions are "basic" to a transaction, see Restatement Second, Contracts § 152 Comment b.

§ 11. Liability for misrepresentations of opinion

A misrepresentation that supports liability under § 9 may be a false statement of opinion only when

(1) the parties had a fiduciary or confidential relationship, or

(2) the defendant purported to have special knowledge or otherwise invited the plaintiff’s reliance on the opinion offered.

Comment:

a. Generally. A statement of opinion may imply that its maker has knowledge of facts to support it, or no knowledge of facts inconsistent with it. In either case the factual implication, if known by the speaker to be false, can support liability for fraud under the rule of § 7 without reference to the rules stated here. This Section addresses a separate question: the liability of a defendant for the false statement of an opinion as such, and without implications of fact.

Statements traditionally classified as opinions include judgments about the quality or value of a thing sold and views about the future likelihood of events. False statements of pure opinion ordinarily are not actionable. The reason is not that opinions are incapable of being true or false; for when a speaker claims to hold an opinion but does not, the claim is as contrary to the truth as any other. The reason for the rule, rather, is that reliance on another party’s opinion is regarded in
§ 11. Opinions

most cases as unjustifiable as a matter of law. It is better practice, and more consistent with customs of commercial life, for parties to rely just on statements of fact made by others and to form their own opinions on the basis of them. This rule is relaxed when there is unusually good reason for the plaintiff to defer to the defendant’s judgment (as explained in Comment b), but a typical buyer is not entitled to rely on the opinions of a typical seller.

If a defendant offers an opinion in circumstances that can support liability under the rules of this Section, the other traditional elements of fraud stated in § 7 still must be satisfied: the plaintiff is required to show that the defendant’s statement was material, that reliance on it was justifiable, and so forth.

Illustrations:

1. Buyer negotiates the purchase of a used car from Seller. Seller states that the car is in good mechanical condition, and Buyer relies on that assurance. Buyer soon discovers that the car’s engine is in poor repair and will be expensive to fix, and that other interior components have rotted. Buyer sues Seller for fraud. Seller’s statement that the car was in good mechanical condition was an opinion, but it implied that Seller knew of facts to support it and not of facts that made it false. The court finds that Seller knew of the car’s problems at the time he made the claim. Seller may be held liable for fraud under the principles of § 7. The liability is not for Seller’s false statement of opinion as such. It is
§ 11. Opinions

for the false factual implications of what Seller said, which amounted to a warranty.

2. Buyer negotiates the purchase of a restaurant from Seller. Seller accurately states the restaurant’s revenues to date and gives Buyer complete access to his business records. Seller tells Buyer that he thinks the restaurant will produce gross revenues of $10,000 per day going forward. After acquiring the restaurant, Buyer finds that it produces revenues of $5,000 per day. Buyer sues Seller for fraud, claiming that Seller’s statements about the restaurant’s future earnings were wrong and that Seller knew they would be. Buyer’s claim fails because Seller’s statements about the future were matters of opinion, and implied no knowledge of facts that Buyer did not have.

Difficult cases can arise at the seam between opinion and fact. They are best resolved by recalling that the distinction is drawn not for its own sake but to identify cases in which reliance by one party on the claims of another is categorically unjustifiable. The inquiry serves a practical policy: enabling parties to rely on each other’s words when it saves time and trouble or is otherwise commercially useful, and discouraging them from such reliance when they can as easily form their own judgments for themselves. If the classification of a statement as opinion or fact is a matter on which reasonable minds could differ, it is an appropriate matter for decision by jury.
§ 11. Opinions

b. Circumstances justifying reliance. False statements of opinion can support a claim for fraud in two general circumstances. The first arises when parties have a fiduciary or confidential relationship. A fiduciary has a legal obligation to act for the benefit of another; the obligation arises automatically from certain formally recognized relationships, such as attorney and client or trustee and beneficiary. A confidential relationship produces similar obligations but is less formal. It arises from circumstances in which the parties are not on equal footing; one has influence over the other, and the stronger party is trusted to act in the interest of the weaker. Such relations often appear within families. In a relationship of either of these types, it may be appropriate for the dependent party to rely on the opinions of the other.

Second, a claim of fraud may lie for a false statement of opinion when the defendant purports to be an expert or otherwise invites deference by claiming access to knowledge that the plaintiff cannot readily duplicate. Relying on the defendant’s opinion in such a case may well be reasonable and more efficient than collecting facts and forming an opinion of one’s own. The law protects the plaintiff’s right to so rely by imposing liability if the opinion is falsely stated.

Illustrations:

3. Plaintiff is injured in a car accident. Agent for Plaintiff’s insurer tells Plaintiff that he probably does not have a good claim against the other driver. Plaintiff releases his claims in return for a
§ 11. Opinions

small settlement. Plaintiff later learns that he had a strong claim against the other driver. Plaintiff sues insurer for fraud. The court finds that Agent knowingly misrepresented the strength of Plaintiff’s case to induce Plaintiff to accept a swift settlement. Court further finds that Agent’s statement was an opinion, but that Agent and Plaintiff were in a confidential relationship that required Agent to act in utmost good faith. Insurer may be held liable to Plaintiff.

4. Professional Realtor produces a report appraising a house at $300,000. Buyer relies on Realtor’s report in deciding to purchase the house. Buyer later discovers that the market value of the house was below $200,000. Buyer sues Realtor for fraud. Buyer’s evidence shows that Realtor was party to a scheme to acquire houses at low prices and then offer inflated opinions of their value to prospective buyers. The court finds that Realtor’s appraisal was an opinion, but also finds that Realtor held himself out as an expert whose opinions could be trusted. Realtor may be held liable to Buyer for fraud.

c. Matters of law. Assertions of law are sometimes said to be matters of opinion that cannot serve as the basis for a claim of fraud. While that is often true, statements about the legal consequences of an act law are best treated as statements of opinion: they may be actionable if they imply untrue facts, or if the parties have a relationship that makes it reasonable for the plaintiff to rely on the defendant’s opinions. They are
§ 11. Opinions

not actionable if they amount to judgments based on facts known to both sides, and on which the plaintiff can reasonably be expected to arrive at an independent view.

A claim of law may imply facts of two kinds. First, it may imply that facts in the world justify the speaker’s conclusions. Thus an assertion that one mortgage has priority over another may imply that one was made before the other; and a claim that a corporation has the right to do business in a state may imply that it has taken all steps necessary to be duly qualified. Second, a claim of law may imply the existence of legal facts: that a regulation has been passed or repealed, or that a piece of property was zoned for commercial use or not. A defendant who knowingly misleads the plaintiff with respect to any of these sorts of facts may be held liable for fraud if the other elements stated in § 7 are satisfied. Often they will not be satisfied; justifiable reliance typically is hard to show when the defendant’s claim might easily have been checked against public records. In all events, any liability in such a case arises not from the defendant’s false statement of opinion per se, but from the facts it implies.

On the other hand, no liability arises when one adversary in a negotiation offers another a view about the best interpretation of legal language—for example, the wording of a lease or a statute—that is equally visible to both. The defendant’s statement then is a true matter of opinion, and a claim of fraud founded on it fails as a matter of law unless the rules of this Section are satisfied. Thus an attorney may be held liable to a client for a legal opinion falsely stated, because an attorney and client have a fiduciary relationship. And if a non-lawyer
§ 11. Opinions

1 claims to have special knowledge or otherwise invites reliance by the plaintiff, a plaintiff again may recover if falsely stated opinions of law follow.

Illustrations:

5. Tenant negotiates the rental of property from Landlord. During their discussions, Landlord tells tenant that local zoning rules will permit Tenant’s business to operate on the premises. When Tenant proposes to go confirm this, Landlord dissuades him, assuring Tenant that “we know the area.” Acting in reliance on these assurances, Tenant signs a contract with Landlord. The assurances turn out to be false, and Tenant suffers losses as a result. Tenant produces evidence that Landlord knew the assurances were false when he made them. Landlord may be held liable for fraud.

6. Tenant negotiates the rental of property from Landlord. During their discussions, Landlord makes a claim about the meaning of language in the proposed lease. Landlord says the language is best understood to give Tenant exclusive use of a walkway adjacent to the property. Acting in reliance on these assurances, Tenant signs a contract with Landlord. The assurances turn out to be false; a court later finds that a neighboring tenant has a right to use the walkway as well. Tenant sues Landlord for fraud, proposing to show that Landlord knew his reading of the lease was infirm. Tenant’s claim fails because Landlord’s interpretation of the language in the lease was a
§ 11. Opinions

matter of opinion, the basis for which was equally visible to both sides; and the parties were in an arm’s-length relationship that did not entitle Tenant to rely on Landlord’s opinions.

Reporter’s note


§ 11. Opinions


c. Matters of law. Illustration 5 is based on National Conversion Corp. v. Cedar Bldg. Corp., 246 N.E.2d 351 (N.Y. 1969); see also Hoyt Properties, Inc. v. Production Resource Group, L.L.C., 736 N.W.2d 313 (Minn. 2007); Empiregas, Inc. of Ardmore v. Hardy, 487 So.2d 244 (Ala. 1985); White v. Mulvania, 575 S.W.2d 184 (Mo. 1978).

§ 12. Misrepresentation of intention; promissory fraud

A statement of a speaker’s intentions is a misrepresentation if the intentions do not exist.

[We might consider whether this Section should be reduced to a comment in Section 9.]

Comment:

a. Generally. Promissory fraud occurs when a party makes a promise and does not intend to keep it. In certain respects this form of fraud is a straightforward application of the general principles of Sec. 7: a promise is a statement of intent; if the intent does not exist, the declaration of it is a misrepresentation that is actionable like any other. A claim of promissory fraud can cause confusion, however, because it may closely resemble a claim of promissory estoppel. See Restatement Second, Contracts § 90. A claim of promissory fraud differs principally because the plaintiff adds an assertion that the promisor never intended to carry out the promise that is the basis for the suit. The plaintiff who makes such a claim typically receives two practical benefits in return. First, a claim of fraud may entitle the plaintiff to an award of punitive damages that would not be available on other theories. See Section 13. Second, a suit for promissory fraud may allow a plaintiff to avoid doctrinal obstacles that would derail claims for breach of contract or promissory estoppel. See Comment c.

Since it is not tortious to break a promise, it may seem surprising that it is tortious to make a promise while...
§ 12. Promissory fraud

1 intending to break it. But the recipient of a promise
2 typically values the promisor’s intention to carry the
3 promise out, and would not do business with a promisor
4 whose intentions were known to be otherwise. A tort claim
5 for fraud under this Section thus protects rights of the
6 promisee in a way that a suit for breach of contract does not.

8

b. Proof. A claim of promissory fraud must be
9 supported by evidence that the defendant made a
10 misrepresentation of intent. The statement of intent need
11 not be explicit. Most often the plaintiff simply produces
12 a contract that the defendant signed, and offers to prove
13 that the defendant never intended to perform it.
14 Ordinarily the contract itself will suffice as
15 representation of the defendant’s intent; a party who signs
16 a contract presumptively represents, at least by
17 implication, an intent to do what the contract requires.
18 But that description may not apply to every case. Both
19 parties to a contract might understand that a breach of it
20 is likely enough; the purpose of the agreement may just be
21 to make clear who pays for the resulting damages in that
22 event. There is no liability for fraud if those facts are
23 shown. Liability arises only when the promisor misleads
24 the promisee.
25 A plaintiff typically must use circumstantial evidence
26 to prove that the defendant had no intention of keeping the
27 promise at the time it was made. No such inference can be
28 drawn from a mere failure to perform the promise later. A
29 plaintiff’s case may be helped, however, by evidence of
30 plans the defendant had at the time of the promise that
31 were inconsistent with it; or by evidence that the promise
was impossible to keep for reasons the defendant knew (and
the plaintiff did not); or by evidence that the defendant
made and broke other promises routinely, and so must have
expected to break this one at well. Other facts may tend
to support the innocence of the defendant’s intentions:
evidence that the defendant partially performed the
promise, for example, or that changed circumstances make
the defendant’s promise costlier to honor that had
originally appeared. See Illustrations 1 and 2.

Illustrations:

1. Corporation promises to supply Seller with
products, and Seller promises to distribute them in
Montana. The term of the agreement is five years.
Two years later, Corporation announces that it is
withdrawing from Montana and cancels its agreement
with Seller. Seller discovers internal memoranda from
Corporation showing that at the time the agreement was
signed, Corporation had already made a decision, not
disclosed to Seller, to end all operations in Montana
after two years. Corporation is subject to liability
for promissory fraud.

2. Employee is dismissed by Employer. Employee
brings a lawsuit alleging that during his term of
employment he performed extra services after hours,
that Employer promised him payment for those services,
and that Employer made the promise without ever
intending to keep it. Employer denies making such a
promise at all. Employee’s only evidence of fraud is
Employer’s denial and a showing that Employer stood to
§ 12. Promissory fraud

benefit financially by inducing Employee to work
without having to pay him. Employee may have a good
claim for breach of contract, but his evidence of
fraud is insufficient as a matter of law.

c. Relation to the statute of frauds and parol
evidence rule. Claims under this Section are not impaired
by a jurisdiction’s statute of frauds. A statute of frauds
extinguishes contract claims, not tort claims; it prevents
the enforcement of a promise under certain circumstances if
the promise is not evidenced in a writing signed by the
promisor. Liability under this Section does not result in
the enforcement of a promise. It results in compensation
for losses suffered by a plaintiff who relied on a promise.
The law of tort protects defendants against unfounded
claims of deceit not with the statute of frauds but by the
use of a heightened standard of proof with respect to the
defendant’s state of mind. See § 7, Comment i.

Courts likewise state as a matter of course that the
parol evidence rule does not impede claims of fraud. See
Restatement Second, Contracts § 214. The application of
that principle to claims of promissory fraud may be
explained in more particular terms. Thus two parties may
sign a contract with an integration clause stating that the
writing is the complete expression of their agreement; and
later the plaintiff might offer extrinsic evidence that the
promisor never intended to perform the promise that the
agreement contained. The plaintiff in such a case is not
adding terms to the written contract, or varying them. The
plaintiff is proving, rather, that a representation in the
contract was false. Neither the parol evidence rule nor an
integration clause are obstacles to such a showing.
§ 12. Promissory fraud

A related problem arises when the parties have a written agreement and the plaintiff claims that the defendant made a separate false promise that was not reflected in the writing. The parol-evidence rule may preclude enforcement of the separate promise as a matter of contract law. The plaintiff nevertheless may assert a claim in tort that the second promise—the one outside the written contract—was made with no intention that it would be kept. It might seem odd that a promise the parol-evidence rule would otherwise extinguish becomes enforceable just because it was made by a promisor who never planned to keep it. Again, however, liability for fraud does not cause the promise to be enforced; rather, the plaintiff collects for damage caused by reliance on it.

While the parol-evidence rule does not obstruct claims of promissory fraud, however, the existence of a contract may suggest that the plaintiff was not justified in relying on an earlier promise that was inconsistent with it. That conclusion is especially likely to be drawn, of course, if the contract contains language expressly disavowing reliance on a promise such as the one at issue. For discussion of when a no-reliance clause defeats a claim of fraud, see § 7, Comment g.

Illustration:

3. Company hires Accountant, then fires him six months later. Accountant sues Company for fraud. He claims that Company originally promised to retain him for at least a year, and he offers to prove that Company never intended to keep that promise. Company argues that Accountant’s claim fails because their
written contract allows Company to fire him at any
time, and because the parol-evidence rule forbids
claims based on promises made outside the writing that
are inconsistent with it. The parol-evidence rule may
prevent Accountant from bringing a contract claim to
enforce the promise that he says Company made.
Accountant nevertheless may pursue a claim in tort to
collect damages he suffered in reliance on Company’s
false assurances.

Reporter’s Note

a. Generally. For representative cases recognizing
and discussing promissory fraud, see Riverisland Cold
Storage, Inc. v. Fresno-Madera Production Credit Ass’n.,
291 P.3d 316 (Cal. 2013); Chedick v. Nash, 151 F.3d 1077
(D.C.Cir. 1998); Graubard Mollen Dannett & Horowitz v
Moskovitz, 653 N.E.2d 1179 (N.Y. 1995); Cabnetware, Inc. v.
Birmingham Saw Works, Inc., 614 So.2d 1034 (Ala. 1993);
Marion Production Credit Ass’n v. Cochran, 533 N.E.2d 325
(Ohio 1988). For a sustained academic examination, see
Ayres & Klass, Insincere Promises: The Law of
Misrepresented Intent (2005).

b. Proof. Illustration 1 is based on Alexander v.
Illustration 2 is based on Connecticut General Life Ins.
Co. v. Jones, 764 So.2d 677 (Fla. App. 2000). See also
Riverisland Cold Storage, Inc. v. Fresno-Madera Production
Credit Ass’n., supra; Southland Bank v. A & A Drywall
Supply Co., Inc., 21 So.3d 1196 (Ala. 2008); Connecticut

c. Relation to statute of frauds and parol evidence
rule. On the relationship between the statute of frauds
and tort claims of promissory fraud, see BPI Energy
Holdings, Inc. v. IEC (Montgomery), LLC, 664 F.3d 131 (7th
Cir. 2011) (Posner, J.) ("[t]he Statute of Frauds is a
defense to a claim for breach of contract, not a defense to
a tort, and fraud is a tort, and promissory fraud is a form
§ 12. Promissory fraud

of fraud and so a tort and so not subject to the Statute of Frauds”); Irish Oil and Gas, Inc. v. Riemer, 794 N.W.2d 715 (N.D. 2011); Tenzer v. Superscope, Inc., 702 P.2d 212 (Cal. 1985); Munson v. Raudonis, 387 A.2d 1174 (N.H. 1978); Burgdorfer v. Thielemann, 55 P.2d 1122 (Or. 1936); Annot., 104 A.L.R. 1420.

§ 13. Damages

(a) Compensatory damages for the tort of fraud are calculated to restore the financial position that the plaintiff would occupy if the tort had not been committed.

(b) Punitive damages may be assessed as necessary to ensure deterrence and to further other policies not adequately secured by a compensatory award.

Comment:

a. General principles. The range of forms that fraud can take calls for a flexible approach to the measurement of damages. Reliance on a defendant’s falsehood may cause a plaintiff to buy something worth less than was promised, or to sell something worth more than the plaintiff was led to believe, or to enter an exchange that the plaintiff would not have made at all if the defendant’s motives or identity were known. Or a fraud may result in no exchange with the defendant, but in expenditures by the plaintiff in preparation for one. The size of any difference between what the plaintiff spent, what the plaintiff received, and what the defendant promised may also vary widely. No one formula will produce the right measure of damages in all such cases, but the two principles of this Section provide general guidance. First, compensatory damages here, as elsewhere in tort, are meant to restore the position the plaintiff would have occupied if the wrong had not been committed. In a case of fraud, that generally means the financial position the plaintiff would have had if the
§ 13. Damages

defendant had spoken truthfully. Second, punitive damages may be added as necessary to deter the defendant and others from committing similar wrongs in the future, and to serve other policies beyond compensation of the plaintiff. See Comment d.

The first principle just stated—the rule of (a)—ordinarily makes “out of pocket” damages the standard measure of recovery for fraud. In a typical case those damages are the difference between what the plaintiff spent on account of the defendant’s fraud and the value of what the plaintiff received as a result. Thus if the defendant’s fraud caused the plaintiff to pay a million dollars for property worth $600,000, the plaintiff’s out-of-pocket damages are $400,000. If the defendant’s fraud caused the plaintiff to lend a million dollars to a bad credit risk who then repaid $600,000, the plaintiff’s out-of-pocket damages likewise are $400,000. Payment of the $400,000 difference in either case is meant to make the defendant’s fraud costless to the plaintiff. It may be supplemented by recovery of special damages that the plaintiff incurred in reliance on what the defendant said—for example, the cost of hiring a lawyer to help carry out the transaction. See Comment b. The goal of all such calculations is to ensure that the plaintiff’s financial position is no worse than it was before the defendant made the misrepresentation.

Courts sometimes allow a plaintiff to seek recovery on a “loss of bargain” theory of damages. This measure compares the value of what the plaintiff received to what the defendant said it was worth. It puts plaintiffs where they would have been if the fraudulent statements they relied on had been true. Such a recovery resembles
§ 13. Damages

1. expectation damages in the law of contract, not traditional damages in tort. It can make plaintiffs better off than they were before the fraud was committed. Loss-of-bargain recovery is usually justified by the inadequacy of out-of-pocket damages to deter fraud. Indeed, a plaintiff’s out-of-pocket damages sometimes may be zero; this can occur when the property received is worth what the plaintiff paid, but the defendant had promised that it was worth much more. Allowing the defendant to pay no damages on those facts would be bad policy, so awarding the plaintiff the benefit of the fraudulent bargain might make sense. But such an award is meant not to make the plaintiff whole but to deter the defendant, or perhaps to achieve more complete justice between the parties. Awards for those purposes are the traditional office of punitive rather than compensatory damages. Loss-of-bargain recovery is therefore best considered a form of punitive recovery and described accordingly. See Comment d.

Separating the loss-of-bargain measure from the calculation of compensatory damages can help clarify the difference between a plaintiff’s possible recovery under different branches of law. A fraud claim often arises from a contract that was tainted by a defendant’s misrepresentations. The plaintiff’s typical choices may then include rescinding the contract, seeking recovery of the defendant’s gains in a suit for restitution, seeking expectation damages through a suit for breach of warranty, or seeking damages in tort for fraud. See § 7, Comment j. Allowing recovery in tort for “loss of bargain” makes tort claims hard to distinguish from claims for breach of warranty. Limiting compensatory damages in tort to the
§ 13. Damages

out-of-pocket measure helps to keep tort and contract
recovery distinct, and makes them useful in different ways.

In some cases the out-of-pocket measure of recovery
does not comfortably fit the facts of a case, as when the
plaintiff’s losses do not arise from a difference in value
between what the plaintiff received and was promised.

Damages are then calculated by returning to first
principles and asking what the plaintiff must receive to be
left no worse off by the defendant’s wrong. See

Illustration 1.

Illustration:

1. Retailer of specialty tires has a supply
contract with Manufacturer of them. The contract
gives either side a right to terminate on short
notice. In July, Retailer is offered an alternative
supply of the specialty tires by a different maker.
Retailer notifies Manufacturer and asks if
Manufacturer has any plans to stop supplying its
tires. Manufacturer assures Retailer that it has no
such plans. The assurance is fraudulent; Manufacturer
plans to stop making the tires at the end of the
summer. A month later, Manufacturer stops making the
tires and terminates its contract with Retailer.
Retailer’s alternative supply is no longer available;
as a result, Retailer goes out of business. Retailer
can recover the value of its business from
Manufacturer.

In calculating out-of-pocket damages, the usual
question is the difference in market value between what the
§ 13. Damages

plaintiff gave up and received. “Market value” means the price at which the property at issue could have been resold in an open market or by private sale if its quality and other characteristics were known. The market value of an article is generally measured at time of the fraudulent transaction in which it changed hands. In occasional cases that timing is inapt, as when the property the plaintiff received was priced too high because its market value was tainted by the same fraud that affected the plaintiff’s own judgment. In that case the market value of the property is measured as of the time when fraud was widely discovered. For further discussion, see Restatement Second, Torts § 549, Comment b.

b. Special damages. Fraud often causes a plaintiff to buy something that is worth less than the defendant stated. In that case a court begins the measurement of damages by comparing what the plaintiff paid to the value received in return. But a plaintiff may also incur additional damages on account of the defendant’s fraud, such as sums spent to prepare for the transaction or to undo or mitigate harm caused by it, or harm caused because the thing acquired from the defendant was unsuitable for its intended purpose. Losses of these kinds, though another branch of out-of-pocket recovery, are best termed “special” damages, as distinct from the general damages that flow directly from the disparity of value in a transaction. Special damages are available in a case of fraud as a matter of course, in addition to whatever else the plaintiff may collect. Their recovery is necessary to restore the position that the plaintiff would have occupied if the fraud had not been committed. In some cases special

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§ 13. Damages

damages may be a plaintiff’s only damages, as when a fraudulent statement causes the plaintiff to prepare for a deal that is never made.

A plaintiff must prove to a reasonable degree of certainty both the amount of any special damages and that the damages were caused by the defendant’s fraud. These requirements can limit a plaintiff’s recovery significantly. In principle, for example, special damages may include the value of opportunities the plaintiff lost because its assets were diverted by the fraud; such recovery is uncommon in practice, however, because the cause and amount of such losses usually are hard to prove with sufficient clarity. See Illustration 2. Recoverable damages also are limited to losses that might reasonably be expected to follow from the fraud. See § 7, Comment h.

Illustrations:

2. Farmer buys milk cows from Supplier, relying on Supplier’s fraudulent assurance that the cows are free from disease. In fact they are infected with Maltese fever, which they communicate to the rest of Farmer’s herd. Farmer is entitled to collect from Supplier, as general damages, the difference between what he paid for the cows and their actual value as infected animals. Farmer also proves, however, that the spread of the disease required him to pay for veterinary treatment and vaccinations of those animals not yet infected; in addition, the disease caused many cows he already owned to become less productive and to lose market value. Farmer is entitled to compensation for those losses as special damages.
§ 13. Damages

3. Buyer purchases an apartment building from Seller. In the course of their negotiations, Seller fraudulently states that the building complies with all local regulations; after the purchase, Buyer discovers that it does not. Buyer hires Lawyer to determine what steps would bring the building into conformity, then pays for repairs and permits that Lawyer recommends. Buyer successfully sues Seller for fraud, and the court finds that Buyer’s expenditures were reasonable and prudent. Buyer can recover from Seller the costs of hiring Lawyer to advise about the repairs and permits, and the cost of securing them. Buyer cannot recover the cost of paying Lawyer to sue Seller for fraud. Miller v. Higgins, 452 S.W.2d 121 (Mo. 1970).

4. Company hires Broker to handle the initial public offering of its stock. Broker fraudulently assures separate Investor that he will have many shares in Company to sell to Investor on the day of the IPO. Investor agrees to buy 100,000 shares from Broker, and Investor forms a company for the sole purpose of making the purchase. In fact Broker does not know if he will have access to any shares. On the day of Company’s IPO, the value of its shares rises tenfold in two hours, but Broker has none to sell to Investor. Investor sues Broker for breach of contract and fraud. The court finds that Investor’s contract claim fails because his purchase was subject to a condition that never occurred: Broker’s acquisition of the shares. Broker is liable for fraud, however,
§ 13. Damages

because he knowingly misrepresented the likelihood that the condition would be fulfilled. Investor has no general damages, but can collect as special damages the costs incurred in forming a company to buy the shares. Investor’s compensatory damages do not include profits he would have made if Broker had obtained the shares for him on the morning of the IPO. Twin Fires Inv., LLC v. Morgan Stanley Dean Witter & Co., 837 N.E.2d 1121 (Mass. 2005).

5. Company proposes a one-year service agreement with Technician. Technician accepts only because Company assures him that he will be a strong candidate for a long-term contract if he meets certain efficiency standards during the year. Company’s assurances are fraudulent; Technician meets the standards but company does not consider him for a long-term contract, and never intended to do so. Technician sues Company for fraud. He cannot recover his ordinary costs of performance for the year because they were compensated under the contract with Company. But Technician can recover as special damages the sums he spent to meet the high efficiency standards, since he was induced to incur them by false hopes that Company raised. Technician also seeks to recover profits he could have made if he had not been busy pursuing a long-term relationship with Company. The court finds evidence of such lost profits speculative; Technician is unable to identify specific jobs that he could have taken but rejected because of his work for Company, nor can he prove what the other jobs would have paid and cost to perform. Technician’s claim for

c. Nominal damages. A plaintiff whose rights have been invaded, but who suffers no provable economic damage as a result, may be awarded nominal damages. Nominal damages do not attempt to compensate for actual loss. They are small sums awarded to reflect the judicial conclusion that the plaintiff’s rights were violated.

d. Punitive damages. Punitive (or “exemplary”) damages may be assessed against a defendant when compensatory damages are insufficient, as may be found for various reasons. First, compensatory damages measured by the principles of Comment a may be too small to deter the defendant or others from engaging in further acts of fraud; sometimes the compensatory award may be nil, despite undoubtedly culpable acts by the defendant. Allowing no recovery on those facts would tempt the defendant or others to repeat the fraud. Punitive damages curb the temptation. Second, sometimes acts of fraud are part of a pattern and are subject to concealment, calling for enhanced damages when they are discovered in order to eliminate the value they have to the defendant when they are not discovered. Third, if an act of fraud is especially outrageous, an award of punitive damages can express the community’s abhorrence in response. Punitive damages justified on this theory require something more than the knowing utterance of a falsehood; the plaintiff must show that the fraud was aggravated in some way, as when the defendant acted with malice or deliberation.
The due process clause of the Fourteenth Amendment imposes additional constraints on the imposition of punitive damages. In deciding whether an award of such damages is constitutionally excessive, courts consider the reprehensibility of the defendant’s conduct, the relationship between punitive award and the actual or potential harm suffered by the plaintiff, and the relationship between the punitive award and civil penalties available in similar cases. The second consideration is sometimes pursued by examining the ratio between the punitive and compensatory damages in a case, with ratios greater than 10:1 regarded as suspect. Such ratios must be used with particular caution in cases of fraud, however; as noted above, a plaintiff’s compensatory award sometimes may amount to little or nothing—and indeed that may be the reason for awarding the punitive damages in the first place. Effective deterrence in such a case may require a punitive award considerably greater than the provable harm suffered by the plaintiff. By the same logic, punitive damages should not be restricted to cases in which the plaintiff can show actual damages. Punitive damages may be most important precisely when actual damages are impossible to prove but the defendant’s culpability is clear. Nominal damages can then provide a sufficient predicate for a punitive award.

e. Mental anguish. The tort of fraud protects the plaintiff’s economic interest in making informed decisions. It is not a dignitary tort, and does not entitle a plaintiff to recover damages for mental anguish. Damages of that kind are best pursued by a claim for the
§ 13. Damages

intentional or negligent infliction of emotional distress.

See R3T: PEH —.


Reporter’s Note

a. General principles. Restatement Second, Torts § 549 stated that loss-of-bargain damages were generally available to plaintiffs in a case of fraud, and many courts have claimed to follow that rule. In practice, however, those courts often balk at awarding loss-of-bargain damages on facts where sound policy does not seem to support them. See, e.g., Twin Fires Inv., LLC v. Morgan Stanley Dean Witter & Co., 837 N.E.2d 1121 (Mass. 2005); Goldstein v. Miles, 859 A.2d 313 (Md. App. 2004); Collins v. Burns, 741 P.2d 819 (Nev. 1987). This Section need not alter the result in those cases where courts have found that loss-of-bargain recovery is appropriate. The Section merely describes such recovery as punitive in character, since it is meant to serve purposes other than making the plaintiff whole. For cases following the out-of-pocket approach to measurement taken here, see Continental Cas. Co. v. PricewaterhouseCoopers, LLP, 933 N.E.2d 738 (N.Y. 2010); Stout v. Turney, 586 P.2d 1228 (Cal. 1978); Peterson v. Johnston, 254 N.W.2d 360 (Minn. 1977). For further discussion and endorsement, see Lens, Honest Confusion: The Purpose of Compensatory Damages in Tort and Fraudulent Misrepresentation, 59 Kan. L. Rev. 231 (2011).


Illustration 1 is based on B.F. Goodrich Co. v. Mesabi Tire Co., Inc., 430 N.W.2d 180 (Minn. 1988).

§ 13. Damages


The leading cases discussing the constitutional limits on punitive damages are State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003), and BMW of North America v. Gore, 517 U.S. 559 (1996). The BMW case notes that “low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages.” For application of the constitutional standards and further consideration of the permissible ratio between compensatory and punitive damages, see Howard University v. Wilkins, 22 A.3d 774 (D.C. 2011); Casciola v. F.S. Air Service, Inc., 120 P.3d
§ 13. Damages

1 1059 (Alaska 2005); Boyd v. Goffoli, 608 S.E.2d 169 (W. Va.
2 2004).
3 On the sufficiency of a nominal injury to support a
4 punitive award, see Collier v. Bryant, 719 S.E.2d 70 (N.C.
5 App. 2011); Amerigraphics, Inc. v. Mercury Cas. Co., 107
6 Cal.Rptr.3d 307 (Cal. App. 2010); Kirkpatrick v. Strosberg,
7 894 N.E.2d 781 (Ill. App. 2008); Kekona v. Abastillas, 150
8 P.3d 823 (Haw. 2006); Third Generation, Inc. v. Wilson, 668
9 So.2d 518 ( Ala. 1995); Nappe v. Anshelewitz, Barr, Ansell
11
12 e. Mental anguish. The position taken in the Comment
13 follows Restatement Second, Torts § 525. See also FMC
14 Corp., Inc. v. Helton, 202 S.W.3d 490 (Ark. 2005); Cornell
15 v. Wunschel, 408 N.W.2d 369, 382 (Iowa 1987); Stich v.
18 For examples of contrary approaches, see Crowley v. Global
19 Realty, Inc., 474 A.2d 1056 (N.H. 1984); Holcombe v.
20 Whitaker, 318 So. 2d 289 (Ala. 1975).
§ 7. Economic loss from injury to a third person or to property not belonging to the claimant.

Except as provided in § 8, a claimant cannot recover for pure economic loss caused by

(a) unintentional personal injury to another party; or
(b) unintentional injury to property in which the claimant has no proprietary interest.

§ 8. Public nuisance resulting in pure economic loss

An actor whose wrongful conduct harms or obstructs public property or a public resource is subject to liability for resulting pure economic loss if the claimant’s losses are distinct from those suffered by the public at large.

§ 9. Fraud

An actor who knowingly makes a misrepresentation of material fact is subject to liability for economic loss caused by another’s justifiable reliance on it.

[A different sort of possibility, based on R2T:

(1) A misrepresentation is fraudulent if the maker

(a) knows or believes that the matter is not as he represents it to be,
(b) does not have the confidence in the accuracy of his representation that he states or implies, or

(c) knows that he does not have the basis for his representation that he states or implies.

(2) One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.]

§ 10. Duties to disclose; tacit misrepresentation

A misrepresentation that supports liability under § 9 may result from a failure to disclose information, but only when the person remaining silent has a duty to speak. Such a duty may exist where:

(a) the actor has made prior statements and knows that they will mislead another if not amended, even if they were not actionable when made; or

(b) the actor has a special relationship with another that obliges the actor to be forthcoming; or
Appendix

(c) the actor knows that another party is about to enter into a transaction under a mistake about a basic assumption behind it, and that the other party, because of the relationship between them, the customs of the trade, or other circumstances, would reasonably expect a disclosure of what the actor knows.

§ 11. Liability for misrepresentations of opinion

A misrepresentation that supports liability under § 9 may be a false statement of opinion only when

(1) the parties had a fiduciary or confidential relationship, or

(2) the defendant purported to have special knowledge or otherwise invited the plaintiff’s reliance on the opinion offered.

§ 12. Misrepresentation of intention; promissory fraud

A statement of a speaker’s intentions is a misrepresentation if the intentions do not exist.

§ 13. Damages

(a) Compensatory damages for the tort of fraud are calculated to restore the financial position that the plaintiff would occupy if the tort had not been committed.
(b) Punitive damages may be assessed as necessary to ensure deterrence and to further other policies not adequately secured by a compensatory award.