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§V. 1:00 FRAUD AND INTENTIONAL DECEIT

§1:10 DEFINITION

Tortious fraud or deceit occurs when a party “willfully deceives another with the intent to induce him to alter his position to his injury or risk.” CAL. CIV. CODE §1709.

Note: The Civil Code makes specific provisions for fraudulent dealings in a contractual setting in §1572 (actual fraud) and in sales involving a confidential, fiduciary or legally recognized special relationship in §1573 (constructive fraud). In the contractual setting, a claim for reformation or rescission of a contract can be established by alleging elements that are essentially equivalent to the elements discussed below for the tort cause of action for deceit. *South Tahoe Gas Co. v. Hoffmann Land Improvement Co.*, 25 Cal. App. 3d 750, 765, 102 Cal. Rptr. 286 (1972).

§1:20 ELEMENTS

§1:21 Misrepresentation

The defendant must have made a misrepresentation consisting of either:

1. An affirmative misrepresentation — the suggestion, as a fact, of that which is not true by one who does not believe it to be true;
2. A concealment or half truth — the suppression of a fact, by one who is bound to disclose it or who gives information of other facts which are likely to mislead for want of communication of that fact; or
3. A false promise — a promise made without any intention of performing it.

CAL. CIV. CODE §1710; see also CAL. CIV. CODE §1572.

§1:22 Material Fact

The misrepresentation must be of a material fact, essential to the analysis undertaken by the plaintiff and such that the plaintiff would not have acted as he did without it. *Roddenberry v. Roddenberry*, 44 Cal. App. 4th 634, 665, 51 Cal. Rptr. 2d 907 (1996).

§1:23 Knowledge of Falsity

The misrepresentation must be made with a knowledge of its falsity or a knowledge of the effect of concealment of a material fact. *Cicone v. U.R.S. Corp.*, 183 Cal. App. 3d 194, 227 Cal. Rptr. 887 (1986); *Block v. Tobin*, 45 Cal. App. 3d 214, 219, 119 Cal. Rptr. 288 (1975). This element distinguishes intentional deceit from the related tort of negligent misrepresentation. *Gagne v. Bertran*, 43 Cal. 2d 481, 487-88, 275 P.2d 15 (1954); see SV.2:00 (Negligent Misrepresentation).

§1:24 Intent to Induce Reliance

The defendant must intend to induce the plaintiff to alter his or her position to his or her injury or risk. CAL. CIV. CODE §1710. The intent to defraud or deceive is not required; the plaintiff need only prove the defendant’s intent to cause another to alter his position. *Nathanson v. Murphy*, 132 Cal. App. 2d 363, 369-70, 282 P.2d 174 (1955); see also CAL. CIV. CODE §1572 (fraud in the context of a contract requires the intent to deceive a party to a contract, or to induce a party to enter into the contract).

§1:25 Justifiable Reliance

The plaintiff must actually and justifiably or reasonably rely on the defendant’s misrepresentation. *Conrad v. Bank of America*, 45 Cal. App. 4th 133, 157, 53 Cal. Rptr. 2d 336 (1996).

§1:26 Causation and Damage

Reliance on the misrepresentation must cause plaintiff damage; misrepresentations without damage do not support a cause of action for deceit. *Nagy v. Nagy*, 210 Cal. App. 3d 1262, 1268, 258 Cal. Rptr. 787 (1989); *Willey v. Seaver*, 111 Cal. App. 565, 568, 295 P. 844 (1931). The misrepresentation must be the proximate cause of the damage. *GN Mortgage Corp. v. Fidelity Nat’l Title Ins. Co.*, 21 Cal. App. 4th 1802, 1807-08, 27 Cal. Rptr. 2d 47 (1994).

The standard of proof requires that the party claiming fraud must prove the elements of the claim. *Doctor v. Lake Ridge Construction Co.*, 252 Cal. App. 2d 715, 718, 60 Cal. Rptr. 824 (1967). The claim must be proven by a preponderance of the evidence. *Liodas v. Sahadi*, 19 Cal. 3d 278, 290, 137 Cal. Rptr. 635 (1977).

§1:30 AUTHORITIES

§1:31 Misrepresentation

Fraud is a generic term that embraces all the multifarious means which human ingenuity can devise and are resorted to by one individual to get an advantage over another. No definite and invariable rule can be laid down as a general proposition defining fraud, and it includes all surprise, trick, cunning, dissembling, and unfair ways by which another is deceived. *Wells v. Zenz*, 83 Cal. App. 137, 140, 256 P. 484 (1927).

"In its broad general sense, the concept of fraud embraces anything that is intended to deceive, including all statements, acts, concealments and omissions involving a breach of legal or equitable duty, trust or confidence which results in injury to one who justifiably relies thereon." *Pearson v. Norton*, 230 Cal. App. 2d 1, 7, 40 Cal. Rptr. 634 (1964).

§1:31a Affirmative Misrepresentation

A single false representation as to a material fact made with the intent to defraud and relied upon by another party supports an action for fraud. *Sears v. Myerson*, 106 Cal. App. 220, 222-23, 289 P. 173 (1930).

True statements can form the basis of false representations if they are made in a manner designed to create a false impression and were so acted on. *Smith v. Brown*, 59 Cal. App. 2d 836, 838, 140 P.2d 86 (1943).

A misrepresentation need not be express for a claim in tort to lie. A misrepresentation may be implied or inferred from the circumstances. *Universal By-Products, Inc. v. City of Modesto*, 43 Cal. App. 3d 145, 151, 117 Cal. Rptr. 525 (1974).

A party who has no duty to another but voluntarily offers information or a response to questions is thereafter obligated to speak truly and to avoid suppression of information he may have that would have a material effect on the circumstances. *Wice v. Schilling*, 124 Cal. App. 2d 735, 745, 269 P.2d 231 (1957).

§1:31b Concealment

The misrepresentation that forms the backbone of an intentional deceit claim can be either a positive statement or the failure to disclose a fact that is true. An affirmative false representation or a knowing concealment of information material to the circumstance will provide the necessary misrepresentation element.

CAL. CIV. CODE §1572; *Gonsalves v. Hodgson*, 38 Cal. 2d 91, 237 P.2d 656 (1951); *Roddenberry v. Roddenberry*, 44 Cal. App. 4th 634, 666, 51 Cal. Rptr. 2d 907 (1996); *Lingsch v. Savage*, 213 Cal. App. 2d 729, 60 Cal. Rptr. 824 (1963).

Deceit may be negative as well as affirmative, arising out of the suppression of information that should have been revealed, as well as by the expression of information that is false. *Agnew v. Cronin*, 148 Cal. App. 2d 117, 129-130, 306 P.2d 527, 534 (1957).

§1:31c Opinion

The expression of a dishonest opinion to a person entitled to rely on the assertion forms the basis of an action for deceit. *Gillespie v. Ormsby*, 126 Cal. App. 2d 513, 527, 272 P.2d 949 (1954).

"Under certain circumstances, expressions of professional opinion are treated as representations of fact. When a statement, although in the form of an opinion, is 'not a casual expression of belief' but 'a deliberate affirmation of matters stated,' it may be regarded as a positive assertion of fact. Moreover, when a party possesses or holds itself out as possessing superior knowledge or special information or expertise regarding the subject matter, and a plaintiff is so situated that it may reasonably rely on such supposed knowledge, information or expertise, the defendant's representation may be treated as one of material fact." *Anderson v. Deloitte & Touche*, 56 Cal. App. 4th 1468, 1476, 66 Cal. Rptr. 2d 512 (1997) (citations omitted).

Opinions, when expressed by a defendant with apparent superior knowledge and when not honestly held, are actionable in tort as misrepresentations. *Harazim v. Lyman*, 267 Cal. App. 2d 127, 132, 72 Cal. Rptr. 670 (1968).

When a statement is made which ordinarily would be framed as an opinion, but is instead presented as an existing fact material to the circumstances, such that it may be reasonably relied on, the statement may form the basis of a deceit claim. *Harazim v. Lyman*, 267 Cal. App. 2d 127, 132, 72 Cal. Rptr. 670 (1968).

To avoid a finding of deceit, an expression of an opinion must be honestly entertained by the person making the statement. *Anderson v. Thatcher*, 76 Cal. App. 2d 50, 65-71, 172 P.2d 533 (1946).

§1:31d False Promise

Deceit may consist of a promise, made without the intention of performing it. CAL. CIV. CODE §1710(4).

Fraud for false promise is a subspecies of an action for deceit, grounded in the notion that a promise to do something necessarily implies an intention to perform. Thus, where a promise is made without any intention of performing, there exists an implied misrepresentation of fact that may be actionable fraud. *Lazar v. Superior Court*, 12 Cal. 4th 631, 638, 49 Cal. Rptr. 2d 377 (1996).

§1:32 Material Fact

The misrepresentation at issue must be material enough to the circumstances that, if it had not been made, the transaction or other activity undertaken by the plaintiff would not have occurred. *Andrew v. Bankers & Shippers Ins. Co.*, 101 Cal. App. 566, 575, 281 P. 1091 (1929).

The fact represented or suppressed is deemed material if it relates to a matter of substance and directly affects the purpose for which the deceived party acted. *Handley v. Handley*, 179 Cal. App. 2d 742, 746, 3 Cal. Rptr. 910 (1960).

A plaintiff will be unable to show materiality or causation if he could have done nothing to improve his position had he known initially that the representation was false. *Bezaire v. Fidelity and Deposit Co.*, 12 Cal. App. 3d 888, 893, 91 Cal. Rptr. 142 (1970).

§1:33 Knowledge of Falsity

A defendant may be liable for deceit without actual knowledge that the representation was false if the plaintiff can prove the defendant's reckless disregard for the truth. CAL. CIV. CODE §1710(1); *In re Cheryl E.*, 161 Cal. App. 3d 587, 599, 207 Cal. Rptr. 728 (1984).

To support a finding of intentional deceit, the misrepresentation must have been made with the knowledge it is or may be untrue. *Seeger v. Odell*, 18 Cal. 2d 409, 414, 115 P.2d 977 (1941).

Deceit may be the suggestion as fact of information that is not true by a party who does not believe it to be true. *Civille v. Bullis*, 219 Cal. App. 2d 134, 32 Cal. Rptr. 607 (1962).

§1:34 Intent to Induce Reliance

In the essential analysis, the plaintiff must prove that the defendant acted to cause a change of position, and to induce action on the part of the party

claiming fraud. *Nathanson v. Murphy*, 132 Cal. App. 2d 363, 369-70, 282 P.2d 174 (1955).

The essential element in a suit for deceit is not the intent to defraud. The vital element of the claim is the defendant's intent to induce action by another person in response to a misrepresentation. *Ashburn v. Miller*, 161 Cal. App. 2d 71, 79, 326 P.2d 229 (1958).

Intent may be established by inference from the acts of the parties because direct proof of intent for fraud is often impossible. *Continental Airlines, Inc. v. McDonnell Douglas Corp.*, 216 Cal. App. 3d 388, 402, 264 Cal. Rptr. 779 (1989).

If a defendant made a misrepresentation but had no intent to induce the plaintiff's reliance on the statement, there is no deceit proven, despite plaintiff's reliance to his detriment. The defendant is not liable for intentional deceit for unintended consequences. *Conrad v. Bank of America*, 45 Cal. App. 4th 133, 157, 53 Cal. Rptr. 2d 336 (1996).

To state a cause of action for fraud under Civil Code §1572, the defendant must have intended that the plaintiff rely on the statement. *Byrum v. Brand*, 219 Cal. 3d 926, 942-45, 268 Cal. Rptr. 609 (financial consultant did not intend to induce reliance although he did conceal, suppress and misrepresent a material fact to investor).

Under Civil Code §1572 a defense of fraud lies when a party to a contract misrepresents or conceals information in order to induce someone to enter into a contract. *Masters v. San Bernardino County Employees Retirement Ass'n*, 32 Cal. App. 4th 30, 41, 37 Cal. Rptr. 2d 860 (1995).

§1:35 Justifiable Reliance

A party seeking relief from intentional deceit must prove that he actually relied on the defendant's misrepresentation. Actual reliance occurs when a misrepresentation is an immediate cause of plaintiff's conduct and which, absent such representation, he would not have engaged in the activity in all probability. *Engalla v. Permanente Medical Group Inc.*, 15 Cal. 4th 951, 976-77, 64 Cal. Rptr. 2d 843 (1997).

Relief will not be granted if the plaintiff placed too much confidence in the person defrauding him. The court will consider the plaintiff's knowledge and the relevant information available to him at the time, as well as his intelligence and relative sophistication, to determine whether the reliance was reasonable in light of all the circumstances. *Anderson v. Thacher*, 76 Cal. App. 2d 50, 65-71, 172 P.2d 533 (1946).