

Restatement of the Law — Torts  
Restatement (Second) of Torts  
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Division 4. Misrepresentation  
Chapter 22. Misrepresentation And Nondisclosure Causing Pecuniary Loss  
Topic 1. Fraudulent Misrepresentation (Deceit)

## § 525. Liability For Fraudulent Misrepresentation

[Link to Case Citations](#)

**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.**

**Comment:**

*a.* The rules that determine the fraudulent character of a misrepresentation are stated in §§ 526-530. The rules that deal with the requirement that the representation must be made for the purpose of inducing that conduct of the other from which his harm results are stated in §§ 531-536. The rules that determine whether the recipient of the misrepresentation is justified in relying upon it are stated in §§ 537-545. The measure of damages is stated in § 549.

As to the liability for negligent misrepresentation inducing reliance that causes pecuniary loss, see § 552. As to innocent misrepresentation, see § 552C.

*b. Misrepresentation defined.* “Misrepresentation” is used in this Restatement to denote not only words spoken or written but also any other conduct that amounts to an assertion not in accordance with the truth. Thus, words or conduct asserting the existence of a fact constitute a misrepresentation if the fact does not exist.

**Illustration:**

1. A, a dealer in used automobiles, offers a second-hand car for sale in his showroom. Before doing so he turns the odometer back from 60,000 to 18,000 miles. B, relying on the odometer reading, purchases the car from A. This is a misrepresentation.

*c.* A representation of the state of mind of the maker or of a third person is a misrepresentation if the state of mind in question is otherwise than as represented. Thus, a statement that a particular person, whether the maker of the statement or a third person, is of a particular opinion or has a particular intention is a misrepresentation if the person in question does not hold the opinion or have the intention asserted.

*d. Representations of fact, opinion and law.* Strictly speaking, “fact” includes not only the existence of a tangible thing or the happening of a particular event or the relationship between particular persons or things, but also the state of mind, such as the entertaining of an intention or the holding of an opinion, of any person, whether the maker of a representation or a third person. Indeed, every assertion of the existence of a thing is a representation of the speaker's state of mind, namely, his belief in its existence. There is sometimes, however, a marked difference between what constitutes justifiable reliance upon statements of the maker's opinion and what constitutes justifiable reliance upon other representations. Therefore, it is convenient to distinguish between misrepresentations of opinion and misrepresentations of all other facts, including intention.

A statement of law may have the effect of a statement of fact or a statement of opinion. It has the effect of a statement of fact if it asserts that a particular statute has been enacted or repealed or that a particular decision has been rendered upon particular facts. It has the effect of a statement of opinion if it expresses only the actor's judgment as to the legal consequence that would be attached to the particular state of facts if the question were litigated. It is therefore convenient to deal separately with misrepresentations of law.

*e. Representation implied from statement of fact.* A misrepresentation of fact may concern either an existing or past fact. A statement about the future may imply a representation concerning an existing or past fact. (See Comment *f*). To be actionable, a misrepresentation of fact must be one of a fact that is of importance in determining the recipient's course of action at the time the representation is made. Thus a statement that a horse has recently and consistently trotted a mile in less than two minutes may justifiably be taken as an implied assertion of the capacity of the horse to repeat the performance at the time the statement is made. So, too, a past fact may be one that makes it obligatory or advisable for the recipient to take a particular course of action, as when A falsely tells B that he has caused the arrest of a criminal for whose arrest B has offered a reward, or when in an insurance policy the insured has falsely stated that his father did not die of tuberculosis. A fraudulent misrepresentation of such a fact may be the basis of liability.

*f. Representation implied from statement promissory in form.* Similarly a statement that is in form a prediction or promise as to the future course of events may justifiably be interpreted as a statement that the maker knows of nothing which will make the fulfillment of his prediction or promise impossible or improbable. Thus a statement that a second-hand car will run fifteen miles on a gallon of gasoline is an implied assertion that the condition of the car makes it capable of so doing, and is an actionable misrepresentation if the speaker knows that it has never run more than seven miles per gallon of gasoline.

### **Illustrations:**

2. A, in order to induce B to buy a heating device, states that it will give a stated amount of heat while consuming only a stated amount of fuel. B is justified in accepting A's statement as an assurance that the heating device is capable of giving the services that A promises.
3. A, knowing that the X Corporation is hopelessly insolvent, in order to induce B to purchase from him shares of its capital stock assures B that the shares will within five years pay dividends that will amount to the purchase price of the stock. B is justified in accepting

these statements as an assurance that A knows of nothing that makes the corporation incapable of making earnings sufficient to pay the dividends.

*g. Representation implied from statement as to past events.* On the same basis, a statement that a particular condition has recently existed or that an event has recently occurred or that a particular person has recently by words or acts expressed a particular opinion or intention, may, if reasonable under the circumstances, be understood and accepted as asserting that the situation has not changed since the time when the condition is said to have existed, the event to have occurred or the opinion or intention to have been expressed.

**Illustrations:**

4. A, in order to induce B to buy a horse, falsely states that a veterinary surgeon a week before had examined the horse and had pronounced it sound. Unless B knows of something that might have changed the horse's condition in the interim, B is justified in interpreting A's statement as implying that the horse is sound at the time of the sale.<sup>5</sup> A tells B that C had the day before offered him \$2000 for a particular piece of land. In the absence of anything known to him that might indicate the contrary, B is entitled to assume that C's opinion as to the value of the land is unchanged.

*h. Misrepresentation causing physical harm.* This Section (and this Chapter) covers pecuniary loss resulting from a fraudulent misrepresentation, and not physical harm resulting from the misrepresentation. As to the latter, see § 557A, which also covers the economic loss deriving from the physical harm. This type of economic loss is not intended to be included in the term, pecuniary loss, as used in this Chapter. See also § 310 (liability in negligence for a conscious misrepresentation involving risk of physical harm) and § 311 (negligent misrepresentation involving risk of physical harm).

Case Citations

Reporter's Notes, Case Citations & Cross References Through December 1977

Case Citations 1978 — June 1987

Case Citations July 1991 — June 1998

Case Citations July 1998 — June 2011

Case Citations July 2011 — November 2011

Reporter's Notes, Case Citations & Cross References Through December 1977:

REPORTER'S NOTE

This Section has been somewhat revised and expanded for purposes of clarity.

On Illustration 1 see: *Town and Country Chrysler Plymouth v. Porter*, 11 Ariz.App. 369, 464 P.2d 815 (1970); *District Motor Co. v. Rodill*, 88 A.2d 489 (Mun.App.D.C.1952); *Boise*

Dodge, Inc. v. Clark, 92 Idaho 902, 453 P.2d 551 (1969); Jones v. West Side Buick Co., 231 Mo.App. 187, 93 S.W.2d 1083 (1936); Austin v. Wilkerson, Inc., 519 P.2d 899 (Okla.1974); Osborn v. Gene Teague Chevrolet, 254 Or. 486, 459 P.2d 988 (1969); Chapman v. Zakzaska, 273 Wis. 64, 76 N.W.2d 537 (1956).

Cf. Leonard v. Springer, 197 Ill. 532, 64 N.E. 299 (1902) (document exhibited); Baker v. Hallam, 103 Iowa 43, 72 N.W. 419 (1897) (same); Eastern Trust & Banking Co. v. Cunningham, 103 Me. 455, 70 A. 17 (1908) (drawing check without funds); Salzman v. Maldaver, 315 Mich. 403, 24 N.W.2d 161 (1946) (stacking aluminum sheets to conceal those corroded); Lindberg Cadillac Co. v. Aron, 371 S.W.2d 651 (Mo.App.1963) (car with cracked engine block painted over).

On Illustrations 2 and 3 see: Community Bank, Lake Oswego v. Bank of Hallendale, 482 F.2d 1124 (5 Cir.1973); Traylor Eng. & Mfg. Co. v. National Container Corp., 6 Terry 143, 70 A.2d 9 (Del.1949); Hill v. Stewart, 93 Ga.App. 792, 92 S.E.2d 829 (1956); Sanders v. Chesmotel Lodge, 300 S.W.2d 239 (Ky.1957); French v. Ryan, 104 Mich. 625, 62 N.W. 1016 (1895); McElrath v. Electric Inv. Co., 114 Minn. 358, 131 N.W. 380 (1911); Connelly Co. v. Schleuter Bros., 69 Mont. 65, 220 P. 103 (1923); Freggens v. Clark, 100 N.J.Eq. 389, 135 A. 681 (1927); Russell v. Industrial Transp. Co., 113 Tex. 441, 251 S.W. 1034 (1924), affirmed, 113 Tex. 441, 258 S.W. 462; Claus v. Farmers & Stockgrowers State Bank, 51 Wyo. 45, 63 P.2d 781 (1936).

On Illustration 5, see: Kabatchnick v. Hanover-Elm Bldg. Corp., 328 Mass. 341, 103 N.E.2d 692 (1952); Baloyan v. Furniture Exhibition Bldg. Co., 258 Mich. 244, 241 N.W. 886 (1932); Seaman v. Becar, 15 Misc. 616, 38 N.Y.S. 69 (1896); Smith, Kline & French Co. v. Smith, 166 Pa. 563, 31 A. 343 (1895); Strickland v. Graybill, 97 Va. 602, 34 S.E. 475 (1899).

See, generally, Smith, Liability for Negligent Language, 14 Harv.L.Rev. 184 (1909); Williston, Liability for Honest Misrepresentation, 24 Harv.L.Rev. 415 (1911); Bohlen, Misrepresentation as Deceit, Negligence or Warranty, 42 Harv.L.Rev. 733 (1924); Carpenter, Responsibility for Intentional, Negligent or Innocent Misrepresentation, 24 Ill.L.Rev. 749 (1930); Weisiger, Bases of Liability for Misrepresentation, 24 Ill.L.Rev. 766 (1930); Green, Deceit, 16 Va.L.Rev. 749 (1930); Bohlen, Should Negligent Misrepresentation Be Treated as Negligence or Fraud?, 18 Va.L.Rev. 703 (1932); Green, Innocent Misrepresentation, 19 Va.L.Rev. 242 (1932); Keeton, Rights of Disappointed Purchasers, 32 Texas L.Rev. 1 (1953); Harper & McNeely, A Synthesis of The Law of Misrepresentation, 22 Minn.L.Rev. 939 (1938); Green, The Duty to Give Accurate Information, 12 UCLA L.Rev. 464 (1965); James & Gray, Misrepresentation, 37 Md.L.Rev. 286 & 488 (1977).

#### COURT CITATIONS TO RESTATEMENT, SECOND

**E.D.Pa.**1977. Cit. in ftn. Plaintiff, an international air carrier, brought an action against a bank and other persons to recover damages allegedly arising out of the fraudulent procurement and use of two airline credit cards. A travel agency, which had booked travel accommodations through plaintiff for some time, had become dissatisfied with the airline's fifteen-day billing policy inasmuch as it had operated on thirty-day credit terms with its own cus-

tomers. Since it was against air transport regulations for a travel agency to receive and use plaintiff's credit card, which extended the billing cycle beyond fifteen days, two of plaintiff's executives and the travel agency circumvented the regulation by having the travel agency apply for and receive the cards through a straw corporation, which became theoretically indebted to plaintiff. The court held that plaintiff's responsible officials, acting within the scope of their authority, knew who the real party in interest in the scheme was, and, therefore, their knowledge was imputed to plaintiff so that there was no reliance on the solvency of defendant corporation and no fraud. Judgment for defendants. *Pan Am World Airways Inc. v. Continental Bank*, 435 F.Supp. 642, 649.

**Mass.App.**1977. Cit. in disc. Plaintiffs, homeowners, brought an action against the seller and builder of the homes and the adjoining land owners to recover for damage to their property caused by subsurface waters. The lower court entered judgment for the plaintiffs. On appeal, the court reversed in part and affirmed in part, holding that the adjoining landowners were not liable for damages to the plaintiffs' property even if the placing of fill on the land did cause subsurface waters to back up onto the plaintiffs' premises. However, the court found that the evidence in the action against the seller and builder supported the jury's conclusion that that defendant misrepresented the problem of subsurface waters to the plaintiffs. *Tucker v. Badoian*, 5 Mass.App. 904, 370 N.E.2d 717, 719, remanded, --- Mass. ----, 384 N.E.2d 1195 (1978).

#### Cross References to

##### 1. Digest System Key Numbers

Fraud ↪ 8 et seq.

##### 2. A.L.R. Annotation

Fraud predicated on vendor's misrepresentation or concealment of danger or possibility of flooding or other unfavorable water conditions. 90 A.L.R.3d 568.

Practices forbidden by state deceptive trade practice and consumer protection acts. 89 A.L.R.3d 449.

Scope and exemptions of state deceptive trade practice and consumer protection acts. 89 A.L.R.3d 399.

Liability of bank, to other than party whose financial condition is misrepresented, for erroneous credit information furnished by bank or its directors, officers, or employees. 77 A.L.R.3d 6.

Fraud in connection with franchise or distributorship relationship. 64 A.L.R.3d 6.

Right to private action under state consumer protection act. 62 A.L.R.3d 169.

Validity of express statutory grant of power to state to seek, or to court to grant, restitution

of fruits of consumer fraud. 59 A.L.R.3d 1222.

Consumer class actions based on fraud or misrepresentations. 53 A.L.R.3d 534.

Seller's liability for fraud in connection with contract for the sale of long-term dancing lessons. 28 A.L.R.3d 1412.

Liability of vendor's real estate broker or agent to purchaser for misrepresentations as to, or nondisclosure of, physical defects of property sold. 8 A.L.R.3d 550.

Misrepresentation as to third person's present intention as to future act as actionable fraud. 40 A.L.R.2d 971.

Misrepresentations as to financial condition or credit of third person as actionable by one extending credit in reliance thereon. 32 A.L.R.2d 184.

Admissibility, in tort action for fraud, of evidence as to price for which the assertedly defrauded purchaser of property sold it. 31 A.L.R.2d 1064.

Misrepresentation by lessor, in negotiations for lease, as to offers of rental received from third persons, as actionable fraud. 30 A.L.R.2d 923.

Misrepresentation by one other than insurance agent as to coverage, exclusion, or legal effect of insurance policy, as actionable. 29 A.L.R.2d 213.

False representations as to income, profits, or productivity of property as fraud. 27 A.L.R.2d 14.

Misrepresentation as to matters of foreign law as actionable. 24 A.L.R.2d 1039.

Measure of damages for fraudulently procuring services at lowered rate or gratuitously. 24 A.L.R.2d 742.

Civil remedies of consumer for violations of Truth in Lending Act (15 U.S.C. §§ 1601-1644, 1661-1665). 11 A.L.R.Fed. 815.

#### Case Citations 1978 — June 1987:

**C.A.1**, 1982. Cit. in sup. The plaintiff brought an action for damages under the Federal Tort Claims Act, based on the Social Security Administration's act of stopping payment on benefit checks which the plaintiff had cashed on behalf of his mother. Due to a SSA key-puncher's error in recording the year of death of the plaintiff's mother, the SSA stopped payment on her benefit checks and began an investigation of the plaintiff for fraud. Consequently, the banks demanded that the plaintiff repay them, and the plaintiff was forced to obtain loans to do so. The plaintiff's credit rating was seriously affected, and as a result he allegedly suffered financial, physical, emotional, and mental damage. The trial court dismissed the complaint, holding that the plaintiff's claim concerned misrepresentation and was barred as an exception to the Federal Tort Claims Act. Upon the plaintiff's appeal, this court

vacated and remanded. Since the erroneous statement was not made to the plaintiff and he did not rely on it, the case was removed from the traditional view of misrepresentation as a separate tort, and the misrepresentation exception was inapposite. However, the court determined that the complaint essentially alleged the traditional elements of defamation, with the SSA's conduct constituting the defamatory communication. Although the defamation was a product of negligence, the defamation itself remained the gravamen of the plaintiff's cause of action, and claims for defamation were also exempted by the Act. Insofar as it alleged injury to reputation, the complaint was dismissed. *Jimenez-Nieves v. United States*, 682 F.2d 1, 4, on remand 618 F.Supp. (D.P.R.1985).

**C.A.2**, 1984. Cit. in disc. Insurer of shipper sued carrier to recover the value of 36 kegs of silver flakes lost during shipment. The trial court granted defendant's motion for summary judgment on the ground that the shipper had failed to give timely notice of loss as required by Article 26 of the Warsaw Convention. On appeal, summary judgment was reversed and the case remanded for determination of factual issues concerning, inter alia, the application of the fraud exception to Article 26. The court noted that the fraud exception includes any intentional acts by the carrier or its agents which significantly decrease the likelihood of the shipper giving timely notice. *Denby v. Seaboard World Airlines, Inc.*, 737 F.2d 172, 183.

**C.A.3**, 1986. Quot. in fn. in sup. Meat suppliers sued a bank and a financial corporation, alleging common law deceit and negligent misrepresentation, inter alia, on the grounds that the plaintiffs had sold meat on credit to insolvent companies, relying on the defendants' representations that the companies were solvent and that the proceeds of the meat sales at bankruptcy were used to satisfy the defendants' debts only. The trial court dismissed the complaints as time-barred by the two-year statute of limitations. Reversing, this court held that the claims were governed by a six-year statute of limitations for common law fraud and were timely filed. The court reasoned that the applicable statute did not mention fraud and that the reference to "taking, detaining or injuring personal property," requiring the two-year statute of limitations, was more like conversion and trespass to chattels than fraud, which did not require a taking, detention, or an injury to personal property. *A.J. Cunningham Packing Corp. v. Congress Financial Corp.*, 792 F.2d 330, 334.

**C.A.10**, 1982. Quot. in sup. An oil company sued its former landman for fraud or deceit based on his obtaining funds over and above the amount payable to him as salary and expenses. The relief sought by the plaintiff was, first, for damages based on common law fraud with respect to the handling of mineral leases, and second, for a judgment for constructive trusts based on leases which, following his termination, the defendant obtained for his own use and benefit. The latter allegation was based on the assertion that the prior employment and the confidential material had formed a fiduciary relationship between the parties and that the defendant had no right to utilize information growing out of his employment for his own benefit. The trial court granted judgment for the defendant on both claims. On appeal, the court reversed and remanded for a new trial. The court quoted the Restatement's definitions of fraud, deceit, scienter, fraudulent misrepresentation, and ambiguous representation to support its conclusion that the plaintiff's evidence established a prima facie case against the defendant. The evidence proved a disparity between the amounts the defendant paid out for leases and the amounts he received from the plaintiff. There was also evidence of the de-

fendant's knowledge that the representations were false. *Tenneco Oil Co. v. Joiner*, 696 F.2d 768, 773.

**D.Ariz.**1979. Cit. in sup. Plaintiff church and defendant church both claimed exclusive possession of certain property to which defendant church had acquired title by conveyance. Members of plaintiff church had belonged to defendant church at the time the conveyance was made. In its prayer for relief, plaintiff alleged that it was entitled to reformation of the deed to the property and a quieting of title in the property with a request that it be transferred to it based on the law of fraud, constructive trust, and resulting trust. Defendant counterclaimed requesting ejectment of the plaintiff and a quieting of title in it. Both parties made motions for summary judgment, and this court denied plaintiff's motion and granted defendant's motion. Specifically, the court held that plaintiff had failed to allege a misleading statement or nondisclosure, as is required in an action based in fraud, and that although no particular form of words is required to declare a trust, the bylaws and articles of incorporation of the religious sect to which both plaintiff and defendant belong make clear that any trust created in the bylaws is for the benefit of a church of defendant's type, and that, in the absence of any dispute over such fact, plaintiff had no legal basis for claiming ownership of the property in question. *Paradise Hills Church v. International Church of Foursquare Gospel*, 467 F.Supp. 357, 362.

**D.Del.**1984. Cit. in disc. The plaintiff sued a former employer for fraudulent or negligent misrepresentations made to him by his employer's agents in connection with stock options that the plaintiff contended were to be issued to him. The court declared a mistrial after the jury failed to reach a verdict. The judge then granted the defendant's motion for a directed verdict, concluding that no evidence supported the plaintiff's claim. The defendant had promised to deliver the stock options, but had never specified when, how, or what number of options the plaintiff would receive. Because the plaintiff had resigned before the options were issued, the court explained, he was ineligible to receive them. *Hamilton v. Wadsworth Pub. Co., Inc.*, 589 F.Supp. 417, 421.

**D.Del.**1985. Cit. in case quot. in disc. A woman hired a private detective in regard to repeated acts of vandalism of her property and became personally involved with him. Subsequently the detective took over the woman's financial affairs and opened an account in her name at a stock brokerage, but, through his personal dealings with the broker, he defrauded the woman of \$110,000. The woman sued the brokerage and its employee, seeking recovery for fraud and intentional infliction of emotional distress. The district court granted defendants' motion for summary judgment, holding, inter alia, that the broker's conduct was not so extreme or outrageous as to support an emotional distress claim. The court also held that there existed insufficient evidence of collusion between the broker and the private detective to prove a claim of fraud against the broker. The court noted that a showing of an intentional misrepresentation, knowingly given to one who relied and was deceived, was required for actionable fraud. *Candelora v. Clouser*, 621 F.Supp. 335, 342, affirmed 802 F.2d 446 (3d Cir.1986).

**N.D.Iowa Bkrtcy.Ct.**1985. Cit. in disc. A debtor and its lender filed a turnover complaint against two corporations with which the debtor had engaged in sales transactions. The debt-

or sought to recover damages resulting from an alleged misrepresentation by one of the corporations. This court dismissed the portions of the turnover complaint that alleged misrepresentation and found that the debtor had failed to prove that the defendant had acted with the intent to induce the debtor to act or refrain from acting. Even if the character of business transactions between the debtor and the defendant had been misrepresented when a No Offset Agreement was signed in favor of the defendant, the misrepresentation was not material, since the lender continued to lend money to the debtor on the debtor's accounts receivable even when a No Offset Agreement was not in force. *In re Manchester Hides, Inc.*, 45 B.R. 794, 803.

**S.D.Iowa**, 1981. Cit. in disc. and coms. (b) and (d) quot. in part in disc. An action was brought to recover amounts owing for services of the plaintiff's offshore drilling rig, whose payment the defendant had personally guaranteed. The defendant filed a counterclaim, alleging that he was induced to join the abortive Middle East oil venture by the fraudulent or negligent misrepresentations of the plaintiff. The principal question was whether the defendant and counterclaim plaintiff, a citizen of Iowa, was induced to join the venture through fraudulent or negligent misrepresentations of certain agents of the plaintiff and counterclaim defendant, a Texas petroleum drilling contractor. The court found that, under Iowa law, the place of the defendant's injury from the abortive Middle East oil venture was Iowa, and his causes of action for fraudulent and negligent misrepresentation "arose within this state" within the meaning of the Iowa borrowing statute. Accordingly, Iowa's five-year limitations period applied whether or not the causes would be fully barred by the laws of Texas, and the defendant's counterclaim was not barred. The court stated that, in an action for fraud, a plaintiff in either Iowa or Texas had a burden of proving by a preponderance of the evidence each of these elements: a material misrepresentation, made knowingly (scienter), with the intent to induce the plaintiff to act or refrain from acting, upon which the plaintiff justifiably relied, with resulting injury and damages. The court found that the evidence established that the counterclaim defendant made false representations with the intent of influencing the counterclaim plaintiff's conduct. Furthermore, even if the counterclaim defendant did not know that the representations were false, they were made with reckless disregard for their truth or falsity; in view of the special relationship of trust and confidence among the parties and the counterclaim defendant's special knowledge, there was a duty to know the truth or falsity of the representations. Accordingly, the court held that scienter and the closely related element of intent to deceive were clearly proved. The court also held that the record established that the counterclaim plaintiff did in fact rely upon the misrepresentations of the counterclaim defendant, that he was justified in such reliance, and that there was no contributory negligence on his part in so relying. Therefore, the counterclaim plaintiff was entitled to recover on his counterclaim. *Sedco Intern., S.A. v. Cory*, 522 F.Supp. 254, 323, 324, judgment affirmed 683 F.2d 1201 (8th Cir.1982), certiorari denied 459 U.S. 1017, 103 S.Ct. 379, 74 L.Ed.2d 512 (1982).

**D.Kan.**1980. Cit. in disc. The plaintiffs, purchasers of common stock and convertible subordinated debentures, brought a class action suit against the defendant corporation which had issued the stock pursuant to a public offering. The plaintiffs alleged that the corporation and named individuals had violated federal and state securities laws by making misrepres-

entations. The plaintiffs' claims against the defendant accountants proceeded to trial as did various cross claims. The court stated that in order to obtain relief, the plaintiffs had to prove certain elements. One of these elements involved the causal connection between the violations of the securities laws and the plaintiffs' injuries. The court narrowed the element of causation into transaction causation and loss causation. Under transaction causation there must have been a causal relationship between the alleged misrepresentations and omissions and the plaintiffs' purchases. Under common law fraud a plaintiff would have to prove that he justifiably relied upon a defendant's misrepresentations. The court stated that this was similar to the transaction causation requirement. The court noted that in private actions under the securities laws there has been a trend which did not require proof of reliance to establish transaction causation. This did not mean that reliance was no longer relevant but rather that a finding of materiality would give rise to a presumption of reliance which may be rebutted. The court concluded that although the plaintiffs had shown that there were securities laws violations, they did not prove, *inter alia*, that the accountants knew of these violations. *Seiffer v. Topsy's Intern., Inc.*, 487 F.Supp. 653, 666.

**D.Kan.**1986. *Cit. in sup.* An attorney who had been prosecuted by the United States Postal Service for mail fraud sued the United States under the Federal Tort Claims Act (FTCA) for malicious prosecution, abuse of the grand jury process, outrage, and deprivation of his constitutional rights. The court denied the defendant's motion to dismiss, holding that the plaintiff's claims were not barred by the misrepresentation and deceit exceptions to the FTCA. The court reasoned that an essential element of a claim for misrepresentation is reliance by a plaintiff on false information provided by a defendant; however, this plaintiff had not relied on the allegedly falsified records and testimony used by the postal service inspectors during their mail fraud prosecution against the attorney. *Crow v. United States*, 634 F.Supp. 1085, 1090.

**E.D.La.**1981. *Cit. in disc.* Nicaraguan citizen who left her country during civil war and moved to Florida brought an action against the Nicaraguan central bank and an American commercial bank located in New Orleans to recover \$150,000 on a check drawn in her favor by the central bank of Nicaragua on its account with the American commercial bank. The central bank of Nicaragua moved to dismiss the action, contending that the suit was barred under the Foreign Sovereign Immunities Act and that the court lacked personal jurisdiction over it. The court held that, although the conduct of the central bank of Nicaragua in maintaining foreign exchange rates through the regulation of foreign currency transactions was not commercial, but was governmental under the Foreign Sovereign Immunities Act, the claim of the Nicaraguan citizen fell within the "commercial activities" exception to foreign sovereign immunity created by the applicable sections of the Foreign Sovereign Immunities Act and, thus, the court had jurisdiction over the claim. The court stated that applicability of the "commercial activity" exception under the Foreign Sovereign Immunities Act rests not on whether the foreign entity generally engages in commercial conduct, but on whether the particular conduct giving rise to the claim in question actually constitutes, or is in connection with commercial activity, regardless of the defendant's generally commercial or governmental character. The central bank's motion to dismiss was denied. *De Sanchez v. Banco Central De Nicaragua*, 515 F.Supp. 900, 912.

**W.D.Mo.**1981. Com. (f) cit. and quot. in part in disc. Conventioneers brought an action against a hotel, seeking damages arising from the hotel's dishonoring of their reservations. The court stated that, although a promissory statement could be deceitful if the promisor actually had no intention of performing and, in addition, the promisor impliedly represented that he knew of nothing that would make the fulfillment of his prediction or promise impossible or improbable, one asserting fraud generally was required to show that the promisor knew that the possibilities of performance were so remote as to render it almost certainly unable to perform its obligations; the failure to perform a contract could not be transmuted into fraud or misrepresentation absent that intent. Accordingly, the court held that the dishonoring of the reservations by the hotel did not give rise to a claim for fraud or fraudulent representation without a showing that the hotel knowingly or willfully misrepresented a material fact to the plaintiffs or intended not to reserve a room. However, the court held that there was a breach of contract which was not waived, compromised or settled. *Wells v. Holiday Inns, Inc.*, 522 F.Supp. 1023, 1026.

**S.D.N.Y.**1985. Cit. in disc. A class action was brought against 18 broker-dealers and a consulting firm, alleging both state and federal claims. The federal claims centered on the allegation that the plaintiffs' single premium deferred annuities purchased from the brokers violated the Federal Securities Act because the brokers had failed to file a registration statement and had used deceptive practices in selling the premiums. The state claims alleged common law fraud and negligence and breach of fiduciary duty and contract. Approving the stipulations of settlement and final judgments of dismissal, the court noted that, although the proof of scienter was nearly the same for both the state and federal claims, elements of scienter were more highly developed under federal securities law than under state fraud law. In *re Baldwin-United Corp.*, 607 F.Supp. 1312, 1323.

**S.D.N.Y.**1985. Cit. in disc. A seller's factor sued a department store, alleging that the department store was liable for goods sold and delivered by the seller to a warehouse. The department store moved for summary judgment, and the factor moved for leave to amend the complaint to add a charge of conspiracy to defraud. The court granted the motion for summary judgment and denied the motion to amend on the ground that the proposed amended complaint failed to plead fraud with particularity. The court noted, however, that the factor's claim for fraudulent nondisclosure could be supported by evidence of a conspiratorial relationship between the defendant and a third party and, further, that the factor could also state a legitimate claim for fraudulent misrepresentation. *Sterling Nat. Bank & Trust Co. of New York v. Federated Dept. Stores, Inc.*, 612 F.Supp. 144, 147.

**E.D.Pa.**1982. Cit. in disc. A meat packer brought suit under the Federal Tort Claims Act to recover damages for economic harm allegedly caused by the incorrect grading of meat by government inspectors. The court dismissed the action and denied the plaintiff's motion to reconsider the dismissal. The court held that the wrongful conduct complained of was not negligence, but merely misrepresentation, over which the court had no jurisdiction. The court admitted the difficulty of distinguishing negligence from misrepresentation, noting that the torts often overlapped. However, under any test the court could devise, the complaint failed because the only wrongful condition created by government agents was misrepresentation of the meat's quality, and the plaintiff was harmed through reliance on that mis-

representation. *Cross Bros. Meat Packers v. United States*, 537 F.Supp. 204, 205, order reversed 705 F.2d 682 (3rd Cir.1983).

**W.D.Va.**1981. Cit. in disc. Virginia resident brought an action for deceit against Tennessee resident. On the defendant's motion to dismiss for want of personal jurisdiction, the court held that the exercise of jurisdiction over a nonresident defendant who had made a material misrepresentation in Virginia causing the plaintiff to sustain economic injury, was within the contemplation of the Virginia long-arm statute, and compelling the defendant to defend the action in Virginia was consonant with the due process clause of the United States Constitution. The court stated that generally a single act committed within the Commonwealth, which resulted in tortious injury, would be sufficient under the due process clause to confer jurisdiction over the actor. Accordingly, the defendant's motion was denied. *Humphreys v. Pierce*, 512 F.Supp. 1321, 1323.

**Alaska**, 1984. Cit. in fn. Buyer of vendor's land made a downpayment but was late in tendering the balance, and vendor refused to convey the land. Buyer sought specific performance, damages for breach of contract, and, in the alternative, damages for fraudulent misrepresentation of vendor's authority to convey the entire parcel, which vendor owned in common with his former wife. The trial court declined to grant the requested relief, but this court reversed and remanded. Buyer's failure to tender the balance by the closing deadline did not bar a suit for specific performance, as specific performance could be granted in spite of a breach unless the breach was serious enough to discharge the other party's duty. However, buyer was entitled to specific performance only with regard to vendor's undivided one-half interest in the property. On remand, the court was to consider whether vendor misrepresented his interest in the property. *Fleenor v. Church*, 681 P.2d 1351, 1358.

**Ariz.**1982. Cit. in disc. Four purchasers of houses brought suit seeking compensatory and punitive damages against the builder, alleging fraud in the sale. The plaintiffs maintained that the builder assured them that the houses would qualify for a federal tax credit available for new construction begun before a certain date. The house construction was not begun before that date, however, and two of the purchasers had the tax credit disallowed by the I.R.S. A third purchaser was not challenged by the I.R.S. on the credit, while a fourth purchaser did not take the credit. The trial court partially granted the builder's motions for summary judgment, finding that only the two purchasers whose tax credits were disallowed had made a prima facie case of fraud and that no recovery for punitive damages could be had by any of the purchasers. This appeal followed. This court listed the elements of actionable fraud and cited the Restatement for the proposition that only pecuniary loss is recoverable in an action for fraud. Accordingly, this court affirmed the summary judgment against the purchaser who took no tax credit, because he purchased a house which he knew did not qualify for a tax credit rather than the house upon which the builder had made assurances. That purchaser had suffered no loss. However, despite the lack of provable pecuniary damages, this court reversed the summary judgment against a purchaser who actually purchased a house based on the builder's assurances and took the tax credit. Since the I.R.S. had not challenged the credit, no pecuniary loss had yet occurred. The court viewed the possibility, however, that the I.R.S. would eventually disallow the credit and impose a penalty as proof enough of pecuniary damages to make a prima facie case. This court also reversed the trial court's sum-

mary judgment against any recovery for punitive damages. The court applied the Restatement definition and reasoning in finding that the record showed sufficient evidence of the builder's reckless indifference to the purchasers' interests to sustain a claim for punitive damages. *Echols v. Beauty Built Homes, Inc.*, 132 Ariz. 498, 647 P.2d 629, 632.

**Cal.App.**1979. Cit. in sup. The plaintiff instituted an action against the defendant for common-law fraud and deceit and for statutory false and misleading advertising. The lower court entered summary judgment for the defendant. The appellate court held, inter alia, that when it is alleged that a publisher published an advertisement knowing that the person who placed the ad had been excluded from practice before the Patent Office and knowing that the individual could not legally hold himself out as being qualified to prepare or prosecute applications for patents, there exists an issue of fact as to the publisher's good faith that precludes summary judgment. *Thomas v. Times Mirror Magazines, Inc.*, 159 Cal.Rptr. 711, 715.

**Del.Super.**1982. Cit. in sup. The plaintiff, a minority shareholder, brought suit in equity against the majority shareholder and its corporate parent, alleging a breach of fiduciary duty in approving a merger allegedly fraudulent to the minority. The corporation had merged with a wholly-owned subsidiary of the major shareholder's parent. Prior to the minority's vote, the corporation had issued a proxy statement endorsing the merger, and it was overwhelmingly approved by the minority shareholders. The plaintiff claimed that the defendants breached their fiduciary and common law duties to the minority shareholders by approving a merger with no bona fide business purposes beyond benefitting the parent and the major shareholder, and by issuing a materially false and coercive proxy statement. The plaintiff sought equitable relief, including a declaration that the merger was void, an order permitting the return of the parent company's shares, received in the merger in exchange for the shares of the corporation at issue, and an accounting. The lower court dismissed the case for lack of subject matter jurisdiction. This court reversed, holding, inter alia, that the plaintiff stated a proper claim in equity. First, the court cited state common law which established that where the majority shareholder had an interest in both sides of the transaction, the majority had the burden of establishing the fairness of the transaction to the minority. Applying this rule, the court held that the plaintiff stated a fairness claim in equity for breach of fiduciary duty where the plaintiff claimed that the majority used its controlling position to coerce the minority shareholders' vote by issuing a false proxy statement. Second, the court concluded that fairness suits for alleged fraud and breach of fiduciary duty fell within equity's exclusive jurisdiction. The court further found that even if the plaintiff's claim fell within equity's concurrent jurisdiction, the plaintiff lacked an adequate remedy at law because a fairness claim differed significantly from an action at law for fraud or deceit. In an action for fraud or deceit, the plaintiff had to establish an intent to defraud, and damages were limited to actual out-of-pocket loss. In an action for a fairness claim, the court would review the circumstances of the case to determine whether there had been a violation of established principles of fairness. The remedies available in the case of a violation would be broad and flexible. Finally, the court determined that the issue of laches was prematurely raised, and the trial court erred in granting the defendant's motion to dismiss based on this issue. *Harmon v. Masoneilan Intern., Inc.*, 442 A.2d 487, 499.

**Fla.App.**1985. Cit. in disc. In response to a contempt action filed by his ex-wife, a hus-

band petitioned to set aside a property settlement after the entry of a final judgment in a divorce action. The master and the trial court refused to set aside the settlement, but this court reversed and remanded. The court concluded that evidence of a fraudulent oral promise by the ex-wife might indicate fraud that would set aside a written agreement. The court noted that the ex-wife had allegedly agreed to sign stock certificates over to her former mother-in-law in return for the husband's promise to sign the property settlement, and then refused to do so. *Horan v. Horan*, 464 So.2d 224, 227.

**Hawaii App.**1986. Quot. in ftn. in disc. A buyer of land sued the sellers' real estate brokers, alleging negligent misrepresentation. The trial court dismissed the claim. Reversing and remanding, this court held that the sellers' brokers could be held liable to the buyer for negligent misrepresentation. The court noted that this tort was already recognized by the state with respect to title companies, and it could not find a valid reason why it should not be applied to real estate brokers. The court emphasized the fact the the buyer sued for negligent misrepresentation rather than fraudulent or innocent misrepresentation. *Shaffer v. Earl Thacker Co., Ltd.*, 716 P.2d 163, 165.

**Iowa**, 1981. Cit. in disc. One of the plaintiffs was injured on a waterslide. The plaintiffs sued a corporation, the corporation's insurer alleging that the defendants had fraudulently misrepresented that the slide was manufactured by it, when in fact another company produced the slide. However, the plaintiffs lost their cause of action against the true manufacturer because the statute of limitations had run. The plaintiffs therefore claimed that they lost their cause of action because of the defendants' misrepresentations. The trial court granted the defendants' motion for summary judgment. On appeal, the court held, inter alia, that the trial court had erred by concluding, as a matter of law, that the plaintiffs could not prove that they had lost their original cause of action. The elements of fraud are a material misrepresentation which is knowingly made with the intent to induce the plaintiff to act or refrain from acting, upon which the plaintiff justifiably relies to his detriment. Also, when a defendant makes a misrepresentation recklessly, with careless disregard as to whether it is true or false, he may be liable for fraud. One who makes such a misstatement may be liable where he believes that the statement is true and recognizes that there is a chance that the fact may not be as represented. The court reversed the trial court's grant of summary judgment for the corporation on the plaintiffs' claims of fraud. A genuine issue of fact remained as to whether the corporation's representative recklessly misrepresented that the slide was manufactured by Aquaslide. The court, however, affirmed the trial court's grant of summary judgments for all defendants on the plaintiffs' claim of negligent misrepresentation. The elements for the tort of negligent misrepresentation are that one who in the course of his employment supplies false information for the guidance of others in their business transactions is liable to those who justifiably rely on such information for their pecuniary loss where he failed to exercise reasonable care in obtaining or communicating the information. A defendant is liable only to foreseen users of the information and not to all persons who reasonably may be expected to use the information. The law has developed a special rule with regard to civil liability so that there is no liability for statements, such as negligent misrepresentations, made during litigation. The court therefore found that the tort of negligent misrepresentation should not apply to statements made during litigation. The court also held that the tort of in-

nocent misrepresentation could not be used as a theory during litigation, and, therefore, that the trial court properly granted the defendants a summary judgment on this claim. *Beeck v. Kapalis*, 302 N.W.2d 90, 94.

**Iowa App.**1986. *Cit. in disc.* An investor sued a bank for misrepresentation and nondisclosure when the bank's representations about a company's financial status turned out to be false and it failed to disclose that it owned half of the company's inventory. The trial court directed a verdict for the bank. Affirming on the issue of misrepresentation, this court held that there was no evidence that the representations made by the bank were, at that time, false or known to be untrue. Reversing and remanding on the issue of nondisclosure, this court held that nondisclosure of self-dealing might constitute actionable nondisclosure. *Nie v. Galena State Bank & Trust Co.*, 387 N.W.2d 373, 375.

**Kan.**1978. *Quot. in sup.* The plaintiffs entered into an agreement to sell their catering business to the defendants. The defendants went into possession and operated the business, but subsequently became delinquent in their payments and in other ways failed to carry out their commitments. The plaintiffs brought an action against the defendants for breach of contract and sought forfeiture and termination of the contract and damages for loss of and damage to the equipment and fixtures. Defendants raised the defense of fraud in the inception, alleging that they relied upon the plaintiffs' misrepresentation of the business "gross income" in the year prior to sale. The trial court terminated the contract, ordered the payments made during the early months of the defendants' possession forfeited, and ordered the defendants to turn over possession to the plaintiffs. The trial court also found that the conduct of the plaintiffs constituted fraud and that the defendants were entitled to recover actual and punitive damages. On appeal, the court noted that in order to maintain an action for relief on the ground of fraud, it must be alleged and shown that the fraud occasioned the loss or injury sustained and that the damage upon which an action for fraud and deceit rests must have been caused by reliance on the misrepresentation. The court found that the evidence failed to demonstrate actionable fraud since the defendants actually received a business which grossed more each year than had been represented, and the fact that the defendants failed to operate the business profitably was not due to any false statement or misrepresentation made by the plaintiffs. Therefore, the court held that there was no actionable fraud and reversed the lower court's judgment in favor of the defendants for actual and punitive damages. The court also held that no error occurred in terminating the contract, ordering the early payments of the defendants forfeited and ordering possession turned over to the plaintiffs, since the buyers had breached the contract by failing to make payments for over a year although they were in possession of the business and were operating it throughout that period. Accordingly, the judgment of the lower court was reversed in part and affirmed in part. *Canterbury Court, Inc. v. Rosenberg*, 224 Kan. 493, 582 P.2d 261, 270.

**Me.**1979. *Cit. in ftn.* Plaintiffs, purchasers of real estate, brought an action against the vendor for fraudulent misrepresentation of the results of a soil test relating to certain property. The trial court entered judgment on a jury's verdict in favor of the purchasers and the vendor appealed. This court discussed case law that set forth eight elements of the tort of fraud or deceit and focused on the eighth requirement, that the plaintiff did not know that the representations were false and by the exercise of reasonable care could not have ascertained

their falsity. The court stated that the case law was out of step with other authorities that stated that contributory negligence was not a defense to a recklessly false misrepresentation or to a knowingly false misrepresentation. The court specifically held that a plaintiff in an action for fraudulent misrepresentation did not have to prove that by the exercise of reasonable care he could not have ascertained the falsity, whether or not the defendant's misrepresentation was knowingly or recklessly made. However, a plaintiff is not justified to rely on a fraudulent misrepresentation if he knows it is false or if its falsity is obvious to him. Decision was affirmed. *Letellier v. Small*, 400 A.2d 371, 375, 376.

**Mass.App.**1980. Com. (f) cit. in disc. The plaintiffs agreed to buy an oven from the defendant under a contract which provided that an adequate supply of gas would be furnished by the defendant. At the time for delivery of the oven, the gas was not available, and the plaintiffs asked for a return of their down payment on the oven. The defendant refused to return the deposit, and the plaintiffs brought an action for fraud, breach of contract, and unfair and deceptive acts. A judgment in favor of the plaintiffs was entered, and the defendant appealed. The appellate court stated that the implicit assurances contained in the defendant's promise could be interpreted as a failure to disclose facts which he should have known would make fulfillment of his promise improbable. The court concluded that the defendant caused the plaintiffs to act differently from the way they otherwise would have acted and thereby committed unfair or deceptive practices. The judgment was affirmed. *Homsi v. C.H. Babb Co., Inc.*, 10 Mass.App. 474, 409 N.E.2d 219, 224.

**Mass.App.**1981. Cit. in disc. A corporation and its principal officer were held liable for setting back, or dispensing false information about, mileage readings on 19 cars sold by the corporation. The trial court assessed damages and ordered injunctive relief upon granting the Commonwealth's motion for summary judgment. On appeal, the court stated that no intent to defraud need be shown under the state mileage disclosure laws and even if it were, as under the federal statute, the very fact of a spinback warrants an inference of intent to defraud; and fraud is implied in the absence of an explanation for a change in the odometer. The court held, inter alia, that the corporation was liable for tampering with the automobile odometers in light of affidavits which did not materially dispute that the sale mileage was lower than the purchase mileage. However, the court found that a genuine issue of material fact existed with respect to the mileage in and mileage out on one automobile, and, therefore, summary judgment as to that car should not have been entered. The court also found that a genuine issue of material fact existed with respect to the principal officer's involvement in the odometer tampering, precluding summary judgment. The case was remanded for proceedings consistent with the opinion. *Com. v. Colonial Motor Sales, Inc.*, 11 Mass.App.Ct. 800, 420 N.E.2d 20, 23.

**Mass.App.**1981. Cit. in disc. The president of the plaintiff travel agency prepared an itinerary and made travel reservations for the defendant group. Despite these efforts the defendant hired another travel agent and the plaintiff sued. A jury awarded damages to the plaintiff but the lower court granted the defendant's motion for a judgment n.o.v., among other things, and the plaintiff appealed. This court stated that there was sufficient evidence for the jury to have found that the defendant's conduct and statements led the plaintiff to believe that his agency had been chosen by the defendant to make the travel arrangements, that the

defendant had not explained the limitation on his authority until after the plaintiff had completed the arrangements and that the defendant should have known that the plaintiff would rely to detriment upon the defendant's conduct and statements. Therefore the jury could have inferred that the defendant intended to induce such reliance. The court vacated the judgment n.o.v. and a judgment, including a remittitur, was entered for the plaintiff. *Moran Travel Bureau, Inc. v. Clair*, 12 Mass.App.Ct. 864, 421 N.E.2d 103, 105.

**Mich.**1984. Cit. in sup. The plaintiff agreed to lend money to a mobile home dealer and retain a security interest in the dealer's inventory and equipment. The dealer violated the agreement by selling mobile homes without paying the amount owed to the plaintiff or placing the money received into a trust account. The plaintiff sued for fraudulent and wrongful conversion, and the trial court granted the plaintiff's motion for summary judgment. The defendant's surety appealed, contending that it was liable only for actual, not constructive, fraud. The intermediate appellate court affirmed, on the theory that "fraud" encompasses both actual and constructive fraud. On appeal, this court affirmed. It held that the legislature intended the commonly understood meaning of fraud, which includes both constructive and actual fraud. *General Elec. Credit Corp. v. Wolverine Ins.*, 420 Mich. 176, 362 N.W.2d 595, 600.

**N.Y.Sup.Ct.App.Div.**1981. Cit. in sup. The plaintiff was a buyer who had sent a check to a dealer in order to purchase a computer terminal. A bank had called in a loan of the dealer and later attached the dealer's assets including the plaintiff's check. When the plaintiff did not receive the terminal, he sued the dealer and its president and also sought to recover money from a bank and one of its officers. The trial court dismissed the plaintiff's complaint for failure to state a cause of action. This court held, inter alia, that the plaintiff could assert a cause of action based upon intentional fraud and fraud against the bank and its officer independent of the claim against the dealer. The court stated that the plaintiff alleged the necessary elements of fraud and deceit, a false representation, scienter, reliance or deception and damages. *Meese v. Miller*, 79 A.D.2d 237, 436 N.Y.S.2d 496, 499.

**N.Y.Sup.Ct.App.Div.**1982. Cit. in disc. The plaintiff corporation purchased land from the plaintiff trustees of a union pension fund. The mortgage agreement between the parties was later modified by a second document giving the fund the right to accelerate the entire sum due should the property be conveyed. The modification agreement was never recorded, and later the corporation induced the defendant property owner to purchase the land by fraudulently denying the existence of any acceleration modifications. After purchase by the defendant, the fund moved to foreclose, but the action was discontinued. The defendant made no effort to avoid the mortgage or disavow the purchase, but two years later the defendant defaulted and the plaintiffs brought the present foreclosure action. The defendant in return demanded rescission of the mortgage and sought damages for fraud and breach of warranty. The trial court dismissed the defendant's counterclaims and held for the plaintiffs. This court modified the decision and affirmed, holding that the defendant had abandoned its right of rescission when, cognizant of the fraud, it accepted the benefits of the contract and affirmed it. The defendant was, however, entitled to damages for fraud, limited to out-of-pocket expenditures resulting from the fraud which would not otherwise have occurred. The same was true for the defendant's breach of warranty claim. *Clearview Concrete Prod.*

v. S. Charles, etc., 88 A.D.2d 461, 453 N.Y.S.2d 750, 755.

**N.Y.City Civ.Ct.**1981. Cit. in sup. The defendant bank offered free checking to new customers, advertising such on its window and counter signs. Without giving any notice to the plaintiff, the defendant began charging a service charge for this service. The plaintiff customer brought an action for breach of contract for withdrawing the free checking privileges offered to the plaintiff. The defendant argued, inter alia, that a contract had not been created. The court held, inter alia, that the plaintiff had a cause of action in contract because the defendant had fraudulently misrepresented the nature of its offer by not disclosing that it had reserved the right to terminate the free checking privilege at its discretion. The court also found that the plaintiff had relied upon this advertising and it had induced her to enter into a contractual relationship with the defendant. The common law provided the plaintiff with remedies of restitution or of voiding a contract so induced. The court also stated that misrepresentations by omission or by commission, which induce business transactions and are relied upon to one party's detriment, may also give rise to an action in tort under the common law. The court therefore awarded the plaintiff the money that the plaintiff had paid for service charges in order to make the plaintiff whole for the economic injury that the plaintiff had sustained. Such an award was held to further the state's policy of encouraging the seller to make full disclosure. *Giummo v. Citibank, N.A.*, 107 Misc.2d 895, 436 N.Y.S.2d 172, 173.

**Pa.**1985. Cit. in diss. op. The plaintiff sued a shipbuilder for anticipatory breach of an option contract to build five ships. The shipbuilder failed to construct the vessels that the plaintiff had ordered. The trial court found for the shipbuilder. The intermediate appellate court and this court affirmed. The court ruled that the parties had lacked the intent to enter into a contract, that no option contract had existed, and that the alleged agreement had left so many terms open that no court could fill the gaps. A dissenting opinion argued that the shipbuilder had never revoked its offer to construct the ships, that the plaintiff had accepted the offer, and that a contract was formed. *Bethlehem Steel Corp. v. Litton Industries*, 507 Pa. 88, 488 A.2d 581, 602.

**Vt.**1979. Cit. in sup. The plaintiff brought a foreclosure action against the defendant for defaulting on two mortgage notes. The defendant counterclaimed alleging, inter alia, fraud and deceit because the plaintiff had misrepresented the profitability of the business purchased from the plaintiff. The jury found in favor of the defendant. This verdict was consolidated with the foreclosure decree so that a setoff was ordered. The appellate court found that the plaintiff was entitled to a new trial because there was no evidence to support a finding that the plaintiff's agents had participated in the allegedly fraudulent activities. The case was remanded based upon that finding, but the opinion discussed other claims of error. The court stated that mere expressions of opinion are not actionable, but promises are if they are part of a whole scheme to defraud. The court held that where there is a conscious scheme to defraud false promises are no different than false opinions, which, when part of a whole scheme, are not mere expressions of opinion. *Proctor Trust Co. v. Upper Valley Press, Inc.*, 137 Vt. 346, 405 A.2d 1221, 1225.

**Va.**1979. Cit. in disc. The plaintiffs bought a residence from the defendants who had been

living in the property. The plaintiffs had asked about water problems on several occasions and were told that there had been no problems even though there had been some minor problems. Between the time the contract was executed and the time the plaintiffs took possession, the basement flooded so badly that the fire department was called to pump out the water. The plaintiffs were not informed of this and about one year later the house was flooded again. The plaintiffs sued the defendants for fraudulent inducement. The lower court found in favor of the purchasers. This court stated that the plaintiffs could not have been fraudulently induced to sign the contract because the concealment or misrepresentation occurred subsequent to the formation of the contract. However, one party can fraudulently induce the other to perform by concealing some fact which might excuse the performance of that other party. The statements made by the defendants prior to the execution of the contract were erroneous although, according to the evidence, they were not made in an attempt to defraud. These statements caused the parties to enter into a contract under a material mutual mistake of fact which made the contract voidable at the option of the buyers. However, the defendants acquired information after formation which negated precontract representations and they were therefore required to disclose this new information. Here, however, the defendants not only did not disclose this information, they attempted to conceal the effects of the flooding and fraudulently induced the plaintiffs to perform. Affirmed. *Ware v. Scott*, 220 Va. 317, 257 S.E.2d 855, 857.

**Wis.**1979. Cit. in sup. (Erron. cit. as § 523.) Wisconsin meat corporation filed suit against an officer of another corporation seeking to recover money allegedly due for meat delivered on credit. The trial court entered an order denying the defendant's motion to dismiss the action against him. On appeal, the court affirmed, holding that it is reasonable, just and consistent with traditional notions of fair play that the defendant--whether or not he acted as a corporate officer--be subjected to suit in Wisconsin to enforce personal liability arising from an alleged tortious act he committed while personally present in the state. *Oxmans' Erwin Meat Co. v. Blacketer*, 86 Wis.2d 683, 273 N.W.2d 285, 289.

**Wis.**1980. Cit. in ftm. in disc. Plaintiff buyer filed a complaint, alleging that he purchased a lot from the defendant sellers with the disclosed intention to construct a house, and that defendants knew of the existence of an underground well and falsely, and with intent to defraud, failed to disclose this fact which they had a duty to disclose, of which fact they knew plaintiff was unaware, and which would have, and did have, material bearing on the construction of a residence on the property. Defendants' motion to dismiss plaintiff's complaint was overruled, and defendants appealed. This court stated that in a claim for intentional misrepresentation, a subdivider-vendor of a residential lot has a duty to a noncommercial purchaser to disclose facts which are material to the transaction, which are known to the vendor and which are not readily discernable to the purchaser. In view of such statement, the court affirmed and held that the motion to dismiss the complaint had been properly overruled. *Ollerman v. O'Rourke Co., Inc.*, 94 Wis.2d 17, 288 N.W.2d 95, 108.

**Wis.App.**1985. Com. (d) cit. in disc. The buyers of a farm sued the seller's attorney in strict liability for misrepresentation, alleging that he had induced them to purchase the farm and had represented that it was free from encumbrances when in fact a second purchaser, by virtue of a prior contract, had an interest in the farm and had been granted specific perform-

ance on the contract. After the lower court granted the attorney's motion for summary judgment, this court reversed and remanded, holding that the complaint stated a claim in strict liability for misrepresentation. The court reasoned that the misrepresentations by the seller's attorney that the prior contract had been canceled involved a matter of fact and not of opinion for the purpose of holding the attorney liable, since the misrepresentations recited past events and not just the attorney's judgment about the legal consequences of those events. *Green Spring Farms v. Kersten*, 128 Wis.2d 221, 381 N.W.2d 582, 585.

Case Citations July 1991 — June 1998:

**U.S.1988.** Cit. in disc. A manufacturer that was engaged in merger talks with another company made three public statements denying the merger negotiations. When merger talks were officially announced, several investors who had sold stock based on the denials sued the manufacturer for damages, alleging material misrepresentations. The district court granted summary judgment to the defendant. The court of appeals reversed and remanded. Vacating and remanding, this court rejected the defendant's argument that each investor should have to prove that he had relied on its misrepresentations. The court stated that, although reliance was an element of common law fraud, in this situation reliance on the misrepresentations could be presumed. *Basic Inc. v. Levinson*, 485 U.S. 224, 241, 108 S.Ct. 978, 989, 99 L.Ed.2d 194, on remand 871 F.2d 562 (6th Cir.1989).

**U.S.1988.** Cit. in conc. op. The United States sued under the Immigration and Nationality Act to denaturalize a citizen, alleging that the citizen had made willful, material misrepresentations in his immigration visa and naturalization application regarding his date and place of birth. The district court held for the defendant, finding that the misrepresentations were not material. The court of appeals reversed and remanded. Reversing and remanding, this court held that a misrepresentation was material under the statute if it could be shown by clear, unequivocal, and convincing evidence that it was predictably capable of affecting the decision to grant citizenship. A concurring opinion said that, in tort law, a misrepresentation was material if a reasonable man would be influenced by its existence or nonexistence in determining his choice of action and that recovery for a loss resulting from another's material misrepresentation was possible only if the losing party detrimentally relied on the misrepresentation. *Kungys v. U.S.*, 485 U.S. 759, 787, 108 S.Ct. 1537, 1555, 99 L.Ed.2d 839.

**C.A.1, 1997.** Cit. in headnote, cit. in disc. and in sup. An investor in debtor's failed project to purchase and develop distressed real estate filed an adversary proceeding, claiming that the debt owed him should not be discharged because it was the product of false representations. The bankruptcy court entered judgment as a matter of law for debtor, holding that the debt was dischargeable, and the district court affirmed. Affirming, this court held, inter alia, that the bankruptcy court did not err in finding that debtor did not intend to defraud plaintiff when he promised to contribute \$75,000 of his personal funds to the project and told plaintiff that the project would have a total capital contribution of \$250,000, and there was no evidence clearly indicating that debtor's statements or actions were the basis for plaintiff's subjective idea or feeling that a trust created in connection with the project would supervise the project. *Palmacci v. Umpierrez*, 121 F.3d 781, 782, 786, 788.

**C.A.2**, 1997. Cit. in disc.ss 525-526. Bank sued the guarantor of a loan for the purchase of a vessel. District court entered judgment for the bank, holding that, although there was a misrepresentation by the bank upon which defendant relied, the injury was insufficiently related to the misrepresentation for the bank to be held responsible for it. This court vacated and remanded, holding, inter alia, that the guarantor failed to establish a misrepresentation, because a paragraph in the loan agreement was a representation from borrower and guarantor to the bank, and the representation was not made on the bank's behalf. *Banque Franco-Hellenique de Commerce v. Christophides*, 106 F.3d 22, 25.

**C.A.3**, 1992. Cit. in disc. §§ 525-526. Trustees of union pension and welfare funds sued employer, claiming entitlement to contributions for unreported employees and reimbursement for medical claims paid to ineligible employee. The district court decided to leave parties as it found them and entered judgment for employer. Vacating and remanding with instructions, this court rejected employer's argument that it had no obligation to the funds because it signed the collective-bargaining agreement under economic duress. It noted that employer was estopped from asserting duress, since it made payments under the agreement for more than ten years, and since even a meritorious claim of duress would have made the agreement only voidable, not void. It also held that, on remand, the court must determine whether employer made any false representations in its reports and payments to funds with intent that funds would rely on them in determining employment status of the ineligible employee, and whether such reliance was justifiable under the circumstances. *Agathos v. Starlite Motel*, 977 F.2d 1500, 1508.

**C.A.3**, 1994. Cit. in ftn. In ongoing asbestos litigation, defendant manufacturer of asbestos products sought writ of mandamus directing district court to grant its motion for partial summary judgment on issues of civil conspiracy and concert of action. The basis for these theories was defendant's association with the Safe Buildings Alliance (SBA), the alleged purpose of which was the dissemination of information concerning the proper way to deal with existing asbestos. Deeming appropriate issuance of the writ, this court held that if it were revealed that the SBA engaged in unlawful activities, defendant could not be held liable for them based merely on association and absent proof that it intended to further the SBA's tortious conduct. *In re Asbestos Litigation*, 46 F.3d 1284, 1290.

**C.A.3**, 1995. Cit. in case cit. disc. Trustees of welfare and pension funds sued contributing employer, a motel, under ERISA for, inter alia, fraud. Plaintiffs sought to recover \$11,000 in benefits paid to defendant's former employee after defendant provided a false report stating that employee still worked at the motel. On remand from this court, the district court entered judgment in favor of defendant. Affirming in part, reversing in part and again remanding, this court held that plaintiffs were not justified in relying on the false status report, since they failed to review or even minimally police defendant's account. The court believed that it was plaintiffs' own inaction and lack of diligence that caused it to pay benefits to someone who ceased to be a covered plan participant. *Agathos v. Starlite Motel*, 60 F.3d 143, 147.

**C.A.4**, 1989. Com. (d) cit. in disc. A seller of land sued the buyer, who was the general manager of a water district, alleging that the defendant breached his fiduciary duty as a public official by failing to disclose his intention to cause a change in water policy that would

increase the subject property's value. The trial court entered judgment on a jury verdict for the plaintiff. Reversing, this court held that the fact that the defendant was a public official with a general fiduciary responsibility to members of his constituency did not mean that he had a specific fiduciary duty to the plaintiff as an individual member of the public and concluded that the defendant had no fiduciary relationship with the plaintiff. The court said that the defendant as buyer had no duty to disclose in this situation and that there was not enough evidence to support the allegation that the defendant intended to change the water policy affecting the subject property, since there was no evidence from which the jury could conclude that the defendant manipulated the political process to obtain a new policy favorable to him. *Nussbaum v. Weeks*, 214 Cal.App.3d 1589, 263 Cal.Rptr. 360, 368.

**C.A.4**, 1991. Subsec. (b) quot. in disc. Alleging wrongful death, entitlement to policy proceeds under the North Carolina Slayer Statute, and unjust enrichment, the administrator of the estate sued the insurer after the policy beneficiary was convicted of procuring the deceased's murder. A Virginia federal district court entered summary judgment for the insurer. Affirming in part, reversing in part, and remanding, this court held, inter alia, that material issues of fact existed as to whether the insurer was estopped from raising the statute of limitations applicable to the Virginia wrongful death act as a defense. The court stated that when the insurer refused a commonwealth attorney's timely request to see the deceased's insurance file on the basis of privacy laws that did not exist, the insurer may have committed an affirmative act of misrepresentation. It reasoned that once the insurer began to speak to the attorney, the insurer had a duty not to mislead him. *Overstreet v. Kentucky Cent. Life Ins. Co.*, 950 F.2d 931, 940.

**C.A.5**, 1987. Cit. in diss. op. An employee of a company agreed to enter into a long-term lease for office space. When his company located elsewhere, the building owner sued it for damages. The trial court found for the plaintiff. Affirming, this court held that although the facts did not support recovery on an agency theory, the employer was liable on statutory grounds of detrimental reliance. The dissent argued that Louisiana would not allow recovery when no apparent authority could be shown. It noted that a common law analogue was tortious misrepresentation, which was not applicable because recovery for misrepresentation of future intention, as opposed to misrepresentation of existing facts, was limited to fraudulent misrepresentation and there was no finding of fraud. *Breaux v. Schlumberger Offshore Services*, 817 F.2d 1226, 1234.

**C.A.7**, 1993. Cit. in disc. Insurance agent accepted money from insured's second wife to prevent insured from naming his daughters as beneficiaries under insured's life insurance policies before insured was murdered. Daughters sued agent and second wife, among others, for fraud, among other claims. Affirming the district court's granting of summary judgment for defendants, this court held, inter alia, that, under Illinois law, although plaintiffs' loss of expectation interest in the insurance policies was sufficient to support a fraud suit, plaintiffs failed to make the claim that the fraud case against defendants could survive the dismissal of their equitable reformation claim against insurer. *Hartmann v. Prudential Ins. Co. of America*, 9 F.3d 1207, 1213.

**C.A.8**, 1992. Quot. in sup. Reseller of office equipment sued equipment manufacturer for

tortious interference with prospective contractual relations, inter alia, after manufacturer told reseller's customer that the used machines were in poor condition. After jury returned verdict for reseller, the district court denied manufacturer's motions for new trial and judgment n.o.v. This court reversed and remanded with direction to enter judgment for defendant, holding that reseller failed to show that manufacturer had used wrongful means, thus acting outside scope of competitor's privilege, since there was no evidence that any misrepresentations made by manufacturer were relied on by reseller's customer. *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1507, cert. denied 506 U.S. 1080, 113 S.Ct. 1048, 122 L.Ed.2d 356 (1993).

**C.A.9**, 1996. Quot. in ftn. A creditor bank brought an adversary proceeding to determine whether a Chapter 7 debtor's credit cards were nondischargeable for fraud. Bankruptcy court found that the debtor's credit card debt owed to creditor was nondischargeable under 11 U.S.C. § 523(a)(2)(A) because of fraud. This court affirmed, holding that the bank established all of the elements of actual fraud: 1) that debtor made a false representation; 2) that debtor had intent to deceive; 3) that creditor justifiably relied on debtor's false representation; and 4) that creditor was damaged. Creditor was justified in continuing to extend credit to debtor, because debtor made the minimum monthly payments on his credit card account by taking cash advances from other credit cards. Creditor had no notice or warning that debtor did not intend to repay the debt he incurred. *In re Eashai*, 87 F.3d 1082, 1087.

**N.D.Cal.**1992. Cit. in sup., cit. generally in sup. A purchaser of real property sued the vendor, alleging that the property was contaminated with pollutants, and the vendor asserted various third-party claims against the environmental consultant hired by the purchaser to perform soil and groundwater investigations, including a claim for negligent misrepresentation in preparation of the investigations. This court, granting the consultant's motion for summary judgment, held, inter alia, that, under California law, the vendor could not recover from the consultant on a negligent misrepresentation theory, as the vendor was not an intended beneficiary of the contract between the purchaser and the consultant. *Lincoln Alameda Creek v. Cooper Industries, Inc.*, 829 F.Supp. 325, 330.

**D.Colo.Bkrcty.Ct.**1997. Cit. in headnotes, quot. in disc. A former client who made loans to an attorney sought a declaration of nondischargeability of the debtor attorney's debts based on fraud or false pretenses. This court entered a judgment of dismissal for debtor attorney, holding, inter alia, that the attorney did not make any affirmative misrepresentations to the client either fraudulently or negligently. The evidence showed that the attorney was forthright and honest in his dealings with the client, and the client knew from the beginning that this was a risky start-up business and that it was in serious need of financial support. The client was not an unsophisticated investor, and he talked to several people besides the attorney before he made his first loan. *In re Waller*, 210 B.R. 370, 372.

**D.Hawaii**, 1993. Quot. and cit. generally in sup. Owner of building under construction sued surety for contractor principal, alleging, inter alia, fraudulent and negligent misrepresentation, fraudulent withholding of material information, and breach of contract arising from surety's refusal to cover allowance items in the construction contract. Denying surety's motion for summary judgment, the court held that surety could be found liable for fraudulent

and negligent misrepresentation regardless of whether its alleged representation that the bond would cover allowance items was characterized as a factual or legal misrepresentation, and that owner stated a valid claim for nondisclosure because surety's alleged failure to inform owner of its policy regarding allowance items was a factual misrepresentation basic to the bond transaction. The court held, moreover, that surety's alleged fraud could also warrant reformation of the contract to make surety liable for allowance items, regardless of the principal's liability. *Elliot Megdal & Assoc. v. Hawaii Planning Mill*, 814 F.Supp. 898, 903, 904.

**D.Me.**1990. Cit. in case quot. in ftn. Clients, who retained a lawyer to represent them in the purchase of real estate, sued the attorney and his malpractice insurer, when the attorney failed to follow their instructions. The clients sued the insurer on the theories of trespass, fraud, and breach of an implied obligation of good faith, when the insurer allegedly misrepresented its intention to conduct a real estate appraisal and allegedly reneged on its promise to settle the clients' claim against the attorney. The court granted the insurer's motion to dismiss the claims, holding, *inter alia*, that the clients failed to state a claim for fraud because they did not allege that they justifiably relied on the insurer's misrepresentations and thereby suffered an actionable injury. Because the clients did not allege an actionable injury in support of their claim of fraud, the court did not have to consider the question of whether a breach of a promise of future performance would support a claim of fraud under Maine law. *Werman v. Malone*, 750 F.Supp. 21, 23-24.

**D.Mass.**1994. Quot. in case quot. in sup. United States brought an action to recover tax liabilities from mortgagee that foreclosed on mortgagor's property that was subject to IRS levy. Mortgagee then brought a third-party complaint against mortgagor and mortgagor's attorney for fraud, alleging that third-party defendants had misrepresented that all other lienholders had been satisfied, as a result of which the court in an interpleader action had granted mortgagor's motion to turn over the surplus funds following foreclosure to mortgagor. Granting third-party defendant attorney's motion to dismiss, the court held that mortgagee failed to adequately allege the elements of its fraud claim, since it failed to indicate how or when it relied on the misrepresentation. *U.S. v. Rockland Trust Co.*, 860 F.Supp. 895, 906.

**D.N.H.**1995. Quot. in case quot. in disc. Buyer of distribution warehouse business sued seller for, *inter alia*, negligent and fraudulent misrepresentation after seller elected not to renew its distribution contract and buyer became unable to cut costs or sell the assets of the business. Denying seller's motion for summary judgment, the court held that assurances on the part of seller's representatives that the sale of the warehouse would not affect seller's continued business with it were pled with sufficient particularity to withstand seller's motion. *Manchester Mfg. Acquisitions v. Sears Roebuck & Co.*, 909 F.Supp. 47, 54.

**D.N.J.**1989. Cit. in disc., cit. in ftn. The co-owners of a nuclear power plant sued its operating owner for breach of contract, negligence, misrepresentation, and fraud arising from the shutdown of the Pennsylvania power plant. This court denied the operator's motion to dismiss the tort claims; however, it granted the motion to dismiss the fraud claim for lack of particularity, with leave to amend. The court stated that as to the tort claims, Pennsylvania law could subject a party to tort liability for improperly performing its contractual duties

such as not responding to reports of control room employees sleeping on the job, misinforming the plant's co-owners that there were no major operating problems, and receiving reports that the operation was not up to industry standards without reporting this to the co-owners. For purposes of the motion, the court accepted the co-owners' allegation that the operator's misrepresentations prevented them from acting to prevent the shutdown by coming in and cleaning house. The court also found that an allegation that the operator had fraudulently told the co-owners in the post-shutdown period that "things were going well" while knowing a dramatic corporate restructuring was necessary was pleaded with sufficient particularity, even though the operator contended these allegations dealt with opinions. *Public Service Ent. Group v. Philadelphia Elec.*, 722 F.Supp. 184, 210, 217.

**D.N.J.**1990. Quot. in sup. Investors in a bank sued the bank and bank officers for common-law fraud and negligent misrepresentation, alleging that they were misled as to the bank's true financial condition and that in reliance on the misrepresentations they held onto their bank stock. The defendants moved to dismiss for failure to state claims upon which relief could be granted, because the plaintiffs did not allege that they either bought or sold securities in reliance on the misrepresentations. This court denied the motion to dismiss, holding that the form of reliance--action or inaction--was not critical to the actionability of fraud under either New Jersey or New York law. *Gutman v. Howard Sav. Bank*, 748 F.Supp. 254, 264.

**E.D.N.Y.**1988. Com. (d) cit. in disc. According to a licensing agreement between a trademark owner and a licensee, the license would cease if a copyright holder obtained an injunction against the trademark owner in an ongoing infringement case. After the copyright holder prevailed in the infringement case, the licensee discontinued royalty payments to the trademark holder, even though an injunction was never issued. The trademark owner sued the licensee for the payments. This court granted the plaintiff's motion for summary judgment, rejecting the defendant's claim that the contract was invalid because it was predicated on the misrepresentation that the infringement decision would be a favorable one, thereby fraudulently inducing the defendant to enter into the agreement. *Topps Chewing Gum, Inc. v. Imperial Toy Corp.*, 686 F.Supp. 402, 406, affirmed 895 F.2d 1410 (2d Cir.1989).

**E.D.N.Y.**1992. Cit. in case quot. in sup. Investors in tax shelters sued their accountant for securities fraud under federal law and state common law fraud after the shelters were disallowed by IRS. Entering judgment for defendant and dismissing both causes of action, this court held, inter alia, that, in the common law fraud claim, plaintiffs failed to establish that they relied on any material, affirmative misrepresentations or omissions, or that any representations made by defendant with regard to the viability of the shelters, or the criteria for which a shelter would be evaluated, and with regard to the potential deductibility of the investments, were known to be false by defendant when made. The court noted that the purchase memoranda expressly warned plaintiffs that the shelters were high-risk investments which could produce only uncertain tax benefits. *Shochat v. Weisz*, 797 F.Supp. 1097, 1114-1115.

**S.D.N.Y.**1990. Cit. in case cit. in disc. After settling a suit for defamation with a popular singer, an American publisher sued an Italian publisher for intentional misrepresentation,

contribution, and equitable subrogation to recover for damages and costs resulting from the American publisher's publication of an article that repeated the substance of an article by the Italian publisher asserting that the singer had converted to the Islamic religion and was developing a close relationship with the Ayatollah Khomeini. Applying Florida law, the court denied the defendant's motion to dismiss, holding that the defendant knew or should have known that some United States publication would probably republish the misrepresentations made in its article. *Globe Communications v. R.C.S. Rizzoli Periodici*, 729 F.Supp. 973, 977.

**S.D.N.Y.**1990. Cit. in sup. (Erron. cit. as § 524.) A purchaser of an apartment building sued the seller for damages after the New York attorney general rejected its plan to convert the premises to a cooperative or a condominium. The plaintiff alleged that it detrimentally relied on the defendant's misrepresentations in concluding that the apartment building did not have enough "long-term vacancies" to preclude the administrative board from accepting the plaintiff's conversion plan. Granting the defendant's motion for summary judgment, this court held that the plaintiff did not have a valid claim against the defendant for fraud, because the plaintiff could not justifiably rely on the defendant's alleged misrepresentations in concluding that one of the apartments was not a "long-term vacancy" and the plaintiff failed to show that it had suffered any injury as a result of the defendant's alleged misrepresentations. *225 West End Ave. Associates v. Bittorf*, 744 F.Supp. 67, 68.

**S.D.N.Y.**1997. Cit. in disc. §§ 525-526. A production company sued another production company, alleging false advertising claims under the Lanham Act. This court denied defendant's motions to dismiss, holding that the procedural rule requiring that averments of fraud or mistake be pled with particularity did not apply to a claim of false advertising. The court stated that claims of false advertising under the Lanham Act and parallel provisions of New York state law fell outside the ambit of the pleading-with-particularity requirement. It stated that, while fraud required a specific intent to harm the victim, the Lanham Act did not require fraudulent intent. *John P. Villano Inc. v. CBS, Inc.*, 176 F.R.D. 130, 131.

**W.D.Ok.**1989. Com. (b) cit. in disc. (Erron. cit. as com. (6).) Investors in limited partnerships who lost their investments sued the law firm that prepared the offering memorandum relating to the sale of limited partnerships and stock on which the investors relied to their detriment. This court granted the defendant's motion to dismiss regarding the plaintiffs' claim that state law imposed a special duty on attorneys involved with securities, without regard to privity or an attorney-client relationship and without regard to securities statutes, when it was foreseeable that the defendant's negligent performance of professional services would injure others. The court noted that the offering memorandum stated that the financial statements were prepared by and were the sole responsibility of the defendant's client. Moreover, the defendant did not undertake to prepare, evaluate the accuracy of, or opine upon the accuracy of financial statements furnished by its client and said so; it could not, therefore, have foreseen that persons in the plaintiffs' position would nevertheless expect it to disclose any misrepresentations or omissions in its client's financial statements. *Buford White Lumber Co. v. Octagon Properties*, 740 F.Supp. 1553, 1562.

**E.D.Pa.**1989. Cit. in disc. A putative real property owner sued a realtor and its agent for

fraud, deceit, and negligent misrepresentation, inter alia, alleging that the defendants sold without the plaintiff's consent two parcels of land that were owned by the plaintiff, but titled in the plaintiff's son's name. The court dismissed the complaint. The court stated that, to support the fraud and deceit counts there must be a misrepresentation and for the negligent misrepresentation count the information must be false; because it was necessary, therefore, to determine ownership of the properties in question, the son was an indispensable party to this litigation, whose inclusion, however, would destroy diversity, necessitating dismissal. The court also said that the plaintiff failed to state a claim, since he did not show how any statement of the agent's was either directed toward the plaintiff or relied on by him. *Marra v. Burgdorf Realtors, Inc.*, 726 F.Supp. 1000, 1007.

**E.D.Pa.**1992. Cit. in disc. A car passenger who was injured in a hit-and-run accident made a claim for uninsured motorist benefits under the driver's policy. The insurer offered to settle the claim, but the passenger rejected its offer as substantially insufficient and sued the insurer in federal district court, asserting six possible causes of action, including common law deceit and bad faith conduct. Granting in part defendant's motion to dismiss, this court held, inter alia, that plaintiff did not allege any of the five elements that make up a prima facie case of deceit, and therefore did not allege facts sufficient to make out a claim for relief on a common law theory of deceit. *Lombardo v. State Farm Mut. Auto. Ins. Co.*, 800 F.Supp. 208, 213.

**E.D.Pa.**1993. Quot. in part in ftn. After Resolution Trust Corporation (RTC) sued former officers and directors of, and attorneys for, failed savings and loan association, alleging gross negligence in extending credit to various borrowers, defendants brought third-party fraud and racketeering claims against borrowers and their guarantors and law firm. Denying in part law firm's motion to dismiss, the court held, inter alia, that defendants properly pleaded their claims under federal civil rule allowing them to implead any party whose conduct was a proximate cause of the savings and loan's losses for which defendants would be liable to RTC. The court said that defendants alleged that they justifiably relied on misrepresentations in law firm's opinion letters in deciding to grant loans on which borrowers defaulted. *Resolution Trust Corp. v. Farmer*, 836 F.Supp. 1123, 1130.

**E.D.Pa.**1994. Cit. in sup. Employee who was fired from his position as sales manager sued former employer for intentional and/or negligent misrepresentation and other claims. Denying in part defendant's motion to dismiss, the court held, inter alia, that plaintiff demonstrated the elements of misrepresentation, as he alleged that he justifiably relied on superiors' statements concerning his future with defendant and his opportunity to improve in accordance with defendant's demands, he refrained from seeking new employment in reliance on those assurances, and that communications between his superiors outlining deficiency evaluations to be made of plaintiff demonstrated defendant's intent to terminate plaintiff in the future. *Mulgrew v. Sears Roebuck & Co.*, 868 F.Supp. 98, 104.

**M.D.Pa.**1995. Cit. in headnote, cit. in disc. Union members sued former union president, inter alia, for conversion and fraud, alleging that defendant violated union bylaws by effecting the transfer of a union owned vehicle to himself. Defendant moved for summary judgment on the ground that § 301 of the Labor Management Relations Act of 1947 preempted

plaintiffs' claims. Denying defendant's motion, the court held that § 301, which preempted all state law actions requiring a court to analyze the parties' collective bargaining agreement, was inapplicable here. In this case, the elements of both fraud and conversion could be proved without an evaluation of the meaning and intent of the collective bargaining agreement. *Teamsters, Chauff. & Helpers, Loc. 764 v. Greenawalt*, 880 F.Supp. 1076, 1077, 1082.

**D.R.I.**1992. Quot. in disc. A buyer of real estate sued the seller for fraudulent misrepresentation, fraudulent concealment, and negligent misrepresentation, inter alia, alleging that seller failed to disclose defects in the home's structural soundness. Buyer had hired an engineer to inspect the home and seller agreed to a pervasive inspection. Several inspection holes were made with seller's permission; however, buyer asserted that one necessary hole was not permitted and was therefore never drilled. This court entered judgment for seller, holding, inter alia, that buyer had not proven the elements of fraud, since there was no evidence that seller intentionally misled buyer as to the outcome of the inspection. Furthermore, seller was not liable for negligent misrepresentation because seller did not fail to exercise reasonable care in communicating the inspection results to buyer, and it was engineer's responsibility, not seller's, to notify buyer whether the inspection was satisfactorily completed. *French v. Isham*, 801 F.Supp. 913, 921.

**D.Utah**, 1993. Quot. in part in ftn. Purchasers of realty sued the vendor and his agents, alleging, inter alia, fraud after a ski resort adjoining the property opened a ski path in plaintiffs' subdivision and allegedly interfered with plaintiffs' right to privacy. Granting in part defendants' motion to dismiss for failure to state a claim, this court held that under Utah law plaintiffs had sufficiently stated a claim for fraud against one of the real estate agents but not against the vendor. The court found no evidence that the vendor made any verbal representation or that there was any written representation that was fraudulent. The agent, however, was alleged to have stated that he had knowledge of the ski resort's development plans and to have misrepresented those plans to plaintiffs. *Iadanza v. Mather*, 820 F.Supp. 1371, 1382.

**D.V.I.**1991. Cit. in disc., com. (b) cit. in disc. A dissatisfied homebuyer sued the seller's broker and the seller, inter alia, seeking pecuniary loss damages on the ground that the broker misrepresented the location of an easement on the property. The court granted the defendants summary judgment, holding that, assuming any misrepresentation by the broker occurred, the broker had corrected her alleged misrepresentation before the closing by disclosing the existence and location of the easement to the plaintiff's attorney. The court said that, even if the attorney never informed the plaintiff of the broker's disclosure of the easement, the attorney's knowledge could be imputed to the plaintiff, since the plaintiff was responsible for creating authority and the appearance of authority in the attorney; as against the defendants, the plaintiff was accountable for any of the attorney's mistakes. *Lempert v. Singer*, 766 F.Supp. 1356, 1364.

**Alaska**, 1989. Quot. in ftn. A general contractor built a shopping center for a developer who had obtained a construction loan from a commercial lender. During construction, the lender agreed to reserve a certain amount of the loan budget for work done by the contractor and to pay the contractor directly. After a loan increase request was denied, the developer

requested that the lender pay the full amount requested by the contractor by changing money allocations in the budget to reflect work completed that was in fact not performed. After completing the project and discovering that the loan funds were exhausted, the contractor sued the lender for breach of contract for failure to disburse the payments directly to the contractor and for negligent disbursement of the loan funds. The trial court entered judgment in favor of the plaintiff, based upon a jury verdict awarding compensatory and punitive damages on both claims. This court affirmed, holding, *inter alia*, that the defendant intentionally misled the plaintiff into believing it would receive full payment so that the plaintiff would complete the project; thus, a punitive damages award for tortious behavior on a breach of contract claim was warranted. *Great Western Sav. v. George W. Easley*, 778 P.2d 569, 580.

**Alaska**, 1991. *Cit. in disc.* Following the foreclosure of his property, a mortgagor sued a mortgage servicing agent and its employee for misrepresentation and punitive damages, *inter alia*. The trial court granted the defendants' motion for a directed verdict. Reversing in part and remanding, this court held that the plaintiff alleged facts under which a reasonable juror could conclude that the defendant employee knew that the foreclosure had occurred but deliberately represented to the plaintiff that it had been postponed, that the employee intended to cause the plaintiff to rely on the false information, and that, due to the misrepresentation, the plaintiff incurred damages in the form of increased federal tax liability. The court also remanded the issue of punitive damages as to this misrepresentation claim, directing the trial court to consider the public policy implications of the conduct at issue because foreclosure of residential property was fraught with financial repercussions for the individuals involved and financial institutions must handle such dealings in a scrupulous fashion. *Barber v. National Bank of Alaska*, 815 P.2d 857, 862.

**Alaska**, 1998. *Cit. in case quot. in ftn.* After a sewer pipe collapsed, the city sued the pipe manufacturer for fraud and unfair trade practices. Answering a certified question from the federal district court, this court held, *inter alia*, that a municipality's intentional misrepresentation claim did not accrue until it had actual notice of all elements of the cause of action, including scienter. The court rejected defendant's assertion that, under both statutory and common law discovery rules, the limitations period began to run when a plaintiff had information sufficient to alert it to begin an inquiry in the exercise of due diligence. *City of Fairbanks v. Amoco Chemical Co.*, 952 P.2d 1173, 1176.

**Conn.**1991. *Cit. in disc.* Mortgagors sued a lienholder, seeking damages for fraudulent misrepresentations that allowed the defendant to take title to the plaintiffs' house by exercising its redemption rights in a foreclosure action the mortgagee brought against the plaintiffs and the other parties holding liens on the plaintiffs' property. The trial court entered a jury verdict for the plaintiffs, awarding economic, emotional, and punitive damages, and denied the defendant's motions to set aside the verdict and for remittitur. Affirming, this court held, *inter alia*, that damages for emotional distress could constitute consequential damages recoverable in a fraud action. *Kilduff v. Adams, Inc.*, 219 Conn. 314, 593 A.2d 478, 484.

**Fla.App.**1989. *Cit. in disc., com. (b) cit. in disc.* The buyer of a multifamily dwelling sued

the seller for fraud after the seller misrepresented the property's zoning. The trial court dismissed the complaint, holding that the fraud was based on material misrepresentations of law and therefore was not actionable. Reversing and remanding, this court held that the defendant's statement that the property complied with all local ordinances was a misrepresentation of fact, not law, and that a cause of action for fraud could be maintained. *Nagashima v. Busck*, 541 So.2d 783, 784.

**Fla.App.1990.** Com. (b) cit. in sup. A dishwasher whose hand was injured when a glass-washing machine malfunctioned brought a negligence action against his employer. The trial court granted the employer summary judgment, ruling that the state's workers' compensation act provided the exclusive remedy for the plaintiff's claim. Reversing and remanding, the court of appeal held that there existed a disputed issue of fact as to whether the employer was estopped by its wrongful conduct from relying on the act's exclusivity provisions, since the employer failed to inform plaintiff that he was fully covered by workers' compensation benefits, and the employer allegedly diverted to its own use sums paid by its workers' compensation carrier on the plaintiff's claim. *Francoeur v. Pipers, Inc.*, 560 So.2d 244, 245.

**Fla.App.1991.** Cit. in ftn. A surety's claims agent falsely informed a subcontractor that the time had expired to file a claim under the terms of a bond purchased by a general contractor to ensure that all subcontractors were paid in full. The subcontractor sued the surety for fraudulent misrepresentation. The trial court dismissed the complaint for failure to state a claim, finding a nonactionable misrepresentation of legal opinion. Reversing, this court held that the statement constituted an actionable misrepresentation of a material fact. The court stated that, because only the agent had a copy of the bond and presumably was the alleged expert as to the contents of the bond that his company wrote, this misrepresentation took on the primary character of a statement of fact that a reasonable person like the plaintiff had every reason to accept as true. *Chino Elec. v. U.S. Fidelity & Guar.*, 578 So.2d 320, 322-323.

**Ill.App.1987.** Subsecs. (e) and (f) cit. in disc. Potential purchasers of a grocery store sued the sellers' attorney for fraud, negligent misrepresentation, breach of fiduciary relationship, and promissory estoppel after the sellers failed to conclude the sale despite the attorney's assurances to the purchasers that they would. The trial court dismissed the action for failure to state a claim. Affirming, this court held, inter alia, that a claim for promissory estoppel was unavailable because the attorney was not one of the contracting parties, and that the attorney was not liable for misrepresentation because his statements concerned future events. The court reasoned that, to constitute fraud or misrepresentation, the statement must have been about an existing or past fact. *Gold v. Vasileff*, 160 Ill.App.3d 125, 112 Ill.Dec. 32, 34, 513 N.E.2d 446, 448.

**Ill.App.1987.** Cit. and quot. in disc. The buyer of a business and the former employer of the seller sued the seller for promissory fraud, involving a promise the seller allegedly made not to compete with the buyer's business. Reversing and remanding the trial court's grant of summary judgment for the defendant, this court held, inter alia, that, since a genuine issue of material fact existed as to whether a scheme of promissory fraud existed and whether the buyer of the business waived his cause of action, the trial court erred in granting the defend-

ant's motion for summary judgment. The court said that one who fraudulently made a misrepresentation of fact, opinion, intention, or law for the purpose of inducing another to act or to refrain from action in reliance on it was subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance on the misrepresentation. The court stated that, if part of an agreement was unenforceable, a court might nevertheless enforce the balance of the agreement if the party seeking the enforcement did not engage in serious misconduct. *Stamatakis Industries, Inc. v. King*, 165 Ill.App.3d 879, 117 Ill.Dec. 419, 422, 520 N.E.2d 770, 773.

**Ill.App.**1988. Subsec. (e) cit. in sup. A bank sued to foreclose on a second mortgage executed by a homeowner. The defendant borrower counterclaimed that the plaintiff was guilty of fraudulent misrepresentation on the ground that a bank official allegedly had made an oral promise to renew the mortgage loan on expiration. The trial court entered judgment for the plaintiff and ordered the foreclosure. Affirming, this court stated that, even if the defendant's allegations were true, a misrepresentation about events to occur in the future could not constitute the tort of fraud; the misrepresentation must have been about an existing or past fact. *First Nat. Bank of Wheaton v. Jones*, 169 Ill.App.3d 277, 119 Ill.Dec. 769, 523 N.E.2d 377, 380.

**Ind.App.**1992. Cit. in disc. Discharged employee sued her former employer under several theories including negligent and intentional misrepresentation arising from her termination. Plaintiff alleged that defendant made an oral agreement to retain plaintiff for more than one year. As a consequence, she was allegedly induced to remain at the job after the original employer sold the company to defendant. The trial court granted defendant summary judgment. This court affirmed, holding that plaintiff's allegations of fraud and misrepresentation did not permit plaintiff to avoid the writing requirement of the Statute of Frauds. *Mehling v. Dubois County Farm Bureau*, 601 N.E.2d 5, 8.

**Iowa**, 1990. Quot. in disc. The decedent and two companions were killed when the car in which they were riding struck a tree. When the decedent's estate sought to collect under insurance policies covering the decedent, the insurer's adjuster offered only half the policies' amount, stating that the insurer was refusing full payment because it was unsure about who was driving and because of the possibility of the decedent's contributory fault. The estate sued the insurer for, inter alia, fraudulent misrepresentations, alleging that it relied on these false statements in refraining from filing suit on the policies for a year and a half. The trial court found for the plaintiff and awarded punitive damages on the fraud claim. The intermediate appellate court reversed the award of punitive damages. Vacating the intermediate appellate court's decision but reversing the trial court's fraud judgment, this court held that punitive damages were improper where evidence of the plaintiff's adversarial relationship with the company precluded a finding that it relied on the alleged false statements. Moreover, the adjuster's statements were not established as knowingly false, since at the time they were made, the issues of contributory fault and identity of the driver were debatable. *Kirk v. Farm & City Ins. Co.*, 457 N.W.2d 906, 909.

**Iowa**, 1993. Cit. in sup. After its storage facility collapsed, property owner sued its contractor on the construction project, asserting various contract and tort claims for defective

improvements to the property. This court affirmed a grant of summary judgment for the contractor, holding, *inter alia*, that the owner's claims for nondisclosure, misrepresentation, and fraudulent concealment sounded in tort rather than in fraud, so that these claims, falling within the applicable statute of repose, were not subject to a discovery rule tolling the statute to save the action from being time-barred. *McKiness Excavating v. Morton Bldgs.*, 507 N.W.2d 405, 409.

**Me.**1987. *Cit. in disc.* Acting for the seller of a general store, a real estate broker misrepresented to a purchaser the store's gross receipts and profitability. The seller was unaware of the agent's misrepresentations and made no independent representations to the purchaser. The purchaser, who relied on the broker's representations and did not discover that they were false until after the purchase, sued the broker and the seller for rescission of the contract based on fraud. The trial court directed a verdict for the defendants. Vacating and remanding, this court held, *inter alia*, that the plaintiff had established a *prima facie* case sufficient to withstand a directed verdict in the action for fraud and rescission based on evidence that the broker had misrepresented a material fact for the purpose of inducing the plaintiff's reliance and upon which the plaintiff did rely to his detriment. The court concluded that the seller, as principal, was liable for the misrepresentations of its agent that were within the scope of the agent's authority. *Arbour v. Hazelton*, 534 A.2d 1303, 1305.

**Me.**1990. *Quot. in sup.* A former employee sued a company for breach of contract, fraud, and negligent infliction of emotional distress arising out of an oral promise of employment made by the company's vice president. The trial court directed a verdict for the defendant on the emotional distress claim and entered judgment on a jury verdict for the plaintiff, awarding compensatory and punitive damages. Affirming with modifications, this court held that the fraud claim was supported by evidence that the employer made a promise of employment with knowledge of its falsity, but that the employer's conduct was not sufficiently outrageous to support an award of punitive damages. The court stated that the jury could have concluded that the company vice president failed to disclose that he lacked the authority to make the promise of employment, and that the employer intended to employ the plaintiff to reduce inventory and then to fire him. *Boivin v. Jones & Vining, Inc.*, 578 A.2d 187, 189.

**Md.**1988. *Com. (h) cit. in disc.* A physician who knew he suffered from genital herpes entered into a sexual relationship with a nurse without informing her of his condition; the nurse contracted the disease. The nurse sued the physician for fraud, negligence, and intentional infliction of emotional distress. The federal district court certified to this court the question of whether a cause of action existed in this state for each of the plaintiff's claims. This court held, *inter alia*, that where one had a duty to disclose that he or she had an infectious, incurable disease, based on either a special relationship or a general tort duty, concealment of the disease could give rise to liability for fraud or misrepresentation. *B.N. v. K.K.*, 312 Md. 135, 538 A.2d 1175, 1182.

**Mass.App.**1990. *Quot. in disc.* After contracting to manufacture parts for a new electronic vending machine, a company sued a soda manufacturer for lost corporate opportunity resulting from the company's rejection of a third party offer in reliance on the defendant's misrepresentations. After a jury verdict for the plaintiff, the judge allowed, in major part, the de-

fendant's motion for judgment n.o.v. Vacating the judgment in part, this court held, *inter alia*, that there was sufficient evidence for the jury to find that the defendant knowingly misrepresented and inflated the projections as to parts requirements, and that the plaintiff's lost opportunity to sell its business to the third party was reasonably foreseeable by the defendant. The court stated that the defendant knew that the third party was negotiating with the plaintiff to acquire the plaintiff's assets and should have foreseen that its projections might affect the value of the plaintiff or its attitude towards the sale. *International Totalizing Sys. v. PepsiCo*, 29 Mass.App.Ct. 424, 560 N.E.2d 749, 753-754, review denied 408 Mass. 1105, 563 N.E.2d 692 (1990).

**Mass.App.**1996. Cit. in disc. Employee sued employer, seeking to recover a half interest in a business that she had allegedly been promised. Trial court awarded employee damages. This court affirmed, holding, *inter alia*, that employee's action for tort in deceit was not subject to the Statute of Frauds requirement that a contract for sale of securities be evidenced by a writing. In response to defendant's assertion that plaintiff failed to present sufficient evidence of "substantial detriment" to her from her reliance on any representation by defendant, the court stated that a showing of detriment to the degree urged by defendant was not required to prove fraud. Additionally, plaintiff did present evidence of the actual damages she sustained as a result of her reliance. *Hurwitz v. Bocian*, 41 Mass.App.Ct. 365, 670 N.E.2d 408, 414.

**N.H.**1994. Quot. in disc. A disciplinary proceeding was brought against an attorney after the attorney endorsed a check with the signature of the lawyer representing an opposing party in a law firm dissolution proceeding. Trial court found certain rules violations. This court affirmed, holding that the attorney violated disciplinary rules by failing to correct his misstatement to the opposing attorney that a certificate of deposit in both their names had been opened at a bank. But the court determined that the attorney's failure to correct his earlier misstatement did not constitute an intentional misrepresentation, because there was no evidence that the attorney failed to correct the misstatement in order to induce the opposing attorney or his client to act or refrain from acting in reliance upon it. *Carpenito's Case*, 139 N.H. 168, 651 A.2d 1, 4.

**N.H.**1994. Cit. in headnote, quot. in disc. Purchasers of developed waterfront property sued seller and real estate company for rescission of the purchase and for money damages, alleging, *inter alia*, that defendants negligently or fraudulently misrepresented the condition of the septic system. Affirming the trial court's dismissal of the case, this court held, *inter alia*, that the evidence supported the trial court's finding that no misrepresentation occurred, since plaintiffs were aware of the problems with the sewer system early on in the negotiations, thus negating any argument that they relied on defendants' statements, and plaintiffs had no evidence that the value of the property was substantially less than that bargained for with defendants. *Gray v. First NH Banks*, 138 N.H. 279, 640 A.2d 276, 276, 279.

**N.J.Super.**1994. Cit. in ftn. The developer and owner of a condominium project sued, among others, a panel manufacturer, charging it with fraud, misrepresentation, and violation of the Consumer Fraud Act based on its allegedly false representations that its prefabricated panel system was both inexpensive and easy to install. The trial court dismissed these fraud-

based claims, stating that a commercial buyer seeking damages for economic losses resulting from the purchase of defective goods may recover solely for breach of warranty under the UCC and not for negligence or strict liability. Reversing in part and remanding, this court held, inter alia, that the trial court erred in dismissing plaintiff's claim against the manufacturer for fraud and misrepresentation, because the UCC expressly preserved a buyer's right to maintain an action for fraud and misrepresentation. *Coastal Group v. Dryvit Systems*, 274 N.J.Super. 171, 643 A.2d 649, 651.

**N.J.Super.**1996. Cit. in disc. Purchaser of triplex rental unit sued realtor and real estate agency for, inter alia, negligence after she discovered that the building did not comply with code requirements. Defendants sought to add plaintiff's attorney as a third-party defendant on the ground that his negligence was either the sole or a contributing cause of plaintiff's loss. The trial court denied the request, explaining that an attorney did not normally owe a duty of care to nonclient third parties. It then entered judgment on a jury verdict for plaintiff. Reversing and remanding, this court held that, because the jury could have found that attorney's duties to plaintiff included a fiduciary duty to realtor to facilitate the transaction to a successful conclusion, defendants should have been granted leave to add attorney as a third-party defendant. *Helmar v. Harsche*, 296 N.J.Super. 194, 686 A.2d 766, 771.

**N.Y.Sup.Ct.App.Div.**1990. Cit. in disc. In an action to recover damages for fraud and breach of contract, the plaintiff appealed from a judgment limiting his award to \$30,000 and dismissing his cause of action to recover damages for fraud. Affirming, this court held that, because the plaintiff failed to adduce any evidence that the defendants made any misrepresentations to him, his cause of action to recover damages for fraud was properly dismissed. *Ruse v. Intra-Boro Two-Way Radio Taxi Assoc., Inc.*, 166 A.D.2d 641, 561 N.Y.S.2d 70, 71.

**N.Y.Sup.Ct.App.Div.**1992. Quot. in case quot. in disc. Commercial tenant sued landlord for fraud, inter alia, alleging that defendant misrepresented the amount of asbestos present on the leased premises. The trial court granted defendant's motion for summary judgment. Affirming as modified to reinstate the fraud claim, this court held that whether plaintiff reasonably relied on defendant's statements should not have been resolved as a matter of law and that questions of fact existed as to whether the extent of the asbestos on the premises was peculiarly within defendant's knowledge and whether plaintiff could have determined the true condition of the premises through means of "ordinary intelligence." *Century 21, Inc. v. F.W. Woolworth Co.*, 181 A.D.2d 620, 582 N.Y.S.2d 101, 104.

**N.Y.Sup.Ct.**1987. Cit. in sup. A wife sued her husband for divorce and alleged claims for fraud and intentional infliction of emotional distress after her husband disclosed that he engaged in homosexual affairs, causing her to fear that she had been exposed to the AIDS virus. This court dismissed these two counts on the ground that there was insufficient evidence to support them. The court stated that to support the fraud and emotional distress claims, the wife had to prove physical or pecuniary injury, not just psychological trauma. *Doe v. Doe*, 136 Misc.2d 1015, 519 N.Y.S.2d 595, 596.

**Ohio**, 1991. Com. (b) cit. in disc. An at-will employee was assured that the employer's

process of inflating labor and capital costs in conjunction with its federal procurement contracts was legitimate; however, he was subsequently discharged for following those practices, and his name was given to federal authorities in connection with a contract fraud investigation. The employee sued his former employer alleging, inter alia, fraudulent misrepresentation and intentional infliction of emotional distress. The trial court entered judgment on a jury verdict for the employee, and the intermediate appellate court affirmed in part but remanded for a new trial on damages. Affirming on liability, this court held as to the fraudulent misrepresentation count that the employer's pricing scheme constituted a false representation that was designed to mislead the employee, a man of limited knowledge and experience, into justifiably believing that such practices were legitimate. The court noted that the overt manner in which the illicit pricing practices were pursued was clearly calculated to project an illusion of normalcy. *Russ v. TRW, Inc.*, 59 Ohio St.3d 42, 570 N.E.2d 1076, 1084.

**Or.**1992. Com. (b) quot. in ftn. Attorney who settled legal malpractice claim against him for failure to timely file a client's medical negligence claim sought contractual indemnity from the attorney who represented to him that there was no time pressure for filing the client's claim. The trial court directed a verdict against the attorney who sought indemnity, and the intermediate appellate court reversed and remanded. Affirming, this court held that although both attorneys were liable to the client, a jury could find that the attorney against whom indemnity was sought, as a result of his misrepresentation, was primarily responsible for the tort against the client and should therefore indemnify the other attorney, who justifiably relied on the misrepresentation. *Scott v. Francis*, 314 Or. 329, 838 P.2d 596, 599.

**Pa.**1994. Cit. in disc. Parents who discovered that the child they had adopted had a history of severe physical and sexual abuse that had not been disclosed to them sued private placement agency and commonwealth agency responsible for placing wards of the commonwealth, claiming wrongful adoption and negligent placement of adoptive child. The trial court granted defendants' demurrers, and the commonwealth court reversed. Affirming in part, this court held, inter alia, that traditional common law causes of action sounding in fraud and negligence applied in the adoption context. The court stated that plaintiffs' complaint pleaded causes of action for intentional and negligent misrepresentation as well as one for negligent failure of defendants to disclose relevant information that they had in their possession at the time of the adoption, and concluded that plaintiffs could proceed to trial on those claims. *Gibbs v. Ernst*, 538 Pa. 193, 647 A.2d 882, 889.

**Utah App.**1992. Quot. in sup. Insurance company's adjuster hired a company to investigate a workers' compensation claim filed by injured worker. Investigating company's employees, masquerading as representatives of a product marketing research company, gained access to worker's home to gather information about his activities. After worker's wife learned of this investigation, she sued insurance adjuster and investigating company for fraud, inter alia. Jury rendered verdict against plaintiff, but trial court granted judgment n.o.v. for plaintiff. Affirming in part and reversing in part, this court held, in part, that trial court properly refused to instruct the jury that emotional distress damages were recoverable in a cause of action for fraud. The court stated that fraud was an economic tort directed towards redressing pecuniary losses, not emotional distress damages. *Turner v. General Adjustment*

Bureau, Inc., 832 P.2d 62, 68.

**Vt.1989.** Cit. in sup. A seller of a tool manufacturing business sued the buyer of the business to collect consulting fees due under the sale contract. The buyer refused to pay the fees because the sale was allegedly induced by fraudulent misrepresentations by the seller in failing to disclose the company's numerous business problems, which the buyer discovered after the sale. The trial court awarded the seller the fees and dismissed the buyer's counterclaim for fraudulent misrepresentation. It determined that the seller had no duty to disclose negative facts absent specific inquiries, and that he did not misrepresent the business prospects for the company's newest product, a "shock-absorbing hammer," because his statements were in the nature of opinions relating to future events. Reversing and remanding, the appellate court held that the seller did have an equitable duty to fully disclose material facts in regards to his statement to the buyer that the sale had to be immediate. The court also stated that the representation of opinion as to the hammer could have been actionable if the opinion was offered in a scheme to defraud. *White v. Pepin*, 151 Vt. 413, 561 A.2d 94, 98.

**Vt.1990.** Cit. in disc., quot. in ft. The buyer of a hotel and restaurant sued the seller for damages, claiming that the defendant fraudulently failed to disclose information about the capacity of the site's septic system. The trial court entered judgment for the plaintiff, holding that the defendant was liable for constructive fraud because it failed to disclose material facts and thereby induced the plaintiff to purchase the property. Reversing and remanding, this court stated that the plaintiff relied not on false information, having received none, nor on silence as to material facts, but on inferences it drew from discussions with the defendant regarding the property's septic capacity that the defendant expressly refused to warrant and held that, under the circumstances, the plaintiff's reliance was not justified and could not be the predicate of liability for fraud, constructive or actual. *Sugarline Associates v. Alpen Associates*, 155 Vt. 437, 586 A.2d 1115, 1120.

**Vt.1993.** Com. (c) quot. in part in sup. The purchaser of a new home sued the general and foundation contractors and others, including the general contractor's wife, alleging breach of contract and fraud after billings on the project far exceeded an amount specified in the contract, which provided that if billings exceeded that amount, the purchaser could terminate the contract. Affirming the trial court's entry of judgment for the purchaser on the breach claims and against purchaser on most of the fraud claims but reversing the directed verdict against purchaser on her fraud in the inducement claim and remanding, this court held, inter alia, that the purchaser had sufficiently alleged a fraudulent inducement claim by asserting that she would not have entered into the contract if she had known the price would exceed the contract cutoff amount, particularly as the general contractor testified that he believed, at the time he entered into the contract, the billings would far exceed that amount. *Winey v. William E. Dailey, Inc.*, 636 A.2d 744, 747-748.

**Wyo.1995.** Cit. in headnote and disc. Home purchasers sued sellers for breach of contract, fraud, deceit, misrepresentation, and nondisclosure after discovering a sediment problem in the well system. Trial court entered judgment for purchasers, holding that the sellers' failure to disclose was negligent and amounted to a misrepresentation. This court reversed, holding that absent an allegation of fraud, an "as is" clause in a contract to sell realty bars a claim

for nondisclosure. Here, there was no evidence of fraud by sellers, the purchasers failed to take advantage of the contract clause providing for inspections by experts hired by purchasers, and purchasers failed to look at the water system, ask about the well's condition, or even turn on a faucet. The court determined that the information was negligently omitted and there was no evidence to support any finding of fraud on the sellers' part. *Richey v. Patrick*, 904 P.2d 798, 798, 801, 802.

Case Citations July 1998 — June 2011:

**U.S.2005.** Quot. in part in disc. Investors brought securities class action suit against drug company that allegedly misrepresented FDA's approval of new drug, leading to artificially high stock-purchase price. The district court dismissed, and the court of appeals reversed under "price inflation" theory of loss causation. This court reversed and remanded, holding that investors could not satisfy loss-causation requirement by merely alleging that they overpaid for defendant's stock because of defendant's false statements. Plaintiff investor here was required to prove that he would not have made an investment decision had he known of defendant's deceit, and that he suffered actual economic loss resulting from such deceit. *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 343, 125 S.Ct. 1627, 1632, 161 L.Ed.2d 577.

**C.A.1, 2000.** Cit. in disc. §§ 525–530. Jewelry sales agent sued a defunct jewelry manufacturer, its CEO, its director, and the corporation that acquired the manufacturer's operating assets, seeking to recover commissions and asserting, in part, a claim for successor liability based on actual fraud. The district court entered judgment for defendants. This court affirmed, holding, *inter alia*, that there was no fraud perpetrated by any of the defendants on plaintiff. There was no evidence of misrepresentation or deceit by defendants that either induced plaintiff to act contrary to his best interests or fail to take action that could have resulted in the payment of all or a part of the commissions due. The effect of the reorganization plan might have had an unfortunate effect on plaintiff, but it was not due to misrepresentation or deceit. *Ed Peters Jewelry Co. v. C & J Jewelry Co.*, 215 F.3d 182, 191.

**C.A.1, 2000.** Quot. in disc. Real estate investor and bank president were convicted of bank fraud and perjury. This court affirmed the convictions, holding, *inter alia*, that "intent to harm" was not a required element of bank fraud, as the "intent" element of bank fraud was an intent to deceive the bank in order to obtain from it money or other property. The court determined that there was no error in the jury instructions regarding intent, because the jury could not have found defendants guilty of bank fraud without finding that they intended to deceive the bank in order to obtain money from it. *U.S. v. Kenrick*, 221 F.3d 19, 28.

**C.A.1, 2000.** Cit. in headnote, quot. in case quot. in disc. Trucking company and its employee sued television network, a reporter, and a producer for defamation, misrepresentation, negligent infliction of emotional distress, invasion of privacy, and loss of consortium. Maine federal district court entered judgment on jury verdict for plaintiffs. This court reversed in part and remanded, holding, *inter alia*, that an action in misrepresentation under Maine law did not lie in these circumstances for defendants' alleged promise to provide

“positive” coverage. However, defendants' promise to exclude a group critical of the trucking industry from the program was a misrepresentation, for which the trucking company owner could recover pecuniary losses. *Veilleux v. National Broadcasting Co.*, 206 F.3d 92, 97, 120.

**C.A.1**, 2001. Cit. in disc. Insurer sued attorney and his law firm for common-law fraud, unfair trade practices, and statutory fraud during attorney's representation of a hotel employee who filed for workers' compensation benefits from insurer. Massachusetts federal district court granted defendants' motions for judgment as a matter of law. This court vacated, holding, inter alia, that there was sufficient evidence that the attorney committed fraud by misrepresenting claimant's medical history and alternate identity. Attorney gave insurer medical reports that falsely indicated that claimant had only one injury and did not show claimant's prior back injury. There was sufficient evidence as to insurer's reliance, as falsified medical history was a factor in insurer's decision to pay benefits. *St. Paul Fire and Marine Ins. Co. v. Ellis & Ellis*, 262 F.3d 53, 61.

**C.A.1**, 2007. Cit. in sup. Smokers of ventilated light cigarettes sued cigarette manufacturer for allegedly making fraudulent misrepresentations in violation of the Maine Unfair Trade Practices Act by advertising and promoting the cigarettes as “light” and having “Lowered Tar and Nicotine” despite its awareness that smokers of light cigarettes engaged in unconscious “compensation” behaviors that essentially negated the ventilation effect. The district court granted summary judgment for defendant. Vacating and remanding, this court held, inter alia, that plaintiff's theory of liability did not amount to a failure-to-warn claim arising out of what defendant should have said, but was instead a fraudulent-misrepresentation claim arising out of what defendant did say; thus, the claim was not preempted by the Federal Cigarette Labeling and Advertising Act. *Good v. Altria Group, Inc.*, 501 F.3d 29, 42.

**C.A.1**, 2009. Cit. in sup. Surviving wife and sons of decedent sued suppliers of vinyl chloride monomer (VC) for fraud, inter alia, alleging that defendants were liable for decedent's wrongful death from liver cancer as a result of exposure to VC during his employment. The district court granted summary judgment for defendants. Affirming, this court held that it would be speculative for a jury to conclude that defendants were responsible for the allegedly false or misleading representations in an industry trade association's chemical safety data sheet for VC based on the fact that they were members of the committee that drafted the report; under Massachusetts law, a person was generally liable in common-law fraud only for fraudulent representations for which he himself was responsible. *Taylor v. American Chemistry Council*, 576 F.3d 16, 31.

**C.A.2**, 2005. Subsec. (1) cit. in appendix. Replacement contractor sued insurance company and city school construction authority, asserting tort and contract claims after it was given inaccurate description of work to be completed in school renovation. The district court held, inter alia, that contract to complete renovation was invalid due to unsatisfied express condition precedent, and dismissed contractor's fraudulent-inducement claim for failure to plead the claim with sufficient specificity. This court affirmed in a per curiam opinion. *Aetna Cas. and Sur. Co. v. Aniero Concrete Co. Inc.*, 404 F.3d 566, 581.

**C.A.2**, 2009. Quot. in disc. Investors that held self-directed or “nondiscretionary” accounts at brokerage firm sued firm and firm’s financial analyst, alleging that defendants knew of the impending collapse of corporation but nevertheless gave plaintiffs inaccurate advice that plaintiffs relied upon in deciding not to sell their securities in corporation. The district court granted defendants’ motion to dismiss. This court certified to the Georgia Supreme Court for review the question of whether a plaintiff was entitled to bring “holder claims” for induced forbearance in the sale of securities. The court noted that, while forbearance, an induced failure to act, had long been recognized by Georgia law as a valid basis for claims sounding in fraud, that rule had not yet been applied in the context of fraud claims arising from the holding of publicly traded securities. *Holmes v. Grubman*, 568 F.3d 329, 336, 337.

**C.A.3**, 1998. Cit. in disc. Individuals were injured when bone screws approved for orthopedic use were implanted into their spines; they sued manufacturer for fraud, alleging that their injuries stemmed from defendant’s misrepresentations to the FDA while seeking authorization to market the bone screw device. The district court dismissed the complaint. Reversing, this court held that, where plaintiffs alleged that defendant’s misrepresentations led to FDA approval, which in turn led to the improper use of the bone screws and plaintiffs’ consequent injuries, the lower court erred in determining as a matter of law that plaintiffs would be unable to establish proximate cause, and that, depending on the applicable law, reliance might not be an element of plaintiffs’ case. *In re Orthopedic Bone Screw Liability Litigation*, 159 F.3d 817, 822, reversed 531 U.S. 341, 121 S.Ct. 1012, 148 L.Ed.2d 854 (2001).

**C.A.3**, 2002. Quot. in disc. Owners of “Insteel” trade name brought trademark-infringement action against competitors. The district court dismissed plaintiffs’ claims as time-barred. Reversing and remanding, this court held that a cause of action under Virgin Islands law most analogous to a trademark-infringement claim for purposes of determining a statute of limitations was an action for deceptive trade practices, rather than common-law fraud; thus, the instant action was subject to a two-year statute of limitations that began running from the date the violation occurred, not the date the violation was discovered, as would be the case under the statute of limitations for fraud. The court said that this action was equitably tolled by the filing of an earlier action that was dismissed for lack of personal jurisdiction. *Island Insteel Systems, Inc. v. Waters*, 296 F.3d 200, 212.

**C.A.3**, 2002. Cit. in case quot. in disc. §§ 525–526. After Israeli-born bank teller entered guilty plea and served prison sentence for embezzlement, INS brought removal proceeding based on her commission of an aggravated felony. Immigration judge held that she was removable, and Board of Immigration Appeals affirmed. This court vacated final order of removal for failure to establish that teller was convicted of an aggravated felony. A conviction for embezzlement with specific intent to defraud qualified as an offense involving fraud or deceit, but a conviction with only specific intent to injure did not. Specific intent to defraud was not established where plea colloquy failed to pin down mens rea element sufficiently for court to conclude that woman acted with intent to defraud rather than to injure employer. *Valansi v. Ashcroft*, 278 F.3d 203, 209.

**C.A.4**, 1999. Quot. in sup. Creditor/law firm sought determination that clients’ debt for legal fees was nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A). The bankruptcy court

entered judgment for firm, and the district court affirmed. Affirming, this court held that a settlement agreement executed by clients, in which they purported to transfer to firm partnership interests that were not theirs to assign, was a refinancing transaction covered under § 523(a)(2), and that the evidence supported the finding that clients engaged in fraud in order to induce firm to accept the agreement. *In re Biondo*, 180 F.3d 126, 134.

**C.A.5**, 2000. Com. (b) cit. in case quot. in diss. op. In Chapter 7 proceedings, credit card issuer sought to have cardholder's debt declared nondischargeable as one arising from false pretenses or fraud. The bankruptcy court entered judgment against issuer and the district court affirmed. Affirming, this court held that issuer relied on its own screening and investigative procedures, not on any representation made by holder, in determining that she was a good credit risk; for that reason, issuer was unable to establish the element of justifiable reliance. Dissent believed that each use was an implied representation of holder's intent to pay, and that issuer's reliance was justifiable so long as the account was not in default and issuer learned of no facts during its initial investigation of holder that would have made reliance unjustifiable. *In re Mercer*, 211 F.3d 214, 220, 225.

**C.A.5**, 2001. Cit. and quot. in disc., com. (b) quot. and cit. in disc. and cit. in ftn., com. (d) quot. in disc. Credit-card company brought adversary proceeding against Chapter 7 debtor, seeking a determination that debtor's credit-card debt was nondischargeable on grounds of false pretenses, false representation, or actual fraud. The bankruptcy court found the debt dischargeable, and the district court affirmed. Reversing, this court held that debtor, through each credit-card use, represented her intent to pay, and that plaintiff, in authorizing the loan, actually relied on the representation; the court remanded for determinations as to whether debtor's representations were knowingly false, and whether plaintiff's reliance was justifiable. The court noted that a misrepresentation need not be spoken; it could be made through conduct. *In re Mercer*, 246 F.3d 391, 404.

**C.A.6**, 2010. Cit. in sup. United States sued fighter-jet-engine contractor that allegedly made knowing false certifications, nondisclosures, and active concealments during the negotiation and performance of the parties' jet-engine contract, asserting violations of the False Claims Act and seeking relief under common-law theories of breach of contract, payment by mistake, and unjust enrichment. The district court, inter alia, held that claim preclusion barred plaintiff from bringing its common-law claims, because it litigated or could have litigated those claims before the Board of Contract Appeals. Reversing in part and remanding, this court held that plaintiff was not precluded from litigating the common-law claims; plaintiff's entire case, including its common-law claims, involved alleged fraud by defendant, and, according to precedent at the time plaintiff filed its administrative claims, the Board did not have jurisdiction over fraud-related claims. *U.S. v. United Technologies Corp.*, 626 F.3d 313, 324.

**C.A.7**, 2000. Cit. in disc. The Commodity Futures Trading Commission banned for life the manager of a commodity pool from the futures markets and fined him \$10 million, finding that the manager violated the Commodity Exchange Act by, in part, committing multiple frauds. This court enforced the Commission's order to the extent it revoked the registrations of, and banned trading by, the manager and the entities he controlled, and ordered them to

cease and desist from further violations of the Act; it granted manager's petition for review to the extent the Commission imposed financial penalties. The court stated that manager made many false statements that could be condemned under the Act without proof of reliance even if the Commission did not establish all elements of common law fraud. *Slusser v. Commodity Futures Trading Com'n*, 210 F.3d 783, 785.

**C.A.7**, 2009. Cit. in sup. Chapter 7 trustee for debtor that operated six stores brought adversary proceeding against creditor that held a security interest in debtor's inventory and buyer that purchased the inventory, after buyer overpaid debtor by over \$1 million for the inventory of four stores, and creditor, which obtained the funds from debtor, refused to return the funds to buyer even though it was contractually obligated to do so as part of the sale. The bankruptcy court entered an order requiring creditor to return the funds to buyer, finding that, while buyer breached a duty to reveal that, shortly before buyer's prior purchase of the other two stores, inventory had been transferred from the four stores to the other two stores, creditor failed to show any loss as a result of the transfer. The district court reversed. Reversing and remanding for reinstatement of the bankruptcy court's decision, this court held, inter alia, that a legal remedy, whether rescission or damages, did not follow automatically from the existence of a false statement or material omission where, as here, there was an absence of reliance on or injury resulting from the alleged fraud. *Leibowitz v. Great American Group, Inc.*, 559 F.3d 644, 648.

**C.A.8, Bkrcty.App.**1999. Cit. in case quot. in sup., quot. in sup., com. (b) quot. in case quot. in disc. Creditor brought adversary proceeding against debtor for determination that debt was nondischargeable as one obtained by false pretenses, false representations, or actual fraud. Affirming the bankruptcy court's entry of judgment for creditor, this court held, inter alia, that debtor acted with requisite fraudulent intent when he accessed home-equity line-of-credit account and borrowed money from creditor with knowledge that account was no longer secured and should have been null and void because creditor had released lien on debtor's home. *In re Moen*, 238 B.R. 785, 791, 792.

**C.A.9**, 2008. Cit. in disc. United States citizen who was formerly imprisoned in the Philippines sued the United States Department of State under the Privacy Act, alleging, among other things, that he was harmed by the department's willful failure to disseminate and to maintain accurate records about the status of his case. The district court granted defendant's motion to dismiss. Affirming, this court held, inter alia, that plaintiff's claims were properly dismissed as time-barred. The court reasoned, in part, that, while plaintiff's claims were sufficiently similar to traditional tort actions such as misrepresentation and false light to warrant application of the general presumption in favor of equitable tolling, plaintiff failed to establish that equitable tolling was warranted on the facts of this case. *Rouse v. U.S. Dept. of State*, 548 F.3d 871, 877.

**C.A.9**, 2009. Cit. in sup. United States citizen who had been imprisoned in the Philippines sued the United States Department of State following his return to the United States, alleging that the Department violated the Privacy Act by willfully and intentionally failing to maintain and to disseminate accurate records regarding his case, thereby depriving him of diplomatic and third-party efforts to secure his release. The district court granted the Depart-

ment's motion to dismiss on the merits, but also found that plaintiff's claim was "probably" barred by the applicable two-year statute of limitations. Affirming, this court held, *inter alia*, that, while plaintiff's claims that the Department was willfully misrepresenting information to and about him were sufficiently similar to traditional tort actions such as misrepresentation and false light to warrant the application of the rebuttable presumption in favor of equitable tolling, the Privacy Act did not afford a remedy for the harms he alleged. *Rouse v. U.S. Dept. of State*, 567 F.3d 408, 416.

**C.A.10**, 2005. Illus. 3 cit. in disc. Judgment creditor brought adversary proceeding against Chapter 7 debtor, alleging that debtor made false representations to obtain a loan from creditor. The bankruptcy court found that the state-court judgment should not be discharged, and the bankruptcy appellate panel affirmed. Affirming, this court held that the judgment was not dischargeable, since debtor's misrepresentations regarding her ownership of certain assets and her intention and ability to obtain financing from her brother to repay the loan were not statements "respecting the debtor's financial condition" under the Bankruptcy Code's governing statute, as strictly construed by the court. The court noted that, if this language were broadly read, many debts incurred from fraudulent misrepresentations typical of common-law torts at the heart of the statute could not be excepted from discharge. *In re Joelson*, 427 F.3d 700, 710, cert. denied 547 U.S. 1163, 126 S.Ct. 2321, 164 L.Ed.2d 840 (2006).

**C.A.10, Bkrcty.App.**1998. Cit. in headnotes, cit. and quot. in sup., cit. in ftn., coms. (d)–(f) quot. in sup. Bank that issued a credit card to Chapter 7 debtor brought an adversary proceeding to except debtor's credit-card debt from discharge. The bankruptcy court held that debtor's cash advances were nondischargeable as a debt for money obtained by false pretenses, false representation, or actual fraud. Reversing and remanding, this court held, *inter alia*, that the sole inquiry in determining whether the debt in this case was nondischargeable was whether bank proved that debtor did not intend to repay the cash-advance debt at the time that the debt was incurred. The bankruptcy court erred as a matter of law in basing its finding of nondischargeability on debtor's implied representation that he had the ability to repay the cash-advance debt when the debt was incurred or on his reckless disregard as to his financial condition. *In re Kukuk*, 225 B.R. 778, 779, 783–785.

**C.A.D.C.**1998. Quot. in disc. During the course of a personal bankruptcy proceeding, the debtor borrower sued a lending corporation and its president, alleging breach of contract and fraud. After instructing the jury that the breach of an implicit contractual representation may be tortious, the district court entered judgment on a jury verdict awarding the debtor damages. This court affirmed the judgment but vacated the compensatory damage award and remanded, holding, *inter alia*, that the tort of fraudulent misrepresentation in the District of Columbia included a cause of action arising from a party's intent not to perform a contractual obligation that it is about to undertake. *Chedick v. Nash*, 151 F.3d 1077, 1081.

**D.Alaska**, 2006. Cit. in case cit. in disc. (general cite). Subcontractors that supplied labor and materials with respect to a government project to a materialman that failed to compensate them, brought suit for, in part, misrepresentation against a government contractor, among others, alleging that contractor had a duty to disclose its withholding of payments from materialman under a support agreement. This court denied the parties' motions for

summary judgment, holding that plaintiffs failed to present any evidence that defendant made affirmative false representations of fact. The court reasoned that defendant had no duty to disclose its contractual relationship with materialman, since plaintiffs and defendant did not share a special relationship; they were parties dealing at arms' length in a business transaction. *U.S. ex rel. North Star Terminal & Stevedore Co. v. Nugget Const., Inc.*, 445 F.Supp.2d 1063, 1074.

**D.Ariz.**1998. Cit. in disc. Property buyers sued sellers and real estate brokers, alleging, in part, that defendants committed fraud and intentional misrepresentation during the listing of the property, during the advertisement of the property, and during the execution of the real property disclosure statement. This court granted in part and denied in part defendants' motion for partial summary judgment, holding, inter alia, that plaintiffs stated a viable claim for fraud and intentional misrepresentation, because a jury could reasonably find that concealment of the inoperability of three of the five water wells was a material misrepresentation. Furthermore, whether equity and good conscience required disclosure of the quality of the water in the wells, the extent of the garbage dumps on the property, and the true nature, construction, and age of the main residence and storage area were fact issues for the jury. *Coleman v. Watts*, 87 F.Supp.2d 944, 951.

**D.Ariz.**1998. Cit. in sup. Medical laboratory and its co-owners sued television network and others in connection with network's broadcast of a story about faulty Pap-smear testing, alleging, in part, fraud relating to a hidden-camera interview at the laboratory during which defendants falsely maintained that they were in the laboratory business. The court denied defendants' motion for summary judgment on the portion of plaintiffs' fraud claim to recover damages for emotional distress suffered by plaintiff co-owner, holding that a question of fact existed as to whether defendants' conduct caused co-owner pecuniary loss for medical treatment and psychological counseling. The court also denied plaintiffs' cross-motion for partial summary judgment, holding that plaintiffs failed to show justifiable reliance on defendants' misrepresentations. *Medical Laboratory Management v. American Broad.*, 30 F.Supp.2d 1182, 1200, 1201, judgment affirmed 306 F.3d 806 (9th Cir.2002).

**N.D.Cal.**2003. Cit. in case quot. in sup. Beneficiary of letter of credit sued issuing bank after defendant refused to honor the letter of credit, alleging, in part, that defendant committed fraud by intentionally and falsely representing, with intent to deceive, that it would honor its obligations under the letter of credit. Granting defendant's motion for summary judgment on the ground that the statute of limitations for fraud had run, the court held, inter alia, that plaintiff failed to allege any reliance on the continuing misrepresentation that defendant would pay when funds became available. Plaintiff did not change its economic position in reliance; it merely deferred bringing suit. *Averbach v. Vnesheconombank*, 280 F.Supp.2d 945, 957.

**N.D.Cal.**2009. Cit. in case quot. in disc. Internet-service providers sued senders of email advertisements to providers' computers, alleging that the emails contained falsified header information or contained a subject line that would be likely to mislead a recipient, and thus violated a California statute proscribing such activities. This court denied defendants' motion to dismiss the complaint on grounds that it was preempted by the federal CAN-SPAM

Act, holding that plaintiffs' claim fell within the savings clause of the statute, which exempted from preemption a state law that prohibited "falsity or deception" in commercial email messages. The court concluded that the phrase "falsity or deception" did not encompass only strict common-law fraud such that antideception state actions not insisting on every element of common-law fraud were preempted. *Asis Internet Services v. Consumerbar-gaingiveaways, LLC*, 622 F.Supp.2d 935, 943.

**D.Colo.Bkrcty.Ct.2002.** Quot. in sup., cit. in ftn., cit. in disc. After creditor lost the funds he had invested in viatical financial settlements offered by debtor-insurance salesman, who had purchased the viaticals from a company that had been operating an elaborate Ponzi scheme, he brought an adversary proceeding to except the resulting debt from discharge as one obtained by "false pretenses, a false representation, or actual fraud." Entering judgment for debtor and finding the debt dischargeable, the court held that any fraud on the part of company, as principal, in connection with the sale of the viaticals could not be imputed to debtor, who had been unaware of the Ponzi scheme and was an innocent agent. Debtor's carelessness in making the representations that induced creditor to purchase the investments was mere negligence, and thus debtor did not act with the requisite scienter to preclude discharge of the debt. *In re McGuire*, 284 B.R. 481, 488–490.

**D.Colo.Bkrcty.Ct.2006.** Quot. in sup. Creditor moved for a default judgment against debtor, seeking a determination of nondischargeability for actual fraud in connection with two "cash advances" that creditor made to debtor within the 60-day period prior to the filing of debtor's Chapter 7 petition. This court denied the motion and dismissed creditor's complaint, holding that the advances were not "cash advances" within the meaning of the controlling Bankruptcy Code provision, but were rather more properly viewed as a "balance transfer," since the entire amount of each advance was paid to creditor to pay off two separate loans that debtor had previously obtained from creditor; thus, a presumption of fraud under the provision was not appropriate here, and creditor could not establish the required elements of the claim, in particular, that it suffered any pecuniary loss, since all funds it advanced were immediately repaid to it. *In re Pugh*, 356 B.R. 528, 531.

**D.Conn.2006.** Quot. in disc. Corporation sued owner of limited-liability companies, alleging, in part, that he fraudulently misrepresented and concealed his companies' lack of marketing capabilities and dire financial status in order to induce plaintiff to enter into an advertising and promotional agreement with one of the companies and provide it with an advance of \$1.25 million. This court denied defendant's motion to dismiss or stay the action pending ongoing arbitration, holding, inter alia, that, while defendant could use the limitation on representations and warranties contained in the agreement as evidence to support his argument that plaintiff's reliance on anything outside the agreement was not reasonable or justifiable, the representations and warranties did not, as a matter of law, bar plaintiff's claim for fraudulent misrepresentation. *Vertrue Inc. v. Meshkin*, 429 F.Supp.2d 479, 497.

**D.Conn.Bkrcty.Ct.2002.** Cit. in disc. Creditor brought an adversary proceeding against Chapter 7 debtor to except debt from discharge as one obtained by fraud. Denying creditor's motion for summary judgment, the court held, inter alia, that a genuine issue of material fact existed as to whether debtor's conduct rose to the level of actual fraud, false pretenses, or

false representation. In re Miller, 282 B.R. 569, 576.

**D.Conn.Bkrcty.Ct.2008.** Cit. in case quot. in sup. Professional jockeys who obtained state-court judgments based, in part, on fraud against debtor-former business managers brought an adversary proceeding seeking a determination that the judgment debts were nondischargeable as ones for money obtained by actual fraud. Granting plaintiffs' motion for summary judgment, this court held that the judgment debts were entitled to preclusive effect under the doctrine of collateral estoppel, since the fraud alleged by plaintiffs in their adversary complaint was identical to the issue of fraud litigated in the state-court action. The court noted that, although the terms fraudulent misrepresentation and concealment used by plaintiffs in their adversary complaint did not appear in the text of the bankruptcy statute, it was clear that plaintiffs intended to use those words to raise a claim of actual fraud under the statute. In re Andrews, 385 B.R. 496, 508.

**D.D.C.2007.** Cit. in sup. Owner of foreign trademark brought suit to vacate a decision of the United States Patent and Trademark Office (USPTO) that allowed competitor to proceed with its intent-to-use application to register the same mark for use on clothing items in the United States, asserting, in part, that competitor submitted its application to the PTO to thwart owner's use of the mark in the United States and thus misrepresented its intent to use the mark in commerce. Granting competitor's motion to dismiss, this court held that, while owner provided fair notice of the nature of its claim by alleging each element of fraudulent misrepresentation, its complaint lacked the factual allegations necessary to clarify the grounds on which the claim. Aktieselskabet AF 21, November 2001 v. Fame Jeans, Inc., 511 F.Supp.2d 1, 18, affirmed in part, reversed in part 525 F.3d 8, 381 U.S.App.D.C. 76 (C.A.D.C.2008).

**D.D.C.2010.** Subsec. (b) quot. in sup. Attorney sued client, after she refused to pay legal bills in connection with his representation of her before the Equal Employment Opportunity Commission in a successful sexual harassment suit against her former employer. Granting client's motion for summary judgment on attorney's claim for fraud, this court held, among other things, that many of the alleged misrepresentations or omissions made by client were not misrepresentations of fact, and thus they could not form the basis of a cause of action for fraud; for example, attorney's allegations that client "falsely refused to pay" attorney for services performed by him despite her having signed a contract to do so, and that client withheld any "bona fide objection to any invoice" did not involve assertions of fact. Hickey v. Scott, 738 F.Supp.2d 55, 69.

**N.D.Fla.2003.** Cit. and quot. in sup. Shareholders sued corporation and its officers for fraud, negligent misrepresentation, and breach of fiduciary duty, alleging that defendants fraudulently misrepresented corporation's earnings, causing plaintiffs to retain their stock until after stock's value suddenly collapsed upon disclosure of the allegedly fraudulent practices. This court granted in part defendants' motion to dismiss, holding that plaintiffs did not sufficiently plead their reliance in order to state a holding claim for fraud and negligent misrepresentation. While plaintiffs alleged that they would have sold their stock had they known the truth about corporation's financial status, they did not allege specifically how many shares they would have sold and when they would have sold them. Rogers v. Cisco

Systems, Inc., 268 F.Supp.2d 1305, 1313.

**S.D.Fla.Bkrcty.Ct.2009.** Quot. in sup. Creditor of company brought adversary proceeding against Chapter 7 debtor who personally guaranteed company's debts, alleging that debtor fraudulently induced it to enter into an agreement to forbear from pursuing its legal remedies after company first began to fall behind on payments. This court granted debtor's motion to dismiss creditor's claim for fraudulent misrepresentation, holding that creditor failed to allege the nature and extent of its damages arising from debtor's alleged conduct. The court noted that it was unclear what percentage, if any, of the debt would have been recovered had creditor "vigorously pursued its legal remedies" in lieu of signing the agreement, and it seemed likely that any actions by creditor to demand full payment would only have accelerated debtor's bankruptcy. *In re Dato*, 410 B.R. 106, 111.

**S.D.Ill.2007.** Quot. in ftn. In consolidated cases, vehicle owners and lessees sued automobile manufacturer for breach of express warranties under the federal Magnuson–Moss Warranty Act, alleging that their vehicles were damaged by a factory-installed coolant. This court denied plaintiffs' motion for class certification, holding that the proposed class's claims were governed by the warranty laws of the 47 states where the class members resided, and that the requisite factors of predominance and manageability for class certification were not satisfied. The court declined plaintiffs' proposal to employ a classwide presumption of reliance on defendant's warranties, noting that, although solid policy arguments could be made for dispensing with reliance as an element of a breach-of-express-warranty claim under the UCC, its persistence might be a vestigial trace of the fact that such claims at one time sounded in tort. *In re General Motors Corp. Dex–Cool Products Liability Litigation*, 241 F.R.D. 305, 322.

**N.D.Iowa, 2008.** Quot. in disc., cit. in case quot. in disc. United States brought common-law fraud and other claims against insurance agent and his company, alleging that agent/company participated in a scheme to obtain federally reinsured crop insurance payments for ineligible persons. This court denied defendants' motion for summary judgment on the fraud claim, holding that defendants made misrepresentations, or failed to disclose misrepresentations, in the various documents agent signed and submitted in support of crop insurance applications or claims; that those misrepresentations, although not made directly to the government, were made to the private insurance company that issued the policies; and that agent intended or had reason to expect that the misrepresentations would be repeated or their substance communicated to the government, and that they would influence the government to reimburse insurer for indemnity payments and to pay crop insurance premium subsidies. *U.S. v. Hawley*, 544 F.Supp.2d 787, 812.

**S.D.Iowa, 1998.** Cit. in headnotes and in sup., com. (b) cit. in ftn. Policyholders sued an insurer for fraud and deceptive trade practices by its agents, alleging that the agents deliberately manipulated actuarial assumptions to generate illustrations that depicted a policy performance they knew would not occur. This court denied defendant's motion to dismiss, holding, inter alia, that plaintiffs stated a viable fraud claim, because they sufficiently alleged that the insurer made false statements regarding existing material facts with the intent to induce plaintiffs to rely on such statements. *Grove v. Principal Mut. Life Ins. Co.*, 14

F.Supp.2d 1101, 1103, 1110.

**D.Kan.2007.** Cit. in sup. Mortgagors brought putative class action against title insurer, alleging that defendant, in acting as their closing agent in a real-estate financing, collected and retained an amount for recording fees in excess of the actual fees paid. This court denied plaintiffs' motion for class-action certification, rejecting plaintiffs' attempt to distinguish a Kansas precedent's conflict-of-laws rule whose application defeated their manageability argument seeking to arrive at a single state's punitive-damages law. Federal courts in this district had applied the precedent in cases involving financial harm, which was all that was alleged here, and plaintiffs' argument that their conversion claims merited different treatment from their other tort claims, e.g., fraud and breach of fiduciary duty, because damages were not a required element of conversion claims, was unavailing; every claim for conversion necessarily involved an element of harm. *Doll v. Chicago Title Ins. Co.*, 246 F.R.D. 683, 692.

**E.D.La.Bkrcty.Ct.2005.** Cit. in ftn. After former employee who was injured in the course of her employment obtained a workers' compensation judgment against former employer that failed to maintain workers' compensation insurance, and employer entered bankruptcy, employee brought adversary proceeding against employer, objecting to discharge of the judgment, in part on grounds of fraudulent misrepresentation. This court dismissed, holding, *inter alia*, that, while debtors conceded that they did not have workers' compensation insurance and that they were aware that they were required to maintain such insurance under state law, there was no evidence that debtors made any representations to plaintiff as to workers' compensation, and the mere fact that debtors employed plaintiff despite their lack of coverage, without more, was insufficient to infer a misrepresentation. *In re Vizzini*, 348 B.R. 339, 344.

**M.D.La.Bkrcty.Ct.1998.** Cit. and quot. in sup., subsec. (a) cit. in sup., com. (b) quot. in sup. Credit-card issuer brought an adversary proceeding to except from discharge Chapter 7 debtors' credit-card debts as ones for money obtained by false pretenses, false representation, or actual fraud. The court excepted debtor-wife's debts from discharge, holding, *inter alia*, that wife committed fraud when she took cash advances with neither the intent nor the ability to repay them and used them to fund her gambling activities. The court found, however, that a \$5,000 loan made to debtor-husband on a revolving line of credit was dischargeable; plaintiff failed to show that husband lacked the intent to repay, since there was no evidence that he was aware of the poor state of his family's finances. *In re Melancon*, 223 B.R. 300, 307, 309, 320.

**D.Me.1998.** Cit. and quot. in disc. A truck driver and his employer sued a television network for negligent misrepresentation and defamation, among other claims, after a network news magazine convinced plaintiffs to participate in a show on the long-distance trucking industry and then ran a negative portrayal of the industry and plaintiffs. Plaintiffs alleged that defendants made false representations to induce plaintiffs to participate in the program and that plaintiffs relied on those false representations to their detriment. This court granted in part and denied in part defendants' motion for summary judgment, holding, *inter alia*, that the driver's negligent and fraudulent misrepresentation claims failed, because he offered no evidence of pecuniary loss. However, there was sufficient evidence that the employer justifi-

ably relied on defendants' specific assurances that the program would portray only the positive side of the trucking industry, and that the employer, as a result, suffered pecuniary harm. *Veilleux v. National Broadcasting Co., Inc.*, 8 F.Supp.2d 23, 32–33.

**D.Me.1999.** Quot. and cit. in disc. Insured sued insurer for, inter alia, fraud and intentional infliction of emotional distress after his request for benefits was denied. Plaintiff also attempted to assert a claim for equitable estoppel. Dismissing the complaint in part, the court held, among other things, that plaintiff's allegations of misrepresentations both when defendant sold him the policy and also when he became disabled with a brain tumor had been pleaded with enough particularity to withstand the motion to dismiss, and that the court could not say as a matter of law that accusing plaintiff of malingering and engaging in an unethical attempt to obtain benefits was not outrageous; however, plaintiff could not maintain an action for equitable estoppel, since equitable estoppel was a defense. *Weaver v. New England Mut. Life Ins. Co.*, 52 F.Supp.2d 127, 132–133, 133, 134.

**D.Md.1999.** Com. (f) quot. in sup. Franchisees sued franchisor for, inter alia, fraud, alleging that defendant misrepresented the initial investment costs associated with opening several bagel shops. Denying defendant's motion for summary judgment on this count, the court held, in part, that material factual issues existed as to whether defendant provided plaintiffs with the most reliable projected start-up costs or the latest available data, as promised in the franchise agreement. *Motor City Bagels, L.L.C. v. American Bagel Co.*, 50 F.Supp.2d 460, 473.

**D.Md.2002.** Com. (f) quot. in case cit. in disc. Mail-order bride sued marriage bureau and its founder for fraud, violation of the Consumer Protection Act, misappropriation of likeness, and negligence, after she learned that, contrary to what founder had told her, she would not be deported or face financial ruin if she left her abusive husband. Denying in part and granting in part founder's motion to dismiss fraud claim, the court determined that founder breached her statutory duty to disclose accurate information about immigration laws to plaintiff. Most of founder's statements were not actionable, however, because they were expressions of opinion, not statements of an existing or past fact, even though founder implied that she knew of nothing that would make improbable her various predictions and promises to plaintiff about her marriage. *Fox v. Encounters International*, 318 F.Supp.2d 279, 285.

**D.Md.Bkrtcy.Ct.1999.** Quot. in case quot. in disc. Purchasers of custom-built home sought determination that builder's debt to them was nondischargeable as one arising from fraud or defalcation while acting in a fiduciary capacity. Dismissing the complaint, the court held, in part, that purchasers had failed to establish that builder made representations with the intention of deceiving them, or that their reliance on builder's statements was justifiable. Furthermore, absent an express trust relationship between the parties, the court could not say that builder was purchasers' fiduciary. *In re Heilman*, 241 B.R. 137, 149–150.

**D.Md.Bkrtcy.Ct.2005.** Adopted in case cit. in disc. Mortgage lender filed an adversary complaint against Chapter 7 debtor, seeking, in part, a determination that deficiencies on three loans to debtor were nondischargeable based on misrepresentations made by debtor on loan applications and other settlement papers about her income, assets, and money paid by

her at closing. Denying plaintiff's motion for partial summary judgment, this court held, *inter alia*, that genuine issues of material fact existed as to whether plaintiff, which was in the business of reviewing loan applications, settlement statements, and other loan documents on a regular basis, justifiably relied on debtor's representations made in her loan papers. *In re Koep*, 334 B.R. 364, 372.

**D.Md.Bkrtcy.Ct.2007.** *Cit. in case cit. in ftm. (general cite).* Seller of printing press brought an adversary proceeding against Chapter 7 debtor whose corporation was involved in brokering the sales transaction, alleging that debtor's misrepresentations that he continued to hold purchaser's deposit that was owed to plaintiff, when, in fact, debtor was well aware that the funds had been spent, established the nondischargeability of the debt. Entering judgment for plaintiff, this court held, *inter alia*, that, where, as here, debtor made an express misrepresentation that plaintiff relied on to its detriment, debtor's subjective belief that he could sell other assets and pay plaintiff was no defense; instead, whether a debtor had a subjective intention to repay was germane in, for instance, credit-card cases, where the debtor's representation of performance was implied. *In re Moore*, 365 B.R. 589, 606.

**D.Mass.1998.** *Com. (b) cit. in sup.* Credit card issuer brought an adversary proceeding to except from discharge on the basis of fraud debtor's credit card debt. Affirming the bankruptcy court's entry of judgment for debtor, this court held, *inter alia*, that, under the theory that a credit card transaction was a unilateral contract pursuant to which a cardholder promised to repay the debt, it was clear that debtor made a representation to repay the cash advances when he took them. Plaintiff, however, failed to prove that debtor committed actual fraud, since there was no evidence that debtor did not intend to repay the cash advances at the time he obtained them. *AT & T Universal Card Services Corp. v. Searle*, 223 B.R. 384, 389.

**D.Mass.2008.** *Cit. in disc.* Consumers and third-party payors brought proposed nationwide class action against pharmaceutical manufacturers under the unfair and deceptive trade practices acts (UDTPAs) of 39 jurisdictions, alleging that manufacturers caused them to overpay for certain prescription drugs. This court granted in part plaintiffs' motion for class certification but rejected their proposed use of a broad "intent to deceive" jury instruction derived from Restatement Second of Torts § 525 to find a common denominator for the various UDTPAs and to address the manageability problems created by certification under multiple state laws. The court reasoned that the use of amalgamated instructions would violate the due-process rights of absent class members who resided in states whose UDTPAs had less stringent requirements for recovery. *In re Pharmaceutical Industry Average Wholesale Price Litigation*, 252 F.R.D. 83, 93.

**D.Mass.2009.** *Quot. in sup.* In multidistrict litigation, over 100 plaintiffs sued manufacturers of epilepsy drug, asserting, among other things, that defendants, in their national marketing campaign, fraudulently failed to disclose that the drug could be associated with psychobiologic events including depression and suicidality. This court denied defendants' motion to dismiss 12 pilot plaintiffs' fraudulent-concealment claims as duplicative of their failure-to-warn claims. While the court recognized that in some circumstances and under some state laws, courts had concluded that failure-to-warn and fraudulent-concealment claims were du-

plicative, it noted that, in contrast to failure-to-warn claims, claims based on fraudulent concealment or misrepresentation required scienter. Here, plaintiffs adequately alleged that defendants intentionally withheld material information about the side effects of the drug from both consumers and their prescribing physicians, with the intent to deceive. In re Neurontin Marketing, Sales Practices and Products Liability Litigation, 618 F.Supp.2d 96, 108.

**D.Mass.2010.** Quot. in sup. Two recipients of artificial hip replacements sued hips' manufacturer, alleging that, while they had not experienced an actual failure or malfunction, the relatively high rate of failure of the hips placed them and members of a proposed class at serious risk of future harm. Granting defendant's motion to dismiss, this court held, among other things, that plaintiffs failed to adequately allege fraud; while plaintiffs claimed that defendant knew of the alleged design defect for at least a year before the first hip was sold, and intentionally concealed it, they attached contradictory exhibits to their complaint (demonstrating defendant's disclosure of testing results suggesting problems with the hips), and thus seller's alleged misrepresentations, as pled, lacked the capacity to mislead consumers, acting reasonably under the circumstances, to act differently from the way they otherwise would have acted. *Watkins v. Omni Life Science, Inc.*, 692 F.Supp.2d 170, 177.

**D.Mass.Bkrcty.Ct.2000.** Com. (b) cit. in disc. Credit card company sought determination that a debt resulting from debtor's use of his card was nondischargeable for fraud. This court entered judgment for debtor, holding, inter alia, that, although use of the card constituted a representation to pay, creditor failed to show debtor's intent to deceive. In re Dietzel, 245 B.R. 747, 753.

**E.D.Mo.Bkrcty.Ct.2010.** Com. (b) quot. in case quot. in sup. Investors brought adversary proceeding against Chapter 11 debtor, alleging that they lost money in an investment scam perpetrated by debtor and others, and seeking a determination that debtor's debt to plaintiffs for those losses was nondischargeable as one obtained by fraudulent misrepresentation. After a bench trial, this court found in favor of plaintiffs. The court rejected debtor's argument that he did nothing more than make promises or predictions regarding how independent escrow agents would be handling plaintiffs' money if they chose to invest, pointing out that, in addition to fraudulently misrepresenting his investment company's past successes in the investment business, debtor failed to advise plaintiffs of company's past failed investments and failed to inform plaintiffs that he had no experience with high-yield investments. In re Reuter, 427 B.R. 727, 744.

**W.D.Mo.Bkrcty.Ct.1999.** Com. (b) quot. in case quot. in disc. Lenders brought adversary proceeding to except debt from discharge. The court held, inter alia, that loan obligation of debtors, who had proceeded to close the loan transaction with the knowledge that they were going to file for bankruptcy relief, was nondischargeable as debt for money obtained by "false pretenses, a false representation, or actual fraud." In re Oligschlaeger, 239 B.R. 553, 556.

**D.N.H.Bkrcty.Ct.2004.** Cit. in disc. Creditor brought an adversary complaint against Chapter 7 debtor, seeking a determination that the debt, which had been secured by shares of stock, was excepted from discharge as one for money obtained by debtor's false representa-

tion that she intended to pay off the loan by selling to third parties some of the stock shares, the certificate for which plaintiff had returned to debtor, and that, if the deal fell through, she would return sufficient shares to creditor as security for the loan. Denying the complaint, the court held, *inter alia*, that plaintiff failed to prove that debtor made the representation with fraudulent intent, that is, the intent not to perform. *In re Michel*, 304 B.R. 33, 40.

**D.N.J.2006.** *Cit. in case cit. in fn.* Investors in company brought securities-fraud class action under the Securities Exchange Act against company and its officers, alleging that defendants defrauded them by artificially inflating the value of the company's stock through false and misleading statements disseminated into the investment community. This court dismissed plaintiffs' complaint without prejudice to replead, holding that plaintiffs had failed to assert any facts to prove the loss-causation element of their 10b-5 claim, *i.e.*, that disclosure of the truth about defendants' statements was the cause of the loss in value of their stock. The court noted that the loss-causation element in a federal securities action derived from the standard common-law fraud rule that if no injury was occasioned by a lie, it was not actionable. *In re Intelligroup Securities Litigation*, 468 F.Supp.2d 670, 682.

**D.N.J.2007.** *Cit. in fn.* Prospective purchaser of corporation sued seller for, in part, intentional misrepresentation, alleging that, after seller terminated negotiations for the acquisition, representatives of seller agreed to pay plaintiff a certain amount of money in consideration for, among other things, plaintiff's promise to consider a future resumption of negotiations, but such payment was never made, nor were negotiations resumed. Granting in part seller's motion to dismiss, this court held, *inter alia*, that, because plaintiff alleged no facts that could reasonably support a conclusion that seller made any statements knowing that they were false, it failed to properly assert the scienter element required for this claim. *Commerce Bancorp, Inc. v. BK Intern. Ins. Brokers, Ltd.*, 490 F.Supp.2d 556, 563.

**D.N.J.Bkrcty.Ct.1999.** *Quot. in disc.* Lawyer sued his former client, a Chapter 7 debtor, to recover his costs of defending himself against a claim by a third party accusing the lawyer of mishandling the third party's funds. The lawyer asserted that debtor defrauded him, thereby exposing him to liability to the third party. This court held that debtor was entitled to a judgment that his obligations to the lawyer were dischargeable, because the lawyer did not prove by a preponderance of the evidence that debtor made any fraudulent misrepresentations. *In re DeBaggis*, 247 B.R. 383, 389.

**D.N.J.Bkrcty.Ct.2002.** *Cit. in fn.* Matrimonial attorney brought an adversary proceeding to except from discharge on the basis of false pretenses or false representation his attorney's fees that had accrued over the period of debtor's divorce proceeding, alleging that debtor stated that he would not seek a discharge in any future bankruptcy of attorney's claim for fees. Granting summary judgment for debtor, the court charged plaintiff with knowledge of the invalidity of a prepetition waiver of discharge, and held that plaintiff's reliance on debtor's supposed waiver of discharge was thus not justifiable. *In re Kroen*, 280 B.R. 347, 351.

**D.N.J.Bkrcty.Ct.2004.** *Com. (b) quot. in disc.* Former patient brought an adversary proceeding against debtor-surgeon to except from discharge debt arising from patient's fraud claim against debtor for misrepresentations he made regarding the quality of the cosmetic

surgery and medical care available at debtor's clinic in the Dominican Republic. Entering judgment for plaintiff, this court held, *inter alia*, that the debt due plaintiff was excepted from discharge as one obtained by false pretenses, false representations, and actual fraud. The court said that debtor had obtained money from plaintiff through material misrepresentations that she was a candidate for the surgery, that the surgeons and techniques he would provide were up to American standards, and that he was a qualified plastic surgeon; he failed to disclose that the offshore surgeons were not covered by malpractice insurance. In *re Santos*, 304 B.R. 639, 661.

**E.D.N.Y.2002.** Quot. in disc. Consumers who suffered smoking-related illnesses sued cigarette manufacturers for fraud and conspiracy, *inter alia*, and sought class certification. This court certified the class subject to modifications. In its memorandum, the court determined that plaintiffs' claims were not preempted under the Federal Cigarette Labeling and Advertising Act, but were governed by New York law. The court set forth the elements of substantive New York law concerning fraudulent misrepresentation. In *re Simon II Litigation*, 211 F.R.D. 86, 138–139.

**E.D.N.Y.Bkrcty.Ct.2004.** Quot. in sup. Creditors brought adversary proceeding against debtor to have debts deemed nondischargeable, alleging that debtor and his associate made misrepresentations to induce plaintiffs to enter into two leases and incur construction costs. This court entered judgment for plaintiffs, holding, *inter alia*, that plaintiffs had established by a preponderance of the evidence that they were fraudulently induced by debtor and his associate to enter into the leases and to make substantial alterations to each of the premises. Although associate made a majority of the false representations, debtor knew that associate was acting on behalf of their companies. Debtor either knew or should have known that associate was making false representations to plaintiffs, and, therefore, associate's representations were imputed to debtor. In *re Zaffron*, 303 B.R. 563, 570.

**S.D.N.Y.2006.** Quot. in case quot. in ftn., cit. in cases cit. in ftn. Investors in biotech corporation's securities sued corporation, certain officers and directors, and an outside consultant, arguing that defendants artificially inflated the stock price through a series of misrepresentations or omissions, and fraudulently induced plaintiffs to retain ownership of, or “hold,” shares that they bought prior to the alleged misrepresentations or omissions. Granting defendants' motion to dismiss, this court applied the substantive law of each plaintiff's resident state, and predicted that, in the absence, as in this case, of any allegations by plaintiffs that defendants made misrepresentations directly to them, South Carolina would bar plaintiffs' so-called “holder” claims; if, however, there were allegations of direct misstatements and reliance, then South Carolina would permit such claims. *Hunt v. Enzo Biochem, Inc.*, 471 F.Supp.2d 390, 413.

**S.D.N.Y. Bkrcty.Ct.1999.** Cit. in headnotes, quot. in disc., cit. in ftn. Judgment creditor/attorney sought determination that debtor/former client's unpaid legal fees and other debts were nondischargeable as debts arising from fraud or willful and malicious conduct. Debtor moved to dismiss. Granting the motion in part and denying it in part, the court held that, to the extent creditor alleged that debtor made misrepresentations that he knew, at the time he made them, were false, and intended to induce creditor's reliance, those allegations with-

stood the motion to dismiss; however, the allegations that were properly dismissed for failure to satisfy the elements of 11 U.S.C. § 523(a)(2)(B) could not serve as a basis for recovery under § 523(a)(6). *In re Alicea*, 230 B.R. 492, 500.

**S.D.N.Y.Bkrcty.Ct.2000.** Cit. in disc. Creditor moved to vacate a judgment wherein the court declined to find a debt nondischargeable under 11 U.S.C. § 523(a)(2)(A). Denying the motion, the court held, in part, that even if creditor had established that counsel's excusable neglect justified vacating the judgment, creditor could not rely on an earlier out-of-state default judgment against debtor in order to show fraud, since the doctrine of collateral estoppel did not apply to default judgments, and because proof of debtor's actual intent to deceive was lacking. *In re Morris*, 252 B.R. 41, 48.

**S.D.N.Y.Bkrcty.Ct.2007.** Cit. in sup. Psychiatric expert brought an adversary proceeding against Chapter 7 debtor, seeking a determination that his fees for forensic-psychiatric-consultation and expert-witness services performed during debtor's child-custody proceeding were nondischargeable as debt for services obtained by actual fraud. The court entered an order that the fees were dischargeable, holding, inter alia, that the debt was not created as a result of a fraudulent statement, and thus was not exempted from discharge based on "actual fraud"; although debtor falsely represented that plaintiff would be paid from a family trust, which, in fact, was nonexistent, and debtor made the representation for the sole purpose of inducing plaintiff to perform the services at issue, plaintiff failed to establish that he justifiably relied on the misrepresentation, since debtor had previously told him that he had no funds to pay for the services. *In re Chase*, 372 B.R. 125, 130.

**S.D.N.Y.Bkrcty.Ct.2007.** Cit. in sup. Attorney brought an adversary proceeding against Chapter 7 debtor, seeking a determination that his legal fees for services performed during debtor's state-court divorce and child-custody proceedings were nondischargeable as debt for services obtained by actual fraud. The court entered an order that prepetition fees were dischargeable, holding, inter alia, that the debt was not exempted from discharge based on "actual fraud," since there was no evidence that debtor made false statements with the intent to deceive and induce reliance when he represented to plaintiff that he would pay the fees. The court reasoned that debtor ultimately paid a portion of the fees, and the fact that he subsequently decided that he would not or could not pay the remainder was of no consequence to the question of debtor's intent when he made the statements; further, plaintiff did not establish that he justifiably relied on the statements. *In re Chase*, 372 B.R. 133, 139.

**S.D.N.Y.Bkrcty.Ct.2008.** Quot. in sup., cit. in case quot. in sup. Judgment creditors brought adversary proceeding against Chapter 7 debtor, seeking a declaration that their Florida state-court default judgment against debtor for fraud was nondischargeable. Granting summary judgment for plaintiffs, this court held, inter alia, that debtor was collaterally estopped from relitigating his liability for fraud in this action by the Florida judgment, because the elements of a claim for fraud under the Bankruptcy Code were identical to the elements of a claim for fraud under Florida common law; contrary to debtor's contention, a plaintiff had to show both actual reliance and justifiable reliance in order to support a claim for fraud under both the Bankruptcy Code and Florida common law. *In re Shiver*, 396 B.R. 110, 127.

**W.D.N.Y.2001.** Com. (b) cit. in case cit. in disc. Credit-card issuer brought an adversary proceeding against debtor, seeking to hold debtor's credit-card debt nondischargeable as debt incurred by false pretenses, false representation, or actual fraud. Reversing the bankruptcy court's grant of summary judgment for debtor and remanding, this court held that a representation of intent to pay was made by debtor on card use, not on card issuance, and that plaintiff had to prove that, at the time of credit-card use, debtor knew that he did not intend to repay the debt, that plaintiff actually and justifiably relied on debtor's alleged misrepresentation, and that as a result it suffered a loss. The court said that plaintiff was entitled to discovery and a fair opportunity to show that debtor acted with fraudulent intent. *Bank of America v. Jarczyk*, 268 B.R. 17, 21.

**W.D.N.C.Bkrcty.Ct.2009.** Quot. in sup. Former distributor for Chapter 7 debtor's apparel business brought an adversary proceeding against debtor, seeking a determination that a judgment debt arising from a state-court default judgment against debtor was nondischargeable as the product of fraud and/or a willful or malicious injury. Granting in part and denying in part plaintiff's motion for summary judgment, this court held, inter alia, that, while debtor's fraud in presenting a forged document during discovery constituted actual fraud for purposes of nondischargeability, the state court's determination that debtor's apparel business breached its agreement with plaintiff with the clear implication being that the breach was intentional was by itself insufficient to create a nondischargeable debt for actual fraud, and plaintiff's theory that debtor committed a fraud by entering into a contract that he did not intend for his business to honor also did not support nondischargeability. In re *Mileski*, 416 B.R. 210, 224.

**E.D.Pa.2001.** Quot. in disc. Trustee of debtor husband's bankruptcy estate appealed from bankruptcy court's order determining that, while debtor fraudulently transferred over \$1.5 million to his wife, trustee was not entitled to joint and several judgment against debtor and wife, because wife was not active participant in fraudulent transfers. This court vacated in part and remanded, holding, inter alia, that bankruptcy court's conclusion that trustee was not entitled to joint and several judgment was an abuse of discretion. The court stated that this case was analogous to a tort case, and that debtor and wife were joint tortfeasors, since they were parties whose actions caused a single injury. In re *Blatstein*, 260 B.R. 698, 720.

**E.D.Pa.2001.** Adopted in case quot. in sup., com. (c) quot. in ftn., com. (d) cit. in ftn. Investors brought action for fraud against licensed consumer discount brokerage firm, its principals, and depository bank, alleging that principals diverted investment funds. Firm and bank filed cross-claims of fraudulent misrepresentation against one another. Denying parties' cross-motions to dismiss cross-claims, this court held, inter alia, that firm, in alleging that bank falsely represented that checks would not be drawn on firm's account without two authorized signatures, pled "false representation of an existing fact" element of fraud with sufficient particularity to sustain count of fraudulent misrepresentation. *Jairrett v. First Montauk Securities Corp.*, 203 F.R.D. 181, 185.

**E.D.Pa.2010.** Cit. in sup. Editor of an academic journal brought defamation and other claims against professor who sought authorship credit for an article that was published in the journal; professor counterclaimed, alleging that editor deliberately misrepresented that pro-

fessor would receive authorship credit if he made sufficient contributions to the article. This court granted editor's motion to dismiss professor's counterclaim for intentional misrepresentation, holding that it was duplicative of his counterclaim for fraud. The court noted that Pennsylvania courts did not distinguish between causes of action for fraud and intentional misrepresentation, and that professor's intentional misrepresentation counterclaim made essentially the same allegations as his fraud claim. *Giordano v. Claudio*, 714 F.Supp.2d 508, 518.

**M.D.Pa.**1998. Cit. in case quot. in disc., cit. in sup. Credit card issuer brought an adversary proceeding to except from discharge the obligations of a Chapter 7 debtor for cash advances he obtained with his credit card in order to gamble at a casino. Entering judgment for debtor, the court held that plaintiff failed to carry its burden of establishing that debtor obtained property through false pretenses. The court refused to bar the discharge of loans incurred to gamble when the winnings were the only likely source of repayment, absent evidence that, at the time debtor obtained the cash advances, he did not intend to repay them. In re *Scocozzo*, 220 B.R. 850, 852.

**M.D.Pa.Bkrcty.Ct.**2001. Cit. in sup. Chapter 7 trustee of insolvent estate brought suit, requesting bankruptcy court to disgorge a sum of money paid to the IRS pursuant to a settlement agreement reached during a Chapter 11 reorganization proceeding. Trustee alleged that the parties to settlement agreement intentionally made false representations to induce payment of prepetition tax debt to detriment of other creditors, and that debtor in possession (DIP) violated its fiduciary duty to its creditors. This court entered judgment for IRS, holding, inter alia, that trustee did not prove that DIP fraudulently misrepresented the settlement agreement, where other creditors had adequate notice of the stipulated settlement agreement, and there was no evidence that DIP and IRS intended to deceive other creditors. In re *Shop N' Go Partnership*, 261 B.R. 810, 813.

**M.D.Pa.Bkrcty.Ct.**2002. Cit. in sup. Bank that had advanced to Chapter 7 debtor's business a line of credit secured by accounts receivable and personally guaranteed by debtor brought an adversary proceeding to except debt from discharge as one obtained by false pretenses, false representation, or actual fraud. Entering judgment for bank, the court found that debtor's failure to fully disclose to bank the contingent nature of the so-called receivables went beyond mere negligent conduct and showed a reckless disregard for the real value of the customer orders, and thus it held the debt nondischargeable. In re *LaFratte*, 281 B.R. 575, 577.

**M.D.Pa.Bkrcty.Ct.**2006. Quot. in sup., cit. in case cit. in sup. Homebuyers who had filed a lawsuit in state court against debtor sellers, seeking, among other things, rescission of the prepetition contract of sale, brought an adversary complaint against debtors, objecting to the dischargeability of the debt on the ground that it was obtained by a false representation. Sustaining the objection as to debtor husband, this court held that plaintiffs proved all of the requisite elements of the tort of fraudulent misrepresentation against debtor. Stating that "fraud" for purposes of nondischargeability was synonymous with the "fraud" defined in the general common law of torts, the court concluded that debtor made a misrepresentation of fact as to the frequency of draining of the septic system's holding tank, a pivotal issue in the

conclusion of the sale, and that plaintiffs were deliberately misled by debtor on this issue. In re Dart, 371 B.R. 75, 78, 79.

**W.D.Pa.2003.** Cit. in case cit. in disc. Administrator of estate of deceased smoker sued cigarette manufacturer for, in part, false representation, alleging that decedent developed lung cancer as a result of smoking cigarettes manufactured by defendant. Granting defendant's motion for summary judgment, the court held, inter alia, that plaintiff's false-representation claim failed because there was no evidence that defendant made any factual misrepresentation that decedent saw or read and relied on in his decision to begin smoking or to continue smoking defendant's cigarettes. Jeter ex rel. Estate of Smith v. Brown & Williamson Tobacco Corp., 294 F.Supp.2d 681, 686, affirmed on other grounds 113 Fed.Appx. 465 (3rd Cir.2004).

**S.D.Tex.Bkrcty.Ct.2007.** Cit. in disc. Creditor filed an objection to debtor's claim of the homestead exemption under Texas state law, seeking, in part, to apply a provision of the Bankruptcy Abuse Prevention and Consumer Protection Act that limited the exemption if debtor owed a debt arising from fraud, deceit, or manipulation in a fiduciary capacity. This court sustained the objection under this provision, holding, in part, that debtor's homestead was property of the bankruptcy estate subject to debtor's interest in the first \$125,000; debtor's receipt of a post-divorce tax-refund check, to which debtor's ex-wife was entitled to half, created a fiduciary obligation toward ex-wife, and debtor committed fraud, deceit, or manipulation while acting in that fiduciary capacity by intentionally concealing the existence of the tax refund from her in violation of the divorce decree. In re Presto, 376 B.R. 554, 594.

**W.D.Tex.Bkrcty.Ct.2007.** Quot. in ftn. in sup., com. (b) quot. in ftn. in sup. Plaintiffs who had brought suit in state court alleging that Chapter 7 debtor fraudulently induced them to enter into certain contracts filed an adversary complaint against debtor, seeking a determination that the debt was nondischargeable on the basis of fraud. Denying defendant's motion to dismiss the adversary complaint, this court held that plaintiffs' allegation of fraudulent intent in their state-court complaint was sufficiently particular to support an action for nondischargeability based on fraud. The court noted that plaintiffs still had the specific burden to establish with competent evidence all of the elements of fraud, including proof of fraudulent intent. In re Hayes, 372 B.R. 287, 288.

**D.Utah Bkrcty.Ct.1999.** Cit. and quot. in disc. Debtor provided a pickup truck as collateral for a debt consolidation loan. Creditor sued seeking a judgment that the debt was nondischargeable. This court held that the debtor willfully and maliciously injured the creditor or its property so that the amount owed to creditor was nondischargeable. Debtor's sale of all the parts of the truck interfered with creditor's right to control its security interest in the truck. In re Gagle, 230 B.R. 174, 178.

**D.Utah Bkrcty.Ct.2002.** Cit. and quot. in disc., cit. in ftn., com. (a) cit. and quot. in disc. Creditor brought an adversary proceeding to except judgment debt from discharge as one for money obtained by false pretenses, false representation, or actual fraud. Granting summary judgment for creditor, the court held, inter alia, that the debt was nondischargeable because

debtor fraudulently misrepresented, for the purpose of inducing creditor to invest in his recycling facility, that creditor's investment would be used to pay off all of the facility's debt obligations, creditor suffered harm in the form of a monetary loss, and creditor justifiably relied on debtor's misrepresentation. In re Chivers, 275 B.R. 606, 618–620, 622–625.

**D.Utah Bkrcty.Ct.2003.** Cit. in ftn. Retirement fund sued to have bankrupt debtor's debt declared nondischargeable, alleging that debtor solicited, received, and refused to account for fund's assets through false representations and material omissions. This court denied debtor's motion to dismiss, holding that debt was nondischargeable under Bankruptcy Code. Debtor's role as principal of the company handling fund's investments placed him in a position of trust and confidence that heightened his duty of disclosure to fund. Debtor made fraudulent misrepresentations to fund's trustee and omitted a significant amount of information that was material to trustee's investment decisions on fund's behalf. Trustee justifiably relied on debtor's representations and omissions in making his investment decisions, and fund was harmed as a result. In re Perkins, 298 B.R. 778, 791.

**D.Vt.2001.** Cit. in disc. Landlord that objected to the volume of the music played by tenant retailer in its store sued tenant for damages and termination of the lease. Tenant counterclaimed for, in part, fraudulent and negligent misrepresentation. Granting landlord summary judgment on tenant's fraudulent-misrepresentation counterclaim, the court held that tenant failed to prove that it justifiably relied on a general statement of opinion from landlord that landlord's building would be an ideal location for one of tenant's stores. Howard Opera House Associates v. Urban Outfitters, Inc., 166 F.Supp.2d 917, 927, affirmed 322 F.3d 125 (2d Cir.2003).

**N.D.W.Va.Bkrcty.Ct.2009.** Quot. in sup. Debtor's mother sought to have an alleged debt to her of over \$264,000 excepted from debtor's Chapter 7 discharge, claiming that he fraudulently took this money from her personal checking account to fund, among other things, his illegal drug use, when she had only granted him authority to pay for her household and living expenses and to make other expressly authorized transactions. Denying mother's motion for summary judgment, this court held, inter alia, that mother failed to establish that debtor made any misrepresentation to her in order to obtain the authority to write checks from her bank account; while mother alleged that debtor exceeded the authority granted him, she did not allege that she was tricked into giving him money through a fraudulent misrepresentation, and the record showed that debtor duly paid her household and living expenses, and wrote other checks under her express authorization. In re Raeder, 399 B.R. 432, 438. See case below.

**N.D.W.Va.Bkrcty.Ct.2009.** Quot. in sup. Chapter 7 debtor's mother, who had given debtor the authority to sign checks to be drawn on her checking account to pay for her expenses and other expressly authorized transactions, brought adversary proceeding against debtor, alleging that debtor had exceeded his authority in withdrawing money from her account for his personal use and thus his alleged debt to her was nondischargeable as one for fraud. Dismissing the complaint, this court held, inter alia, that the record did not demonstrate that debtor made a misrepresentation to plaintiff in order to obtain the authority to write checks from her bank account; the evidence showed to the contrary that plaintiff intended to make

gifts to debtor, and that allowing him use of her bank account was the method by which she effectuated those gifts. *In re Raeder*, 409 B.R. 373, 380. See case above.

**E.D.Wis.**1999. Cit. in disc. District court denied a motion to dismiss plaintiff's claim of fraud in the inducement, holding that such claims as a rule were not barred by Wisconsin's economic-loss doctrine. This court denied defendants' motion for reconsideration, holding, *inter alia*, that to intentional lies that induced the signing of a contract, the economic-loss doctrine should not, and did not, apply. *Budgetel Inns, Inc. v. Micros Systems, Inc.*, 34 F.Supp.2d 720, 724.

**E.D.Wis.Bkrcty.Ct.**2004. Cit. in disc. Subcontractor brought adversary proceeding to have arbitration award declared nondischargeable in debtor's bankruptcy. Finding in favor of debtor, the court held that debt was dischargeable because, *inter alia*, subcontractor failed to show that debtor made false representations with the intent to induce subcontractor into relying on those misrepresentations and that those misrepresentations thereby caused subcontractor a pecuniary loss. *In re Bowles*, 318 B.R. 129, 144.

**W.D.Wis.Bkrcty.Ct.**2010. Com. (f) quot. in sup. Attorney brought an adversary proceeding against Chapter 7 debtor, who was a former client, seeking a determination that debtor's unpaid attorney's fees were nondischargeable on grounds that debtor lied to him and fraudulently induced him to continue representing debtor in a prior state-court action by misrepresenting that he would not file for bankruptcy. This court granted judgment in favor of debtor, holding, among other things, that, while a promise of future performance or intention was actionable as fraud if at the time the statement was made the promisor never actually intended to honor it, here, there was no showing of fraudulent intent or that debtor obtained legal services from plaintiff through a knowing misrepresentation or fraud. *In re Sasse*, 438 B.R. 631, 647.

**Alaska**, 1998. Cit. in case quot. in ftn. Timber sale applicants sued the state and two state forestry officials for breach of contract, tortious misrepresentation, promissory estoppel, and unjust enrichment, alleging that the state breached its promise to sell timber. Trial court dismissed plaintiffs' claims. This court affirmed, holding, *inter alia*, that neither the state nor one forester was liable for fraudulently inducing one plaintiff to finish a draft of a forest land-use plan. Plaintiff failed to show reliance, because he had already submitted his two draft reports, and he submitted the final report six days later. *Brady v. State*, 965 P.2d 1, 15, cert. denied 526 U.S. 1026, 119 S.Ct. 1268, 143 L.Ed.2d 363 (1999).

**Alaska**, 1999. Cit. in headnote and disc. Insured sued insurer, and an arbitrator awarded the policy limits on the uninsured motorist coverage. In insured's subsequent lawsuit alleging bad faith and intentional misrepresentation, trial court granted insurer's motion for a directed verdict on the issue of emotional-distress damages, holding that there was no evidence of severe emotional distress. This court affirmed, holding, *inter alia*, that the trial court properly granted a directed verdict on plaintiff's claim for emotional-distress damages. The court determined that the trial court properly imposed a threshold severity requirement. *Nelson v. Progressive Corp.*, 976 P.2d 859, 867.

**Alaska**, 2001. Cit. in ftn. Real estate agent appealed real estate commission's finding that he committed promissory fraud in selling commercial real estate to purchaser by promising to personally pay for roof repairs and then incurring over \$15,000 in repairs in purchaser's name; agent also appealed commission's award of \$10,000 to purchaser. Affirming, this court held that substantial evidence supported commission's finding that agent committed promissory fraud, and that award to purchaser was supported by the evidence. *Yoon v. Alaska Real Estate Comm.*, 17 P.3d 779, 782.

**Alaska**, 2006. Cit. in ftn. Car dealer sued manufacturer for, in part, fraudulent misrepresentation, after manufacturer opened a competing dealership nearby. The trial court entered judgment for manufacturer. Vacating and remanding, this court held, inter alia, that the trial court's failure to make sufficient findings of fact appropriate to the relevant legal test was an error of law. Manufacturer's oral statements that it was not planning to add a dealership, while they may have been technically true, could have been misleading to dealer; whether manufacturer made such statements fraudulently for the purpose of inducing dealer to act in reliance, and whether any reliance by dealer was justifiable, required additional exploration. *Anchorage Chrysler Center, Inc. v. DaimlerChrysler Corp.*, 129 P.3d 905, 914, 915.

**Alaska**, 2006. Quot. in disc., cit. in ftn., cit. in case cit. in ftn. Prospective buyer who withdrew her offer for a home after learning that seller had accepted it only as a back-up offer brought fraudulent-misrepresentation claim against the home's listing agent, alleging that agent had led her to believe that the home was immediately and unconditionally available. The state's real-estate commission ruled in buyer's favor and imposed sanctions against agent, and the trial court affirmed. This court affirmed, holding that there was substantial evidence that agent misrepresented the home's availability by inaccurately listing the home as an "active listing," prematurely telling buyer that the originally accepted offer had been rescinded, and incorrectly assuring buyer that her own offer had been accepted; there was also substantial evidence that the misrepresentations were fraudulent, because agent knew the representations to be untrue or unfounded when he made them yet intended or expected that buyer would rely on them. *Lightle v. State, Real Estate Com'n*, 146 P.3d 980, 983.

**Alaska**, 2008. Cit. in ftn., cit. in case cit. in ftn. Injured employee asked the state workers' compensation board to set aside a compromise-and-release agreement he had signed with his employer to settle his workers' compensation claim, alleging that employer's insurer misled him as to the effect of the agreement and the benefits available to him. The trial court affirmed the board's refusal to set aside the agreement. Reversing and remanding, this court held, inter alia, that the board applied an incorrect legal standard when it evaluated employee's claim by reviewing only whether employer's insurer and its adjuster made a fraudulent misrepresentation to employee, because, for purposes of avoiding or reforming a contract, it was not required that a misrepresentation be fraudulent, only material; here, fact issues remained as to whether employee, who was unrepresented at the time, justifiably relied on a number of potentially material misrepresentations in entering the agreement. *Seybert v. Cominco Alaska Exploration*, 182 P.3d 1079, 1094.

**Alaska**, 2009. Cit. in case quot. in sup. and cit. in ftn. Automobile dealer brought various claims against automobile manufacturer in connection with an agreement in which dealer

agreed to modify its existing facility in exchange for the right to open a second facility to sell manufacturer's vehicles. On remand, the trial court entered judgment for defendant. Affirming as to plaintiff's claims for fraudulent misrepresentation, this court held, *inter alia*, that, while the trial court did not clearly err in finding that plaintiff suffered no consequential losses as a result of defendant's fraudulent misrepresentations, it erred in failing to award at least nominal damages for the expenses dealer incurred in switching its facility's floor logos. *Anchorage Chrysler Center, Inc. v. DaimlerChrysler Motors Corp.*, 221 P.3d 977, 988, 992.

**Ariz.**2002. Quot. in *ftn.* Bank that provided interim financing for construction project sought declaratory judgment that it performed its contractual obligations in financing agreement between bank, permanent lender, and borrower. Permanent lender counterclaimed, charging bank with fraudulent concealment, among other claims. Trial court granted bank summary judgment, holding that bank owed no duty to permanent lender to disclose information about borrower's financial condition. Appellate court affirmed. This court reversed in part and remanded, holding, *inter alia*, that fact issues existed as to fraudulent-concealment claim, since there were reasonable inferences from which jury could find that bank had knowledge of false information being given permanent lender, and bank took measures intended to prevent permanent lender from learning the truth. *Wells Fargo Bank v. Arizona Laborers, Teamsters and Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 496, 38 P.3d 12, 34.

**Cal.**2003. Quot. in *disc.* Stockholder brought putative class action against corporation and three of its officers for fraud or negligent misrepresentation, alleging that fraudulent quarterly report that overreported earnings and profits wrongfully induced him to hold stock instead of selling it. The trial court entered judgment for defendants, but the court of appeals reversed. Reversing, this court held that plaintiff failed to sufficiently plead the element of actual reliance on defendants' alleged misrepresentations to state a holder's action for fraud or negligent reliance under California law. *Small v. Fritz Companies, Inc.*, 30 Cal.4th 167, 174, 132 Cal.Rptr.2d 490, 494, 65 P.3d 1255, 1259.

**Cal.App.**2000. Quot. in *disc.* Shareholder brought a putative class action against corporation and three of its directors and officers for fraud and negligent misrepresentation, alleging that defendants made misrepresentations about the corporation's quarterly revenue and earnings that induced him and other similarly situated shareholders to continue holding shares that they otherwise would have sold. The trial court sustained a general demurrer. Reversing in part, this court held, *inter alia*, that, under the principle of forbearance, common law claims of fraud and negligent misrepresentation could be based on the decision of shareholders to retain or refrain from selling their shares after they had received material and misleading statements from the corporation. *Greenfield v. Fritz Companies, Inc.*, 82 Cal.App.4th 741, 753, 98 Cal.Rptr.2d 530, 539, review granted and opinion superseded 101 Cal.Rptr.2d 653, 12 P.3d 1068 (2000), reversed 30 Cal.4th 167, 132 Cal.Rptr.2d 490, 65 P.3d 1255 (2003). See case above.

**Cal.App.**2001. Quot. in *disc.* Business consumer sued telecommunications company for fraud and negligence after company gained control of consumer's toll-free service without

consumer's knowledge or permission. Trial court granted defendant judgment on the pleadings on the fraud claim and partial summary judgment on the negligence claim. Reversing and remanding, this court held, *inter alia*, that, while plaintiff could not state a claim for fraud based on affirmative misrepresentation where he was unaware of defendant's acquisition of his toll-free service, plaintiff did state a viable claim for fraudulent concealment. *Lovejoy v. AT&T Corp.*, 92 Cal.App.4th 85, 92, 111 Cal.Rptr.2d 711, 716.

**Del.Ch.**2006. Cit. in ftn. Private equity firm that bought a publishing company's stock sued private equity firm that sold the shares from its portfolio, seeking to rescind the contract based on the falsity of representations contained in the stock-purchase agreement. Granting in part and denying in part defendant's motion to dismiss, this court held that although the plain terms of the agreement's exclusive-remedy provision would limit plaintiff's remedy for its fraudulent-misrepresentation claim to a capped indemnity claim for damages, and would bar its claim for rescission, public policy invalidated the provision, so as to allow plaintiff to press its rescission claim, insofar as plaintiff proved that defendant intentionally misrepresented a fact within the agreement or knew that the publishing company had misrepresented such a fact. *Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1055.

**Del.Ch.**2009. Quot. in sup. Losing bidder in a bidding contest for the acquisition of a corporation brought a common-law fraud claim, *inter alia*, against successful bidder, alleging that defendant falsely stated in its Securities Exchange Act filings that it was acquiring the corporation's shares for investment purposes when in fact it was purchasing the shares to control or influence the corporation, and that plaintiff relied on defendant's disclosures in making decisions about how to proceed. Denying defendant's motion to dismiss plaintiff's common-law fraud claim, this court held that plaintiff alleged a reasonable basis from which it could be inferred that defendant intentionally made material false disclosures about its investment intent in a context where defendant expected plaintiff to review and rely on them and where plaintiff reasonably did so to its detriment. *NACCO Industries, Inc. v. Applica Inc.*, 997 A.2d 1, 29.

**D.C.App.**2008. Cit. in disc. Son whose mother died intestate petitioned to rescind his assignment of his property rights in his mother's estate and to remove assignee as the personal representative of the estate. The trial court granted the petition. Affirming, this court held that, even if evidence that assignee knowingly made fraudulent misrepresentations that induced petitioner to agree to assign his property rights was not sufficiently clear and convincing to constitute fraud in the inducement, it was nonetheless sufficient to justify the rescission of the assignment. The court noted that, under the common law, the recipient of a fraudulent misrepresentation could recover monetary damages in tort, but only if he established all of the elements of common-law fraudulent misrepresentation. *In re Estate of McKenney*, 953 A.2d 336, 341.

**Ga.**2010.Cit. in sup. Debtors brought fraud and negligent-misrepresentation claims, *inter alia*, in bankruptcy court against brokerage firm and firm's financial analyst, alleging that defendants' misrepresentations induced plaintiffs to continue to hold certain securities, rather than sell them, and that the securities' subsequent decline in price caused plaintiffs to

lose nearly \$200 million. After the case was transferred to federal district court and consolidated with multidistrict securities litigation for pretrial purposes, the district court dismissed the complaint. The court of appeals certified questions of state law. Answering the questions, this court held, *inter alia*, that Georgia common law recognized both fraud and negligent-misrepresentation claims based on forbearance in the sale of publicly traded securities, subject to limitations that the alleged misrepresentations occurred through direct communication between the parties and that the plaintiffs specifically relied on the defendants' communications. *Holmes v. Grubman*, 286 Ga. 636, 691 S.E.2d 196, 198.

**Hawaii**, 2002. Quot. in *ftn. to conc. op.* Automobile shoppers brought fraud, tort, and contract claims and statutory consumer-protection claims against car dealership, alleging that they had traveled to defendant's lot in response to a misleading automobile-sale advertisement. The trial court granted defendant's motions for summary judgment and partial summary judgment. Vacating and remanding, this court held that the \$3–\$5 in gasoline that plaintiffs expended in responding to defendant's advertisement, if proved, satisfied the requirement of “substantial pecuniary loss” necessary to support a claim for relief grounded in fraud. The concurring opinion argued that the trial court's treatment of the term “substantial pecuniary loss” as establishing a threshold requiring substantial amounts of damages to prove the injury element of actions for fraud or deceit was incorrect. *Zanakis–Pico v. Cutter Dodge, Inc.*, 98 Hawai'i 309, 331, 47 P.3d 1222, 1244.

**Ill.App.**2009. Quot. in *conc. op.* Shareholders brought fraudulent-misrepresentation claim against accounting firm, alleging that shareholders retained their stock in reliance on accounting firm's fraudulent financial reports, and suffered pecuniary damage as a result of the fraud. Affirming the trial court's order dismissing the complaint, this court held that plaintiffs failed to adequately plead both reliance and damage and therefore failed to state a cause of action upon which relief could be granted. A concurring opinion agreed that plaintiffs failed to properly plead reliance, but argued that a cause of action could be stated in cases where a plaintiff was induced to refrain from selling stock, reasoning that inducing another to refrain from action through fraudulent misrepresentation was a sufficient ground to state a cause of action for fraud. *Dloogatch v. Brincat*, 396 Ill.App.3d 842, 336 Ill.Dec. 571, 920 N.E.2d 1161, 1172.

**Kan.App.**2008. Cit. in *sup.* Buyers of apartment buildings brought claims for intentional and negligent misrepresentation against seller, alleging that the buildings had serious leaking and moisture problems that existed before the sale. The trial court granted summary judgment for the seller. Affirming, this court held, *inter alia*, that buyers waived their right to rely on seller's representations in a disclosure statement as to the lack of any water-leakage problems in the buildings' basements, and relied instead on inspections conducted by their own structural engineer and mechanical inspector. The court reasoned that, although a claim for negligent misrepresentation had different elements than a claim for intentional misrepresentation, both torts required a plaintiff to have relied on a misrepresentation; here, buyers did not rely on any representations made by seller. *Katzenmeier v. Oppenlander*, 39 Kan.App.2d 259, 178 P.3d 66, 69–70.

**Ky.**2004. Cit. in *ftn.* General contractor sued construction manager of building renovation

for economic losses as a result of manager's negligent misrepresentation and supervision of the project. Trial court dismissed the claim, finding that manager owed a duty only to the building owner, and not the contractor. The court of appeals reversed and remanded, and this court affirmed, vacating the trial court's decision. The court held, inter alia, that manager had an independent duty to make accurate representations to contractor and could be liable for economic damages if contractor showed it suffered a loss as a result of justifiably relying on manager's negligent misrepresentations. *Presnell Construction Managers, Inc. v. EH Construction, LLC*, 134 S.W.3d 575, 580.

**Me.**2002. Cit. in disc. §§ 525–526. Owner of a parcel of property sued adjoining landowners for, in part, tortious interference with prospective economic advantage, alleging that defendants' interference with an easement delayed his plan to subdivide and develop his property. The trial court entered judgment on a jury verdict awarding plaintiff damages on the tortious-interference claim. Vacating in part and remanding, this court held, inter alia, that insufficient evidence existed to support a finding that defendants interfered through fraud or intimidation. *Rutland v. Mullen*, 798 A.2d 1104, 1111.

**Md.Spec.App.**2000. Cit. in case quot. in ftn. Former husband sued his ex-wife's domestic partner for, inter alia, intentional interference with parent/child relations and fraud. The trial court dismissed the complaint. Affirming, this court held, in part, that absent an allegation of enticement or abduction of the child from the custodial parent, plaintiff's assertions that defendant had engaged in a course of conduct designed to win the affections of his daughter were insufficient to sustain an action for intentional interference with the parent/child relation, and that plaintiff had failed to establish that he had been damaged as a result of defendant's alleged misrepresentations as to the nature of her relationship with plaintiff's ex-wife. *Lapides v. Trabbic*, 134 Md.App. 51, 758 A.2d 1114, 1123.

**Mass.**2003. Quot. in sup. Shareholders sued accounting firm for, inter alia, fraudulent misrepresentation and unfair trade practices in connection with firm's audit opinions certifying corporation's financial statements, alleging that shareholders relied on audit opinions to acquire stock. Trial court granted accounting firm summary judgment. Reversing, this court held, inter alia, that shareholders were not required to show that firm's misrepresentations were made with specific purpose of inducing reliance; shareholders could satisfy burden by showing that firm had reason to expect that shareholders would rely on its statements. *Reisman v. KPMG Peat Marwick LLP*, 57 Mass.App.Ct. 100, 109, 787 N.E.2d 1060, 1066.

**Mass.App.**1998. Cit. in headnote and ftn. After a driver and her infant son were injured in a car accident, the driver's family sued the car manufacturer and the dealer for breach of warranty, negligence, deceit, and products liability, among other claims. The trial court dismissed the deceit counts. The jury awarded plaintiffs damages on the warranty and negligence claims, but the trial court granted the manufacturer's motion for judgment n.o.v. On appeal, plaintiffs alleged that there was sufficient evidence to establish defendants' implicit representation that the car was safe, as well as plaintiffs' reliance on that representation and the resultant injury. This court affirmed, holding, inter alia, that the trial court properly dismissed the deceit counts, because plaintiffs failed to establish a causal relationship between the acts or omissions of the defendants and their injuries. *Lally v. Volkswagen Aktiengesell-*

schaft, 45 Mass.App.Ct. 317, 698 N.E.2d 28, 31, 42.

**Mass.App.2003.** Quot. in case quot. in sup. Holders of corporation's stock that lost much of its value sued accounting firm that had certified the corporation's financial statements, asserting claims for, in part, fraud and negligent misrepresentation. Reversing the trial court's grant of summary judgment for defendant, this court held, inter alia, that, as to the fraud claim, plaintiffs were not required to show that defendant's misstatements were made with the specific purpose of inducing plaintiffs' reliance. Plaintiffs could satisfy their burden of proof by showing, as they did, that they were among those whom defendant had reason to expect would rely on its statements. *Reisman v. KPMG Peat Marwick LLP*, 57 Mass.App.Ct. 100, 109, 781 N.E.2d 821, 828.

**Mass.App.2004.** Quot. in ftn. Former girlfriend sued former boyfriend for intentional and negligent infliction of emotional distress, fraud, and assault and battery, claiming that he misrepresented his ability to become a father, he knew she had limited time in which to become a biological mother, and she would not have become intimate with him had she known about his vasectomy. Trial court dismissed claims for negligent infliction of emotional distress and fraud, and granted boyfriend summary judgment on remaining claims. Affirming, this court held, inter alia, that girlfriend failed to state a claim for fraud. The court said that it was unaware of any jurisprudential standards to assess the materiality of boyfriend's alleged misrepresentation. *Conley v. Romeri*, 60 Mass.App.Ct. 799, 802, 806 N.E.2d 933, 937.

**Mass.App.2007.** Quot. in part in sup. After landowners brought an action to evict owners of a cottage located on their land, cottage owners cross-claimed for damages in the amount of the fair-market value of the cottage, alleging that landowners fraudulently misrepresented that cottage owners would have the opportunity at the end of their lease to purchase the underlying land. Although landowners prevailed on their summary-process complaint, the trial court, based on a jury's finding that landowners had wrongfully induced cottage owners to make improvements to the cottage, and that it could not be moved without damaging it, ruled that landowners were liable for the value of the improvements. This court affirmed the judgment but modified it, holding that cottage owners' actual pecuniary loss was not just the cost of improvements, but the loss of the value of the entire house, as they were now unable to move it as a result of reliance on the misrepresentation and were forced to abandon it. *Ward v. Perna*, 69 Mass.App.Ct. 532, 540, 870 N.E.2d 94, 101.

**Neb.2009.** Cit. in sup., com. (h) cit. and quot. in sup. and cit. in ftn. Representatives of their mother's estate sued assisted-living facility and others, alleging that facility had been negligent in caring for terminally ill mother and had misrepresented that mother would receive professional hospice care. The trial court directed a verdict against estate on its misrepresentation claims. Affirming, this court held, inter alia, that plaintiff could not recover damages for pain and suffering under its misrepresentation claims, because damages for such claims were limited to pecuniary losses; while some courts had permitted plaintiffs to recover noneconomic damages under a theory of intentional fraud, there was no compelling reason to permit such damages for plaintiff's misrepresentation claims in this action, particularly since damages for pain and suffering were available under plaintiff's negligence claim.

Tolliver v. Visiting Nurse Ass'n of Midlands, 278 Neb. 532, 540, 541, 771 N.W.2d 908, 915, 916.

**Neb.**2009. Cit. in ftn. Purchaser of office building sued seller after the building's roof leaked, alleging that defendant fraudulently and negligently misrepresented the roof's condition. The trial court dismissed the complaint. Affirming, this court held that, in both negligent and fraudulent misrepresentation cases, whether the plaintiff exercised ordinary prudence was relevant to whether the plaintiff justifiably relied on the misrepresentation when the means of discovering the truth was in the plaintiff's hands; in this case, the trial court did not err as a matter of law in applying an ordinary-prudence standard to plaintiff's negligent-misrepresentation claim, and in finding that plaintiff's managing partner was not justified in relying on defendant's representations. The court noted that negligent misrepresentation had essentially the same elements as fraudulent misrepresentation, with the exception of the defendant's mental state. Lucky 7, L.L.C. v. THT Realty, L.L.C., 278 Neb. 997, 1002, 775 N.W.2d 671, 675.

**N.J.Super.**2002. Cit. in disc. Former employee of insurance brokerage company sued company and another insurance brokerage firm that had acquired the company, alleging that after he was fraudulently induced to join the company as its regional director of insurance services, he was terminated upon company's acquisition. At trial, the jury awarded plaintiff \$2 million for emotional distress and \$5 million in punitive damages, and the trial court entered judgment n.o.v. on emotional-distress award. On cross-appeals, this court affirmed, holding, inter alia, that evidence was insufficient to support emotional-distress damages for plaintiff. McConkey v. AON Corp., 354 N.J.Super. 25, 59, 804 A.2d 572, 593.

**N.M.App.**2005. Cit. in disc. Family members of deceased relatives whose body parts were delivered without consent from area hospitals to government laboratory to study plutonium content brought class action against operators of hospital and laboratory and doctor who performed autopsies on family members, alleging, in part, fraud. Trial court granted doctor's motion to dismiss on limitations grounds. This court reversed and remanded on the ground that application of the statute of limitations presented a jury question, but upheld the dismissal of plaintiffs' claim for fraud. The court said that fraud was not adequately pleaded since emotional-distress damages were not recoverable as part of fraud claim. In tortious concealment, as alleged here, there was no meeting of minds or expression of parties' intent as with a contract. While fraudulent misrepresentation might cause emotional distress, such distress had not generally been recognized as element of damage. Williams v. Stewart, 137 N.M. 420, 112 P.3d 281, 290.

**N.Y.Sup.Ct.App.Div.**2000. Cit. in disc. Transit authority sued law firm, among others, for, inter alia, fraud, alleging that authority settled one action and satisfied the judgment against it in another as a result of perjured testimony presented by firm's clients at firm's behest. The trial court entered partial summary judgment for authority. Affirming on this point, this court held, in part, that authority's justifiable reliance on firm's misrepresentations, the one element of its claim that was not made conclusive by firm's conviction in an earlier RICO action stemming from the same fraudulent practices, had been established by allegations made in the affidavit sworn by authority's vice president and general counsel.

New York City Transit Auth. v. Morris J. Eisen, P.C., 276 A.D.2d 78, 715 N.Y.S.2d 232, 237.

**N.Y.Sup.Ct.App.Div.2001.** Quot. in diss. op. Defendant who purchased stock based on nonpublic, confidential information he received from employee of company whose stock was not purchased, was convicted of, among other things, scheme to defraud. Affirming, this court held, inter alia, that prosecution did not have to prove that employee who supplied defendant with information was an insider of the corporations whose securities defendant purchased in order to sustain scheme-to-defraud charge. The dissent argued that when an “outsider” used confidential information to purchase securities, he deceived the source of the information, not the stockholders of the companies whose securities he purchased; therefore, the scheme-to-defraud charge should not stand. *People v. Napolitano*, 282 A.D.2d 49, 724 N.Y.S.2d 702, 716.

**N.Y.Sup.Ct.App.Div.2010.** Quot. in diss. op. Foundation sued insurance company for allegedly fraudulently inducing it to continue to hold, rather than sell, a large block of defendant's common stock, seeking to recover the value it would have realized by selling its shares before the stock's price sharply declined. The trial court granted defendant's motion to dismiss. Affirming, this court held that plaintiff's “holder” claim failed, as a matter of law, because it violated New York's “out-of-pocket” rule, under which the true measure of damages for fraud was indemnity for the actual pecuniary loss sustained as the direct result of the wrong. The dissent argued that plaintiff pleaded actual reliance on defendant's misrepresentations with sufficient particularity to support a holder claim. *Starr Foundation v. American Intern. Group, Inc.*, 76 A.D.3d 25, 901 N.Y.S.2d 246, 258.

**Ohio App.1999.** Cit. in disc. Remaindermen of a trust sued the trust grantor's business partner, a cotrustee bank, and another cotrustee for breach of fiduciary duty to the trust. Trial court granted defendant partner summary judgment, holding that the discovery rule did not apply to extend the statute of limitations applicable to plaintiffs' claims. This court reversed and remanded, holding, inter alia, that the discovery rule did apply, because the fundamental nature of plaintiffs' claims was fraud, and those claims fell within the legislature's provision that fraud claims did not accrue until the fraud was discovered. Although plaintiffs' breach-of-fiduciary-duty claims against bank and cotrustee appeared to be based on their status as trustees, their claims against partner appeared to be based upon his status as an agent for the trusts and the trustees. *Orvets v. National City Bank, Northeast*, 131 Ohio App.3d 180, 722 N.E.2d 114, 120.

**Pa.1999.** Cit. in case quot. in disc. Purchasers of real estate brought tort and contract action against realtor and its agent, among others, alleging that agent misrepresented to them that repairs had been made to the property's septic system and that the system had passed a dye test and was functioning properly. The trial court entered judgment for plaintiffs, and the intermediate appellate court affirmed. Reversing, this court held that realtor was not liable for agent's assertions where agent did not knowingly or intentionally make false statements with respect to the condition of the system, and where agent was under no duty to verify or investigate the accuracy of the results of a dye test performed by a third-party contractor, with whom agent shared no contractual relationship. *Bortz v. Noon*, 556 Pa. 489,

729 A.2d 555, 560.

**Pa.2002.** Cit. in diss. op. During divorce proceedings, trial court granted wife's petition to set aside prenuptial agreement on ground that husband misrepresented value of engagement ring in agreement, and superior court affirmed. Reversing and remanding, this court held, inter alia, that wife's reliance on husband's representation was unreasonable where ring was in her possession at time of agreement and she could have obtained appraisal of its value. The dissent argued that wife's reliance on husband's representation was justifiable, given nature of parties' relationship and disparity in their age and experience. *Porreco v. Porreco*, 571 Pa. 61, 74, 811 A.2d 566, 574.

**Pa.Super.2000.** Cit. in case quot. in disc. Prospective buyer of commercial real estate sued sellers for breach of contract and fraud after the property was ultimately conveyed to another purchaser. Trial court entered judgment for prospective buyer, holding that seller's failure to disclose that the property was not off the market and its assertions that plaintiff was the exclusive prospective buyer were material misrepresentations upon which plaintiff relied to its detriment. This court reversed, holding, inter alia, that no fraud arose, because plaintiff's assertions were not material to the transaction at hand and defendant was under no legal duty to reveal the existence of its negotiations with the other purchaser to plaintiff. *GMH Assoc., Inc. v. Prudential Realty*, 752 A.2d 889, 901.

**Pa.Super.2003.** Cit. in case quot. in sup. Excavation contractor for construction of township library sued architects, engineers, and entities that performed subsurface testing for project, alleging negligence and negligent and fraudulent misrepresentations contained in defendants' report and drawing, which falsely represented that rock would not be encountered during excavation. Trial court granted defendants summary judgment. This court affirmed, holding that economic-loss doctrine barred plaintiff's negligent-misrepresentation claims under Restatement Second of Torts § 552. Plaintiff's fraudulent-misrepresentation claims failed, because there was no evidence of defendants' intent to mislead plaintiff into relying on the information. Plaintiff was told in bid documents that it was not to rely on documents allegedly containing the misleading information. *David Pflumm Paving & Excavating, Inc. v. Foundation Services Co.*, 816 A.2d 1164, 1171.

**Pa.Super.2003.** Cit. in case cit. in disc. Nursing facility sued deceased resident's daughter for breach of contract and fraud, inter alia, alleging that daughter lied about her intention to spend down her mother's resources by paying outstanding medical expenses. Trial court dismissed. This court affirmed in part, holding that plaintiff failed to state a claim for fraud. Because plaintiff did not establish existence of a contract between it and daughter, plaintiff did not indicate how daughter's representation about spending down mother's resources was material to any transaction between plaintiff and daughter. To extent daughter promised employee of state department of public welfare that she would spend down mother's resources, it was not clear how daughter could have intended that plaintiff would rely on statement she made to department. *Presbyterian Medical Center v. Budd*, 832 A.2d 1066, 1072.

**Tenn.2010.** Cit. in sup. Buyers of new residential construction brought fraudulent-misrepresentation claim against real estate appraiser hired by the bank that financed the con-

struction, alleging that appraiser recklessly overestimated the value of the proposed construction in a report prepared for the bank. The trial court granted summary judgment for appraiser. The court of appeals affirmed. Reversing and remanding, this court held that an appraisal was an opinion of value that could form the basis of a fraudulent-misrepresentation claim. The court accordingly rejected appraiser's argument that his report, which stated that it provided an estimate of the market value of the proposed construction, could not provide a basis for buyers to show at trial that he made a representation of an existing or past fact, a required element of a claim for intentional misrepresentation. *Davis v. McGuigan*, 325 S.W.3d 149, 155.

**Tex.2010.** Quot. in disc. Following the bankruptcy of limited-liability company, bond and hedge funds that bought bonds issued by company brought a fraud claim, inter alia, against company's auditor, alleging that auditor's reports misrepresented the status of company's escrow account. The trial court granted summary judgment for defendant on all claims; the court of appeals reversed as to the fraud claim. Reversing and rendering judgment that plaintiffs take nothing, this court held that plaintiffs' "holder claims," which alleged that defendant's misrepresentations wrongfully induced them to continue holding their bonds, failed. The court explained that plaintiffs had no direct communications with defendant, as required to state a holder claim; rather, the alleged misrepresentations were in publicly available documents. *Grant Thornton LLP v. Prospect High Income Fund*, 314 S.W.3d 913, 928.

**Tex.App.2002.** Quot. in ftn. Employees sued former employer for breach of contract and fraud, alleging that employer failed to pay compensation due them pursuant to written, contractual representations made by employer at the time of their employment. Trial court certified plaintiff class and adopted trial plan. This court affirmed, holding, inter alia, that trial court did not abuse its discretion in determining that plaintiffs' class claims demonstrated requisite commonality, and that common issues of law and fact predominated over individual issues. While acknowledging concern that different legal standards would govern plaintiffs' fraud and contract claims throughout several states involved, the court examined elements of breach of contract and fraud in pertinent states, and did not find substantive variations on basic breach-of-contract and fraud theories of recovery pled by plaintiffs. *Snyder Communications v. Magana*, 94 S.W.3d 213, 239, review granted, judgment reversed 142 S.W.3d 295 (Tex.2004).

**Wash.App.2004.** Cit. in disc. Guardian ad litem for child who was struck by a car settled negligence suit against insured city regarding curb extensions, but insurer missed deadline for payment of funds under settlement agreement. Guardian sued insurer for fraudulent misrepresentation and intentional infliction of emotional distress, inter alia. Trial court dismissed suit. This court reversed in part and remanded, holding that plaintiffs' intentional-tort claims of fraudulent misrepresentation and infliction of emotional distress were not barred, since intentional-tort claims did not require preexisting duty. Thus, third-party claimants could bring tort claims against insurer despite lack of duty, as this would not interfere with insurer's good-faith duties to insured and would not place conflicting duties upon insurer. *Dussault ex rel. Walker–Van Buren v. American Intern. Group, Inc.*, 123 Wash.App. 863, 99 P.3d 1256, 1260, 1261.

**Wis.2005.** Cit. in ftn. to conc. op. Wholesaler sued food manufacturer's subsidiary and its agent for intentional misrepresentation, alleging that defendants concealed facts material to subsidiary's change in marketing strategy, which caused plaintiff to be shut out of the market to resell subsidiary's products. The trial court dismissed the suit. This court reversed and remanded, holding that defendants did not satisfy their duty of disclosure, thereby providing a basis for the intentional-misrepresentation claim, and that the claim was not barred by the economic-loss doctrine. The concurring opinion argued that, although the economic-loss doctrine should not bar plaintiff's misrepresentation claim, the majority erred in adopting a fraud-in-the-inducement exception to the doctrine. *Kaloti Enterprises, Inc. v. Kellogg Sales Co.*, 283 Wis.2d 555, 699 N.W.2d 205, 222.

Case Citations July 2011 — November 2011:

**C.A.1**, 2011. Cit. in ftn. Ice cream producer sued equipment lessor that financed producer's purchase and installation of an ice cream hardening system, asserting fraud, inter alia, in connection with a side letter to the parties' lease, provided by defendant, that estimated an end-of-term buyout price of 12% of the cost of the original system and its installation. Following a bench trial, the district court found for plaintiff on its fraud claim, ordering rescission and damages. This court affirmed as to defendant's liability for fraud, holding that the trial court did not clearly err by finding that defendant behaved dishonestly and that plaintiff reasonably relied on defendant's representation concerning the estimate. Defendant admitted that it never actually made an estimate and offered no explanation for the remarkable spread between the 12% buyout price anticipated and the 40% initially demanded. Further, the court found that defendant specifically created the impression that a good-faith estimate had been made and never corrected that representation before plaintiff acted on it. *House of Flavors, Inc. v. TFG Michigan, L.P.*, 643 F.3d 35, 40.

**C.A.5**, 2011. Quot. in case quot. in sup. Buyer of an option to purchase a shopping-mall property sued seller of the option, alleging misrepresentation and other claims, after a prospective lessee of the property exercised its right of first refusal before buyer could exercise the option. The trial court entered judgment on a jury verdict for plaintiff. Affirming the award of out-of-pocket damages, this court held that the jury was entitled to find that plaintiff justifiably relied on defendant's misrepresentation that prospective lessee never bought the property in transactions of this nature; the evidence reasonably supported the jury's determination that plaintiff incurred fees from its lender and taxes upon its expectation that the deal would close in reliance on defendant's representations. *LHC Nashua Partnership, Ltd. v. PDNED Sagamore Nashua, L.L.C.*, 659 F.3d 450, 462.

**C.A.6**, 2011. Cit. in sup. Employer sued union, asserting, among other things, state-law claims for breach of an implied warranty of authority, negligent misrepresentation, and intentional misrepresentation, alleging that defendant misrepresented that it had the authority to bind retirees during collective bargaining with respect to retirees' healthcare benefits. The district court granted defendant's motion to dismiss. Affirming in part, reversing in part, and remanding, this court held that the Labor Management Relations Act did not preempt plaintiff's state-law claims, because those claims all turned on defendant's precontractual

conduct, and none of them required the court to interpret the collective-bargaining agreement. The court further noted that the claims required the district court to decide only whether defendant made the alleged representations and whether plaintiff reasonably relied on them. *CNH America LLC v. International Union, United Auto., Aerospace and Agr. Implement Workers of America (UAW)*, 645 F.3d 785, 792.

**C.A.Fed.2011.** Quot. in disc. Patentee sued competitor for infringement of its patent for blood glucose monitoring strips. The district court found plaintiff's patent unenforceable for inequitable conduct, because plaintiff did not disclose certain prior art to the Patent and Trademark Office (PTO). Vacating the judgment in part and remanding, this court held that the party asserting inequitable conduct was required to prove that the patentee acted with the specific intent to deceive the PTO, and that the materiality of any prior art that was not disclosed was "but-for" materiality, i.e.: the PTO would not have allowed a claim had it been aware of the undisclosed prior art. The court noted several other contexts in which a but-for materiality standard applied, including for proof of common-law fraud, which required that the plaintiff relied on the misrepresentation in acting or refraining from action. *Therasense, Inc. v. Becton, Dickinson and Co.*, 649 F.3d 1276, 1295.

**D.N.M.2010.** Quot. in sup. Seller of endodontic equipment sued supplier, alleging, among other things, breach of a supply contract, breach of the implied covenant of good faith and fair dealing, and violation of the New Mexico Unfair Practices Act (NMUPA). The trial court entered judgment on a jury verdict awarding plaintiff punitive damages for breach of the implied covenant and violation of the NMUPA. Denying defendant's motion to set aside the punitive-damages award, this court rejected defendants' argument that plaintiff's NMUPA claim was a contract claim, rather than a tort claim, and thus could not support breach-of-contract punitive damages under Delaware law. The court reasoned that a claim under NMUPA was more akin to a tort claim of fraudulent misrepresentation than to a claim for breach of contract. *Guidance Endodontics, LLC v. Dentsply Intern., Inc.*, 749 F.Supp.2d 1235, 1275.

**E.D.N.Y.Bkrcty.Ct.2011** Cit. in case quot. in sup. Judgment creditor brought an adversary proceeding against Chapter 7 debtor, alleging that it had obtained a state-court judgment against debtor for participating in a fraudulent scheme to divert debtor's husband's assets, and seeking a determination that its judgment was nondischargeable on grounds of fraud. This court entered judgment in favor of debtor, holding that creditor failed to prove that debtor acted with the intent to defraud creditor. The court reasoned that, at best, the state court's decision could be interpreted to find that debtor's conduct in acting as a figurehead of two franchises owned by husband's corporation, and the transfer of property to her from husband, were acts that resulted in a constructive fraud upon creditor. *In re Kuncman*, 454 B.R. 276, 283.

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