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Common-Law Fraud and Misrepresentation

Grand Park Law Group · 2026



A. **Elements (Cal. Civ. Code §§ 1709–1710)**

California's deceit statutes — Civil Code sections 1709 and 1710 — codify the common law of fraud. Section 1709 makes one who "willfully deceives another with intent to induce him to alter his position" liable for "any damage which he thereby suffers." Section 1710 then enumerates four species of "deceit": (1) the suggestion of a fact known to be false; (2) the positive assertion of a fact (even if believed) without reasonable grounds; (3) the suppression of a fact by one bound to disclose it or who gives misleading partial information; and (4) a promise made without intent to perform.

Translated into the modern five-element pleading standard, a fraud plaintiff must allege and prove: (1) a misrepresentation (false representation, concealment, or non-disclosure); (2) knowledge of falsity (scienter); (3) intent to induce reliance; (4) justifiable reliance; and (5) resulting damage. *See Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 974. *Engalla* — a Kaiser Permanente arbitration-fraud case — is the modern reference point for both the elements and the rule that fraud must be pleaded "with particularity," meaning the complaint must identify "how, when, where, to whom, and by what means" the misrepresentations were made. *Id.* at 974.

Damages are governed by Civil Code section 3343 (out-of-pocket measure for fraud in property transactions) and, for non-property transactions, by the more flexible benefit-of-the-bargain or out-of-pocket rules under section 3333. Punitive damages are available under Civil Code section 3294 on clear-and-convincing evidence of "oppression, fraud, or malice."

B. Promissory Fraud (Lazar v. Superior Court)

Promissory fraud — a "promise made without any intention of performing it," Civil Code § 1710(4) — is the most important fraud variant in commercial litigation because it converts what would otherwise be a contract dispute into a tort with punitive-damages exposure. The leading case is *Lazar v. Superior Court* (1996) 12 Cal.4th 631, in which the California Supreme Court held that an executive could sue his employer in tort where the employer had induced him to leave a secure New York job by promising a permanent California position the employer never intended to provide. *Id.* at 638–39.

Lazar requires a plaintiff to plead with particularity "(1) a promise made regarding a material fact without any intention of performing it; (2) the existence of the intent not to perform at the time the promise was made; (3) intent to deceive or induce the promisee to enter into a transaction; (4) reasonable reliance by the promisee; (5) nonperformance by the party making the promise; and (6) resulting damage to the promisee." *Id.* at 638. The plaintiff's burden on element (2) is steep: subsequent failure to perform, standing alone, is insufficient to prove the requisite contemporaneous fraudulent intent. *See Tenzer v. Superscope, Inc.* (1985) 39 Cal.3d 18, 30. Circumstantial evidence — pattern conduct, internal communications, financial inability to perform at the time of the promise — is typically required.

C. Concealment and the Duty to Disclose

Fraud by concealment under section 1710(3) requires the same five elements as affirmative-misrepresentation fraud, but with one critical addition: the defendant must have been under a duty to disclose. The four "*LiMandri* circumstances" in which a duty to disclose arises are set out in *LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 336: (1) the defendant is in a fiduciary relationship with the plaintiff; (2) the defendant has exclusive knowledge of material facts not known to the plaintiff; (3) the defendant actively conceals a material fact from the plaintiff; or (4) the defendant makes partial representations but suppresses material facts. Outside of a fiduciary relationship, categories (2)–(4) require some form of "transaction" between the parties giving rise to the duty.

D. Negligent and Constructive Misrepresentation

Negligent misrepresentation, codified at section 1710(2), substitutes negligence for scienter: the defendant asserts as true a material fact for which it has no reasonable ground to believe true. Punitive damages are unavailable, *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1241, and the claim is subject to the economic-loss rule discussed in Part VI below. "Constructive fraud" under Civil Code section 1573 is a fiduciary-relationship variant — a breach of duty involving an advantage gained at the expense of one to whom a fiduciary owes loyalty, even without scienter.

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