

Fraud: Delaware

PETER WALSH AND CLARISSA CHENOWETH, POTTER ANDERSON CORROON LLP,
WITH PRACTICAL LAW COMMERCIAL LITIGATION

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A Q&A guide to fraud claims under Delaware law. This Q&A addresses the elements of actual fraud, including material misrepresentation and reliance, and other types of fraud claims, such as fraudulent concealment and constructive fraud.

ELEMENTS GENERALLY

1. What are the elements of a fraud claim in your jurisdiction?

To state a claim of common law fraud under Delaware law, a plaintiff must plead that:

- The defendant either:
 - represented false material facts as true;
 - actively concealed and prevented the plaintiff from discovering the truth; or
 - remained silent in the face of a duty to speak.
(See Material Misrepresentation.)
- The defendant made the false representation or omission with:
 - knowledge or belief that the representation or omission was false, with reckless indifference to the truth; and
 - the intention to induce the plaintiff to take action or refrain from acting based on the representation or omission.
(See Scienter.)
- The plaintiff:
 - reasonably relied on the representation or omission (see Reliance); and
 - suffered damage as result of its reliance (see Remedies).

(See *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983); *Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc.*, 854 A.2d 121, 143-55 (Del. Ch. 2004); *DRR, L.L.C. v. Sears, Roebuck & Co.*, 949 F. Supp. 1132, 1141 (D. Del. 1996) (applying Delaware law).)

MATERIAL MISREPRESENTATION

2. What are the requirements for a material misrepresentation in your jurisdiction?

Under Delaware law, a material misrepresentation actionable in fraud is:

- An assertion through a writing, spoken words, or conduct.
- About a material fact that either:
 - is factually incorrect; or
 - creates a false impression about the truth and the speaker fails to provide qualifying information to cure the mistaken belief.

(See *Norton v. Poplos*, 443 A.2d 1, 5 (Del. 1982).)

If the recipient of a material misrepresentation:

- Seeks fraud damages, it must show that the misrepresentation was:
 - fraudulent; and
 - material.
- Asserts fraud to avoid a contract, it may show that the misrepresentation was either:
 - fraudulent; or
 - material.

(See *Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1048 n.26 (Del. Ch. 2006).)

3. What is the standard of materiality for a fraud claim in your jurisdiction?

Under Delaware law, a misrepresentation is material if either:

- It is likely to induce a reasonable person to manifest assent.
- The maker knows that the misrepresentation is likely to induce the recipient to manifest assent.

(See *Alabi v. DHL Airways, Inc.*, 583 A.2d 1358, 1362 (Del. Super. 1990).)

4. What types of representation are not actionable in fraud in your jurisdiction?

Under Delaware law, a plaintiff may not bring a claim of fraud based on:

- The defendant's puffery (see *Vichi v. Koninklijke Philips Elecs., N.V.*, 85 A.3d 725, 775 (Del. Ch. 2014)).
- Representations that are obviously false (see *Vichi*, 85 A.3d at 775).
- Opinions, unless the defendant:
 - knew they were false when making them; or
 - made them without good faith.
 (See *Mooney v. E. I. du Pont de Nemours and Co.*, 2017 WL 5713308, at *6 (Del. Super. Nov. 28, 2017); *Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc.*, 854 A.2d 121, 148 (Del. Ch. 2004).)
- Predictions about the future, unless the defendant:
 - knew they were false when making them; or
 - made them without good faith.
 (See *Mooney*, 2017 WL 5713308, at *6.)
- Reliance on extra-contractual oral representations when the contract between sophisticated parties expressly disclaimed reliance on extra-contractual representations (see *St. James Recreation, LLC v. Rieger Opportunity Partners, LLC*, 2003 WL 22659875, at *3 (Del. Ch. Nov. 5, 2003)).
- Concealment where the plaintiff is on notice or inquiry notice of the possibility of the concealed facts (see *Metro Communication*, 854 A.2d at 151).

5. Does your jurisdiction recognize fraud claims based on a defendant's false promise to honor a contract? If so, under what circumstances?

Under Delaware law, a defendant's insincere promise to perform its contractual obligations is actionable as promissory fraud if the plaintiff shows that at the time the defendant made the promise, the defendant had either:

- No intention to perform.
- Reason to know that the promises were impossible to fulfill.

(See *Winner Acceptance Corp. v. Return on Capital Corp.*, 2008 WL 5352063, at *7 (Del. Ch. Dec. 23, 2008).)

The defendant's failure to honor a promise is insufficient to constitute fraud. The plaintiff must plead and prove particularized facts, which are specific facts leading to a reasonable inference, that the defendant had no intention of performing when the defendant made the promise. (See *Grunstein v. Silva*, 2009 WL 4698541, at *13 (Del. Ch. Dec. 8, 2009).)

SCIENTER

6. Must a plaintiff plead and prove scienter in your jurisdiction? If so, what must a plaintiff plead and prove to establish scienter?

Pleading fraud in Delaware generally requires showing that the defendant acted with scienter, which under Delaware law means the defendant acted either:

- Knowingly and intentionally.
- With reckless indifference to the truth.

(See *Vichi v. Koninklijke Philips Elecs., N.V.*, 85 A.3d 725, 810 (Del. Ch. 2014); *Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc.*, 854 A.2d 121, 147 (Del. Ch. 2004).)

7. Are there any types of fraud claims for which the plaintiff does not need to allege and prove scienter?

A claim of equitable or constructive fraud under Delaware law provides a remedy for negligent or innocent misrepresentations and does not require a showing of scienter. However, an equitable fraud claim requires the plaintiff to plead and prove the parties had a special relationship, for example a fiduciary relationship. (See *In re Wayport, Inc. Litig.*, 76 A.3d 296, 327 (Del. Ch. 2013); *Fortis Advisors LLC v. Dialog Semiconductor PLC*, 2015 WL 401371, at *9 (Del. Ch. Jan. 30, 2015).)

RELIANCE

8. Must a plaintiff plead and prove actual reliance on the defendant's misrepresentation in your jurisdiction?

To satisfy the reliance element of fraud in Delaware, the party receiving a misrepresentation must have actually:

- Been exposed to the misrepresentation.
- Acted or not acted in reliance on the misrepresentation.

(See *In re Wayport, Inc. Litig.*, 76 A.3d 296, 325 (Del. Ch. 2013); *NACCO Indus., Inc. v. Applica Inc.*, 997 A.2d 1, 29 (Del. Ch. 2009); *Anglo Am. Sec. Fund, L.P. v. S.R. Global Int'l. Fund., L.P.*, 829 A.2d 143, 159 (Del. Ch. 2003).)

9. What is the standard of reliance for a fraud claim in your jurisdiction?

In Delaware, the courts variously refer to the reliance standard for a fraud claim as:

- Reasonable reliance (see, for example, *St. James Recreation, LLC v. Rieger Opportunity Partners, LLC*, 2003 WL 22659875, at *3 (Del. Ch. Nov. 5, 2003); *Alabi v. DHL Airways, Inc.*, 583 A.2d 1358, 1363 (Del. Super. 1990)).
- Justifiable reliance (see for example *In re Wayport, Inc. Litig.*, 76 A.3d 296, 325 (Del. Ch. 2013); *NACCO Indus., Inc. v. Applica Inc.*, 997 A.2d 1, 9 (Del. Ch. 2009); *Lock v. Schreppler*, 426 A.2d 856, 863 (Del. Super. 1981) (superseded by statute on other grounds)).
- Either reasonable or justifiable reliance (see, for example, *Vichi v. Koninklijke Philips Elecs., N.V.*, 85 A.3d 725, 777 (Del. Ch. 2014)).

10. Explain how a plaintiff can satisfy the reliance standard for a fraud claim in your jurisdiction.

To establish justifiable or reasonable reliance under Delaware law, the plaintiff:

- Must show that the defendant's misrepresentation involved a matter that a reasonable person is likely to consider important in deciding to act.
- Need not show that a reasonable person is likely to decide whether to act based solely on the defendant's misrepresentation.

(See *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, 2018 WL 6311829, at *13 (Del. Ch. Dec. 3, 2018); *Anglo Am. Sec. Fund, L.P. v. S.R. Global Int'l Fund., L.P.*, 829 A.2d 143, 159 (Del. Ch. 2003); *Lock v. Schreppler*, 426 A.2d 856, 863 (Del. Super. 1981) (superseded by statute on other grounds).)

11. Does your jurisdiction permit fraud claims based on the plaintiff's reliance on a third party's communication of the defendant's misrepresentation?

Under Delaware law, a plaintiff may base a fraud claim on the plaintiff's reliance on a third-party's communication of the defendant's misrepresentation if the third party was acting as the defendant's agent (see *Norton v. Poplos*, 443 A.2d 1, 6 (Del. 1982)).

12. Must a plaintiff investigate the truthfulness of a defendant's representation before relying on it in your jurisdiction?

Under Delaware law, a plaintiff cannot reasonably rely on a false representation if the plaintiff could have discovered the truth in an investigation (see *Universal Enter. Grp., L.P. v. Duncan Petroleum Corp.*, 2013 WL 3353743, at *14 (Del. Ch. July 1, 2013); *Ward v. Hildebrand*, 1996 WL 422336, at *4 (Del. Ch. July 8, 1996); *Lock v. Schreppler*, 426 A.2d 856, 862 (Del. Super. 1981) (superseded by statute on other grounds)).

However, Delaware law does not foreclose a fraud claim where:

- The truth was discoverable in a public record, but the defendant's misrepresentation caused the plaintiff to refrain from investigating.
- The defendant's misrepresentation was about a matter peculiarly within the defendant's knowledge.

(See *S.C. Johnson & Son, Inc. v. Dowbrands, Inc.*, 111 Fed. App'x 100, 108 (3rd Cir. 2004) (applying Delaware law); *Tam v. Spitzer*, 1995 WL 510043, at *9 (Del. Ch. Aug. 17, 1995); *Norton v. Poplos*, 443 A.2d 1, 7 (Del. 1982); *In re Brandywine Volkswagon, Ltd.*, 306 A.2d 24, (Del. Super. 1973).)

REMEDIES

13. Must a fraud plaintiff elect its remedies in your jurisdiction? If so, are there any exceptions?

A plaintiff alleging fraud involving a contract must choose between:

- Rescission of the contract.
- Monetary damages.

Plaintiffs choosing rescission must act diligently. A plaintiff may not receive the benefits of the contract and then seek to rescind it when it is convenient. (See *E.I. DuPont de Nemours & Co. v. Fla. Evergreen Foliage*, 744 A.2d 457, 465 (Del. 1999); *Craft v. Bariglio*, 1984 WL 8207 (Del. Ch. Mar. 1, 1984).)

14. What are the forms of damages available to a fraud plaintiff in your jurisdiction?

A fraud plaintiff in Delaware may generally recover only the pecuniary loss the plaintiff suffered from relying on the defendant's

misrepresentation. The plaintiff may also recover punitive damages where the defendant's fraud either:

- Is gross, oppressive, or aggravated.
- Involves a breach of trust or confidence.

(See *In re Wayport, Inc. Litig.*, 76 A.3d 296, 327 (Del. Ch. 2013); *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1076-77 (Del. 1983).)

However, the Court of Chancery, as a court in equity, does not award punitive damages. A plaintiff bringing a fraud claim in that court therefore cannot recover punitive damages. (See, for example, *Envo, Inc. v. Walters*, 2009 WL 5173807, at *8 (Del. Ch. Dec. 30, 2009).)

15. What forms of equitable relief are available to a fraud plaintiff in your jurisdiction?

Under Delaware law, a fraud plaintiff may elect to receive rescission of a transaction rather than monetary damages. Rescission may be available even where a plaintiff fails to meet the scienter standard of fraud but is able to prove the defendant made an innocent false representation. However, rescission restores the parties to their respective positions before the transaction, which may not be possible depending on the stage of the litigation. (See *Universal Enter. Grp., L.P. v. Duncan Petroleum Corp.*, 2013 WL 3353743, at *15 (Del. Ch. July 1, 2013); *E.I. DuPont de Nemours & Co. v. Fla. Evergreen Foliage*, 744 A.2d 457, 465 (Del. 1999); *Craft v. Bariglio*, 1984 WL 8207, at *12 (Del. Ch. Mar. 1, 1984).)

FRAUDULENT CONCEALMENT

16. Does your jurisdiction recognize claims of fraudulent concealment? If so, under what circumstances?

Under Delaware law, a plaintiff may base a fraud claim on a defendant's deliberate concealment of material facts or silence in the face of a duty to speak. To prove a claim of fraudulent concealment, the plaintiff must demonstrate that the defendant successfully took an affirmative action designed or intended to prevent the plaintiff's discovery of facts giving rise to the fraud claim. (See *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983); *Norton v. Poplos*, 443 A.2d 1, 5 (Del. 1982); *Lock v. Schreppler*, 426 A.2d 856, 860 (Del. Super. 1981) (superseded by statute on other grounds).)

A fraudulent concealment claim may be a stand-alone cause of action or may be the basis to toll the statute of limitations (see Question 23).

CONSTRUCTIVE FRAUD

17. Does your jurisdiction recognize claims of constructive fraud? If so, what distinguishes constructive fraud from actual fraud?

Delaware law recognizes constructive or equitable fraud claims where the parties have a special relationship that imposes on the defendant a legal or equitable duty of truthfulness and accuracy, for example a fiduciary duty. However, where a constructive fraud claim is based on a fiduciary duty, the fraud claim may be redundant to a breach of fiduciary duty claim. The elements of constructive or

equitable fraud are the same as the elements for common law fraud except the law replaces the scienter element with the defendant's duty of truthfulness and accuracy, so a defendant's negligent or innocent misrepresentation may be actionable as constructive or equitable fraud. (See *In re Wayport, Inc. Litig.*, 76 A.3d 296, 327 (Del. Ch. 2013); *Parfi Holding AB v. Mirror Image Internet, Inc.*, 794 A.2d 1211, 1236-37 (Del. Ch. 2001), rev'd on other grounds, 817 A.2d 149 (Del. 2002).)

The Chancery Court has exclusive jurisdiction over equitable fraud claims (see, for example, *Yu v. GSM Nation, LLC*, 2017 WL 2889515, at *4 (Del. Ch. July 7, 2017)). The Chancery Court typically exercises jurisdiction over any common law claims pled in addition to equitable fraud under that court's "clean-up" doctrine (*Yu*, 2017 WL 2889515, at *2).

DOCTRINES THAT PRECLUDE FRAUD CLAIMS

18. Does your jurisdiction permit fraud claims based on the defendant's breach of contract?

In Delaware, a plaintiff may bring a fraud claim for misrepresentations contained in a contract or material misrepresentations or omissions outside of the contract. The plaintiff asserting claims for fraud and breach of contract relating to the same transaction must allege both:

- That the defendant's fraud breached a duty independent of the defendant's contractual duties.
- Fraud damages that are separate from the damages resulting from the breach of contract.

(See *ITW Glob. Invs. Inc. v. Am. Indus. Partners Capital Fund IV, L.P.*, 2015 WL 3970908, at *4 (Del. Super. June 24, 2015); *Ameristar Casinos, Inc. v. Resorts Int'l Holdings, LLC*, 2010 WL 1875631, at *11 (Del. Ch. May 11, 2010); *Brasby v. Morris*, 2007 WL 949485, at *7 (Del. Super. Mar. 29, 2007); *Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1064 (Del. Ch. 2006).)

19. Does the economic loss doctrine foreclose a fraud claim in your jurisdiction?

Under Delaware law, fraudulent inducement of a contract, as opposed to fraud in the performance of a contract, is an exception to the limitation of the economic loss doctrine. The plaintiff asserting both contract and tort claims must generally allege that the defendant breached a duty that is independent from the defendant's contractual duties. (See *Kuhn Const. Co. v. Ocean & Coastal Consultants, Inc.*, 844 F. Supp. 2d 519, 526 (D. Del. 2012); *Brasby v. Morris*, 2007 WL 949485, at *7 (Del. Super. Mar. 29, 2007); *Council of Unit Owners of Sea Colony East*, 1990 WL 177632, at *5 (Del. Super. Oct. 16, 1990).)

20. Does your jurisdiction recognize any other doctrine or rule that precludes a common law fraud claim? If so, what is the doctrine or rule?

Under Delaware law, an integration clause in a contract that contains clear nonreliance language forecloses a fraud claim based on representations the defendant made before the parties contracted

(see *Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1058 (Del. Ch. 2006)).

PROCEDURAL ISSUES

21. What is the pleading standard for a fraud claim in your jurisdiction?

In Delaware, the complaint must state the circumstances constituting fraud according to the heightened pleading standard of particularity. The complaint may allege the defendant's mental state generally. (Super. Ct. Civ. R. 9(b); Del. Ch. Ct. R. 9(b).)

To satisfy the pleading requirements, the plaintiff must allege facts that support a rational inference of the defendant's fraud, including facts showing:

- The circumstances of the misrepresentation, including:
 - the timing of the misrepresentation;
 - the place of the misrepresentation; and
 - the contents of the misrepresentation.
- The identity of the person making the representation.
- What the defendant intended to gain by making the misrepresentation.

(See Super. Ct. Civ. R. 9(b); Del. Ch. Ct. R. 9(b); *Young & McPherson Funeral Home, Inc. v. Butler's Home Improvement, LLC*, 2015 WL 4656486, at *3 (Del. Super. Aug. 6, 2015) (quoting *Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc.*, 854 A.2d 121, 144 (Del. Ch. 2004)); *Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1050 (Del. Ch. 2006).)

22. What is the burden of proof a plaintiff must satisfy for a fraud claim in your jurisdiction?

In Delaware, a plaintiff must prove each element of fraud by a preponderance of the evidence (see *Vichi v. Koninklijke Philips Elecs., N.V.*, 85 A.3d 725, 787 (Del. Ch. 2014); *Pusey v. West*, 1989 WL 48685, at *1 (Del. Super. May 10, 1989)).

23. What is the statute of limitations for asserting a fraud claim in your jurisdiction?

The statute of limitations for fraud claims in Delaware is three years. Unless there is a basis for tolling the statute of limitations or "unusual or extraordinary circumstances" warrant disregarding the statute of limitations, the cause of action accrues at the time the defendant perpetrates the fraud. The statute may be tolled if either:

- The plaintiff is unable to discover the fraud, known as the discovery rule or the doctrine of inherently unknowable injuries.
- The defendant concealed the facts necessary to discover the fraud, known as fraudulent concealment.
- The plaintiff has reasonably relied on the competence and good faith of a fiduciary, known as equitable tolling.

(10 Del. C. § 8106; see *Vichi v. Koninklijke Philips Elecs., N.V.*, 85 A.3d 725, 788 (Del. Ch. 2014); *Reading Int'l, Inc. v. St. Francis*, 2005 WL 1654343, at *1 (Del. Super. June 17, 2005); *In re Tyson Foods, Inc.*, 919 A.2d 563, 585 (Del. Ch. 2007).)

The Chancery Court, as a court of equity, is not bound by statutes of limitations. Instead, a defendant may raise the equitable defense of laches and assert that a plaintiff waited too long to bring a fraud claim. For fraud claims seeking legal relief, the Chancery Court typically applies the three-year statute of limitations by analogy. For equitable fraud claims seeking equitable relief, the Chancery Court typically gives great weight to the statute of limitations period in its laches analysis that includes where the plaintiff unreasonably delayed bringing suit. (See *Vichi* 85 A.3d at 788.)

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