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CONTRACT LAW

By

DAVID R. DOW  
Houston, Texas

and

CRAIG SMYSER  
Houston, Texas

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ble mistake, particularly the ordinary care requirement.<sup>18</sup>

The *Hayes* court rejected the owners' arguments. After discussing the ordinary care requirement, the court concluded that the four-part remediable mistake test was inapplicable. The *Hayes* court noted that remediable mistake applies in contract cases where there is negotiation, offer, acceptance, mutual consideration, and performance. In *Hayes*, however, the release at issue was not the result of bargaining; it was the result of mistaken, unilateral action by one party, and the other parties did not even know about the release until after the lessee revoked it. Rather than apply the remediable mistake doctrine, the *Hayes* court chose to adopt a rule from a similar Oklahoma case, *Armbruster*.<sup>19</sup> The *Hayes* court cited *Armbruster* for the proposition that the lessee was entitled to cancellation of the release unless: (1) the cancellation would "offend the rights of an innocent purchaser for value," or (2) a party in good faith innocently relied and materially altered his position in a manner "that could not be reversed without significant prejudice."<sup>20</sup> The court examined the record and concluded that the owners, by their own admissions, had not relied to their detriment on the lessee's release; thus, the evidence was sufficient to affirm the summary judgment—meaning that the release would not be enforced.<sup>21</sup>

The rule announced in *Hayes* applies in narrow—and therefore rare—circumstances. In fact, *Hayes* has not since been cited for this rule. This lack of citation, however, probably reflects less on the merits of the rule itself than on the scarcity of cases to which the rule might apply. In any case, it is an exception to unilateral mistake and very likely would be decisive in any cases in which it does apply.

## § 2.12 Fraud and misrepresentation

### Research References

West's Key Number Digest, Contracts ⇨94; Fraud ⇨1 to 17  
C.J.S., Contracts §§ 136, 139 to 140, 156 to 171, 173 to 174; Fraud §§ 2 to 8, 10 to 25, 28 to 36, 59 to 60, 62 to 63, 67 to 75, 77 to 80

Fraud is as basic a cause of action to business tort cases as negligence is to personal injury. Because in most cases where a plaintiff can prove fraud, he can demonstrate malice sufficient to justify punitive damages, it is perhaps the most frequently pled

<sup>18</sup>*Hayes*, 809 S.W.2d at 659.

<sup>19</sup>*Hayes*, 809 S.W.2d at 659 (citing *Armbruster v. Thetis Energy Corp.*, 675 P.2d 476 (Okl.App. 1983)).

<sup>20</sup>*Hayes*, 809 S.W.2d at 659 (cit-

ing *Armbruster*, 675 P.2d at 478 and *Mobil Oil Corp. v. Flag-Redfern Oil Co.*, 522 P.2d 651 (Okl.App. 1973)).

<sup>21</sup>*Hayes*, 809 S.W.2d at 659.

and attempted business tort.

Fraud comes in more than one variety: common-law or actual fraud, constructive fraud, and statutory fraud or fraud in connection with real estate and stock transactions.<sup>1</sup>

## § 2.13 Fraud and misrepresentation—Common law fraud

### Research References

West's Key Number Digest, Contracts ◊94(1); Fraud ◊2, 65  
C.J.S., Contracts §§ 136, 139 to 140, 156 to 160, 170 to 171, 173 to 174;  
Fraud §§ 7 to 8, 10, 28, 31, 35 to 36

The elements of common law fraud are: (1) a material misrepresentation, (2) which was false, (3) and which was either known to be false when made or was asserted without knowledge of its truth, (4) which was intended to be acted upon, (5) which was relied upon, and (6) which caused injury.<sup>1</sup>

Reflecting these common law elements, the Pattern Jury Charges provide that “Fraud occurs when (a) a party makes a material misrepresentation, (b) the misrepresentation is made with knowledge of its falsity or made recklessly without any knowledge of the truth and as a positive assertion, (c) the misrepresentation is made with the intention that it should be acted on by the other party, and (d) the other party acts in reliance on the misrepresentation and thereby suffers injury.”<sup>2</sup>

The distinctions, probably not significant, between the PJC 105.2 definition and that of the Texas Supreme Court's most recent pronouncement in *Formosa Plastics* lie in the PJC's requirement that the false statement be made “as a positive assertion” and that a false statement made without any knowledge of the truth be made “recklessly”; these requirements were simply culled from earlier Texas Supreme Court cases.<sup>3</sup>

Like the Texas pattern jury charges, the American Bar Association's Business Torts Litigation Model Jury Instructions provide that to recover for fraud a plaintiff must prove (1) that the defendant made a fraudulent misrepresentation of fact, opinion, intention, or law; (2) that the misrepresentation was made with the purpose or expectation of inducing the plaintiff to

### [Section 2.12]

<sup>1</sup>Tex. Bus. & Com. Code § 27.01.

### [Section 2.13]

<sup>1</sup>*Formosa Plastics Corp. USA v. Presidio Engineers*, 960 S.W.2d 41, 48 (Tex. 1998).

<sup>2</sup>State Bar of Texas, Texas Pat-

tern Jury Charges—Business, Consumer & Employment PJC 105.2 (1998).

<sup>3</sup>*See Eagle Properties, Ltd. v. Scharbauer*, 807 S.W.2d 714, 723 (Tex. 1990); *Trenholm v. Ratliff*, 646 S.W.2d 927, 930 (Tex. 1983).

act or refrain from action in reliance upon the misrepresentation; and (3) that the plaintiff justifiably relied on the misrepresentation to its injury.<sup>4</sup>

Unlike the Texas model, the ABA's Model Jury Instruction places the issue of falsity in a separate instruction that provides the misrepresentation is fraudulent if (1) the defendant knows or believes the matter was not as the defendant represents it to be; (2) the defendant does not have the confidence in the accuracy of the representation that the defendant states or implies; or (3) the defendant knows it did not have the basis for the representation that the defendant states or implies.<sup>5</sup>

## § 2.14 Fraud and misrepresentation—Common law fraud—Materiality requirement

### Research References

West's Key Number Digest, Contracts ⇨94(2); Fraud ⇨18  
C.J.S., Contracts §§ 136, 139 to 140, 156, 158 to 160, 166, 170 to 171, 173 to 174; Fraud §§ 26 to 27, 62

To support a judgment for fraud, the misrepresentation must be material.

Materiality is essentially an issue of causation, since in order for a statement to be material, it must be one important enough to induce someone to act on it,<sup>1</sup> or such that "but for" the statement the defrauded party would not have signed the contract that is the subject of the misrepresentation.<sup>2</sup>

The ABA's Model Jury Instructions provide that a matter is material if either: (1) a reasonable person would attach importance to it in determining his or her choice of action in the transaction in question; or (2) the Defendant knew or had reason to know that its plaintiff regards, or is likely to regard, the matter as important in determining his or her choice of action, regardless of whether a reasonable person would regard the misrepre-

<sup>4</sup>American Bar Association Model Jury Instructions, Business Torts Litigation, § \_\_6.02[2] (1996).

<sup>5</sup>American Bar Association Model Jury Instructions, Business Torts Litigation, § \_\_6.02[3] (1996). These ABA Model Jury Instructions for fraud are modeled on § 525 and § \_\_526 of the Restatement (Second) of Torts (1977).

[Section 2.14]

<sup>1</sup>Fisher v. Yates, 953 S.W.2d 370, 383 (Tex.App.—Texarkana 1997); writ denied per curiam, 988 S.W.2d 730 (Tex. 1998); Manges v. Astra Bar, Inc., 596 S.W.2d 605, 611 (Tex.Civ.App.—Corpus Christi 1980, writ ref'd n.r.e.).

<sup>2</sup>Adickes v. Andreoli, 600 S.W.2d 939, 946 (Tex.Civ.App.—Houston [1st Dist.] 1980, writ dismissed w.o.j.).

sentation as important.<sup>3</sup>

## § 2.15 Fraud and misrepresentation—Common law fraud—Statements of fact versus statements of opinion

### Research References

West's Key Number Digest, Contracts ⇨94(6), 94(7); Fraud ⇨11, 12  
C.J.S., Contracts §§ 136, 139 to 140, 156, 158 to 160, 162 to 163, 170 to 171, 173 to 174; Fraud §§ 10 to 17, 62 to 63, 67 to 75, 77, 80

The general rule is that only false statements of fact form the basis for actionable fraud.<sup>1</sup>

So-called "pure" expressions of opinion are not actionable.<sup>2</sup> However, an opinion may constitute fraud if the speaker has knowledge at the time that the opinion is false.<sup>3</sup> In addition, "[a]n expression of an opinion as to the happening of a future event may also constitute fraud where the speaker purports to have special knowledge of facts that will occur or exist in the future."<sup>4</sup> Finally, an opinion based on past or present facts may support an action for fraud.<sup>5</sup>

Representations as to matters not equally available to both parties are legally equivalent to statements of fact.<sup>6</sup>

An expression of opinion may be actionable when the parties are in a fiduciary or confidential relationship.<sup>7</sup>

The Texas Pattern Jury Charges provide for instructions on opinions based on false statements of fact,<sup>8</sup> statements of opinion that the maker knows to be false,<sup>9</sup> and expressions of opinion that are false, made by persons claiming or implying to have special knowledge of the subject matter of the opinion.<sup>10</sup>

The Pattern Jury Charges further define "Special knowledge" as that "knowledge or information superior to that possessed by the other party and to which the other party did not have equal

<sup>3</sup>American Bar Association Model Jury Instructions, Business Torts Litigation, § \_\_6.05 (1996). This instruction is modeled on § 538 of the Restatement (Second) of Torts (1977).

#### [Section 2.15]

<sup>1</sup>Trenholm v. Ratcliff, 646 S.W.2d 927, 930 (Tex. 1983).

<sup>2</sup>Trenholm, 646 S.W.2d at 930.

<sup>3</sup>Trenholm, 646 S.W.2d at 930.

<sup>4</sup>Trenholm, 646 S.W.2d at 930.

<sup>5</sup>Trenholm, 646 S.W.2d at 930.

<sup>6</sup>Roberts v. United New Mexico Bank at Roswell, 14 F.3d 1076, 1079 (5th Cir. 1994) (Bank knew that water on land it was selling had high saline content and thus the Bank's statement that water was "very good" was actionable fraud.).

<sup>7</sup>Buckner v. Buckner, 815 S.W.2d 877, 880 (Tex.App.—Tyler 1991, no writ).

<sup>8</sup>PJC 105.3C.

<sup>9</sup>PJC 105.3D.

<sup>10</sup>PJC 105.3E.

access.”<sup>11</sup>

Conversely, “an expression of a personal or legal opinion or a prediction about the future is not a fraudulent representation if it is made to one with equal knowledge of or opportunity to know the relevant facts and if it is not given with the intention of deceiving the other person.”<sup>12</sup>

“Puffing”—exaggerated statements of value—is not actionable, at least when buyers are in as good a position as sellers to ascertain the truth of the statements.<sup>13</sup> For example, a representation that a commercial building was “superb”, “super fine,” and “one of the finest little properties in the City of Austin” were not misrepresentations of material fact but merely “puffing” or opinion and thus could not constitute fraud, even though after the purchaser paid \$7 million for the building, asbestos was discovered in the fireproofing.<sup>14</sup> Similarly, a statement that Mercedes are the best engineered cars in the world, would not give the buyer mechanical problems, and would not need much servicing is puffing.<sup>15</sup>

The Dallas Court of Appeals came up with a four-part test to be used to distinguish between puffery and a potentially fraudulent misrepresentation. The four criteria are: (1) the statement’s specificity; (2) the speaker’s knowledge; (3) the comparative levels of the buyer’s and seller’s knowledge; and (4) whether the statement relates to the present or the future.<sup>16</sup>

## § 2.16 Fraud and misrepresentation—Common law fraud—Statements about law

### Research References

West’s Key Number Digest, Contracts ⇨94(7); Fraud ⇨10 C.J.S., Contracts §§ 136, 139 to 140, 156, 158 to 160, 162, 170 to 171, 173 to 174; Fraud §§ 10 to 12, 17, 78, 80

Statements about law are generally not actionable. For example, a representation as to the legal effect of a document is regarded as a statement of opinion rather than of fact and will

<sup>11</sup>PJC 105.3E.

<sup>12</sup>Bryant v. Transcontinental Gas Pipe Line Corp., 821 S.W.2d 187, 189 (Tex.App.—Houston [14th Dist.] 1991, writ denied).

<sup>13</sup>Prudential Ins. v. Jefferson Associates, 896 S.W.2d 156, 163 (Tex. 1995); Int’l Harvester Co. v. Kesey, 487 S.W.2d 799, 802 (Tex.Civ.App.—El Paso 1972) rev’d on other grounds, 507 S.W.2d 195 (Tex. 1974).

<sup>14</sup>Prudential Ins., 896 S.W.2d at 163.

<sup>15</sup>Autohaus, Inc. v. Aguilar, 794 S.W.2d 459, 463 (Tex.App.—Dallas 1990), writ denied per curiam, 800 S.W.2d 853 (Tex. 1991).

<sup>16</sup>Angelo Broadcasting v. Satellite Music, 836 S.W.2d 726, 733–36 (Tex.App.—Dallas 1992, writ denied).

not ordinarily support an action for fraud.<sup>1</sup>

Certain exceptions exist to the general rule that misrepresentations of law are not actionable fraud. Thus, a party having superior knowledge, who takes advantage of another's ignorance of the law to deceive him by studied concealment or misrepresentation, can be held responsible.<sup>2</sup> In addition, if a party intends a representation of law to have the effect of fact and it is understood as a factual statement, it is actionable.<sup>3</sup> Finally, a party who is in a fiduciary or confidential relationship may also be liable for misrepresentations of law.<sup>4</sup>

## § 2.17 Fraud and misrepresentation—Common law fraud—Contractual promises

### Research References

West's Key Number Digest, Fraud ⇨12  
C.J.S., Fraud §§ 10 to 12, 14 to 15, 17, 73, 77, 80

An ordinary breach of a contractual promise will rarely constitute fraud. Indeed, promises generally cannot form the basis of a fraudulent misrepresentation because otherwise every breach of contract would be converted to a fraud case. "As a general rule, the failure to perform the terms of a contract is a breach of contract, not a tort."<sup>1</sup>

In order for a contractual promise to be actionable as fraud, the promise must be made with the intent at the time not to perform.<sup>2</sup> Thus intent—present intent not to perform—is the essential ingredient to making a promise to perform in the future actionable, and intent not to perform may be measured from a

#### [Section 2.16]

<sup>1</sup>*Fina Supply, Inc. v. Abilene Nat. Bank*, 726 S.W.2d 537, 540 (Tex. 1987) (Bank's statement that extension of time for expiration of letter of credit actually extended time that letter of credit was effective held to be unactionable statement of law.)

<sup>2</sup>*Fina Supply*, 726 S.W.2d at 540.

<sup>3</sup>*Fina Supply*, 726 S.W.2d at 540.

The exception to this exception is where the parties are in an equal bargaining position with equal access to legal advice; in that situation, since both parties may make their own investigation, legal representations, even when intended as factual statements, will not form the basis of ac-

tionable fraud. *Fina Supply*, 726 S.W.2d at 540.

<sup>4</sup>*Fina Supply*, 726 S.W.2d at 540.

#### [Section 2.17]

<sup>1</sup>*Crim Truck & Tractor v. Navistar Int'l*, 823 S.W.2d 591, 597 (Tex. 1992).

<sup>2</sup>*New Process Steel Corp. v. Steel Corp.*, 703 S.W.2d 209, 214 (Tex.App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.); *Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 434 (Tex. 1986) ("A promise to do an act in the future is actionable fraud when made with the intention, design and purpose of deceiving, and with no intention of performing the act.").

party's subsequent acts after the promise is made.<sup>3</sup>

Intent is a fact question which must usually be inferred from circumstantial evidence, and "slight circumstantial evidence of fraud, when considered with the breach of promise to perform, is sufficient to support a finding of fraudulent intent."<sup>4</sup>

1. Fraud based on a promise with intent not to perform analytically thus closely resembles fraudulent inducement. The Texas Pattern Jury Charge provides that a "misrepresentation" may be "a promise of future performance made with an intent not to perform as promised."<sup>5</sup>

## § 2.18 Fraud and misrepresentation—Common law fraud—Silence or omission

### Research References

West's Key Number Digest, Contracts ◊94(1), 94(8); Fraud ◊15 C.J.S., Contracts §§ 136, 139 to 140, 156 to 161, 170 to 171, 173 to 174; Fraud §§ 18 to 19, 33, 74, 79 to 80

Silence and omission in arm's length transactions generally do not subject one to liability for fraud; put another way, absent a fiduciary or confidential relationship, ordinarily there is no duty to disclose.<sup>1</sup> However, when the law imposes a duty to speak, silence may be actionable as a positive misrepresentation of existing facts.<sup>2</sup>

Reliance is an element of fraud by silence or omission.<sup>3</sup>

The pertinent Texas Pattern Jury Charge provides that, with respect to concealment or failure to disclose, fraud occurs when: (1) a party conceals or fails to disclose a material fact within the knowledge of that party, (2) the party knows that the other party is ignorant of the fact and does not have an equal opportunity to discover the truth, (3) the party intends to induce the other party to take some action by concealing or failing to disclose the fact, and (4) the other party suffers injury as a result of acting without knowledge of the undisclosed fact. Thus, the PJC leaves to the Court or the fact finder the question of whether the parties are in

<sup>3</sup>*New Process Steel*, 708 S.W.2d at 434.

<sup>4</sup>*New Process Steel*, 708 S.W.2d at 435.

<sup>5</sup>PJC 105.3B.

### [Section 2.18]

<sup>1</sup>*Ins. Co. of N. Am. v. Morris*, 981 S.W.2d 667, 674 (Tex. 1998) ("Generally, no duty of disclosure arises without evidence of a confidential or fidu-

ciary relationship.").

<sup>2</sup>*Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 181 (Tex. 1997); *Castillo v. Neely's TBA Dealer Supply*, 776 S.W.2d 290, 295-96 (Tex.App.—Houston [1st Dist.] 1989, writ denied); *New Process Steel Corp.*, 703 S.W.2d at 214; RESTATEMENT (SECOND) OF TORTS § 551 (1977).

<sup>3</sup>*Schlumberger Tech.*, 959 S.W.2d at 181.

the kind of confidential or fiduciary relationship that will give rise to the duty to disclose.<sup>4</sup>

Tort law may well provide a somewhat greater duty to disclose. Thus, although the Restatement does limit the kinds of relationships that will give rise to the duty to disclose, the comments to § 551, are more equivocal by recognizing that the source of the duty to disclose is an ethical one that arises out of the custom of the trade, good faith, and “common honesty.” Accordingly, “[t]here are indications, also, that with changing ethical attitudes in many fields of modern business, the concept of facts basic to the transaction may be expanding and the duty to use reasonable care to disclose the facts may be increasing somewhat.”<sup>5</sup>

Even absent a confidential relationship, in some specific circumstances courts have imposed a duty to disclose facts, either to make a partial disclosure fully correct,<sup>6</sup> or, for instance, where new information makes earlier representations untrue.<sup>7</sup>

## § 2.19 Fraud and misrepresentation—Common law fraud—Requirement of falsity

### Research References

West's Key Number Digest, Contracts ◊94(1); Fraud ◊13(1)  
C.J.S., Contracts §§ 136, 139 to 140, 156 to 160, 170 to 171, 173 to 174;  
Fraud §§ 11 to 12, 17, 23 to 25, 80

Only false statements—or, more precisely, statements false at the time they were made are actionable.<sup>1</sup> In addition, partially false (or partially true) statements may also be actionable.<sup>2</sup> Similarly, statements that are literally true but that leave a false impression in the context in which they are made may be

<sup>4</sup>PJC 105.4

<sup>5</sup>RESTATEMENT (SECOND) OF TORTS § 551, cmt. 1 (1977). The ABA's Section of Litigation Model Jury Instructions 6.13[1] and 6.13 [2] model their language on § 551 of the *Restatement (Second) of Torts*. Both the ABA and § 551 of the Restatement (Second) of Torts differ from the Texas PJC in several respects, most notably in that they contemplate proof of justifiable reliance whereas the PJC does not, but the PJC does require proof of intent to induce action by the other party. See PJC 105.4.

<sup>6</sup>State Nat'l Bank v. Farah Manufacturing Co., 678 S.W.2d 661, 681 (Tex.App.—El Paso 1984, writ

dism'd by agr.).

<sup>7</sup>Susanoil, Inc. v. Continental Oil, Co., 519 S.W.2d 230, 236 (Tex.Civ.App.—San Antonio, 1975, writ ref'd n.r.e.). See cases cited in COMMENT to PJC 105.4 “Silence as misrepresentation.”

### [Section 2.19]

<sup>1</sup>Prudential Ins. v. Jefferson Assocs., 896 S.W.2d 156, 163 (Tex.1995); DeSantis v. Wakenhut Corp., 793 S.W.2d 670, 689 (Tex. 1990).

<sup>2</sup>Blanton v. Sherman Compress Co., 256 S.W.2d 884, 887 (Tex.Civ.App.—Dallas 1953, no writ).

actionable.<sup>3</sup> Finally, a representation may be fraudulent if made with the intention that it be understood in the sense that it was false, without any belief or expectation as to how it will be understood, or with reckless indifference as to how it will be understood.<sup>4</sup>

## § 2.20 Fraud and misrepresentation—Common law fraud—Knowledge of falsity and intent to induce action

### Research References

West's Key Number Digest, Contracts ◊94(3); Fraud ◊13(2)  
C.J.S., Contracts §§ 136, 139 to 140, 156, 158 to 160, 164 to 165, 170 to 171, 173 to 174; Fraud §§ 11 to 12, 17, 23 to 25, 29 to 30, 34 to 35, 80

Knowledge of falsity, or making a statement recklessly without any knowledge of the truth and as a positive assertion, is clearly an element of the prima facie fraud case.<sup>1</sup>

For many years, over many cases, there was disagreement as to whether knowledge of falsity was required.<sup>2</sup> Given the current theory of the ethical underpinnings of business fraud, knowledge of falsity (in common parlance, a lie) or reckless utterance would seem to be an indispensable element. Thus, for example, where the seller of a commercial building did not know that the building had asbestos fireproofing, he could not be liable in fraud to the buyer claiming that the vendor did not tell him that the building had asbestos because “[a] seller has no duty to disclose facts he does not know.”<sup>3</sup>

In addition to having knowledge of falsity, the misrepresenter must also intend for his or her false statement to induce action.<sup>4</sup> Although intent to induce a party to act on a statement is a necessary element of fraud, this kind of intent has generated relatively few decisions; moreover, intent is often established by circumstantial evidence, evidence that often is the same to estab-

<sup>3</sup>Chandler v. Butler, 284 S.W.2d 388, 394 (Tex.Civ.App.—Texarkana 1955, no writ)(truthfully stated stock price left misleading impression when given in response to request for market price).

<sup>4</sup>State Nat'l Bank v. Farah Mgf. Co., 678 S.W.2d 661, 681 (Tex.App.—El Paso 1984, writ dism'd by agr.).

### [Section 2.20]

<sup>1</sup>Prudential Ins., 896 S.W.2d at 163; Trenholm v. Ratliff, 646 S.W.2d

927, 930 (Tex. 1983); PJC 105.2.

<sup>2</sup>Cf. Stone v. Lawyers Title Corp., 554 S.W.2d 183 (Tex. 1977) with discussion in 2 J. EDGAR & J. Sales, Texas Torts And Remedies § 44.02[4] (1988).

<sup>3</sup>Prudential Ins., 896 S.W.2d at 162.

<sup>4</sup>Sears, Roebuck & Co. v. Meadows, 877 S.W.2d 281, 282 (Tex. 1994) (reversing trial court judgment because trial court refused to submit issue as to whether Sears intended to mislead plaintiff.).

lish a knowing misrepresentation accompanied by reliance.<sup>5</sup>

Intent to induce an action must be distinguished from intent not to perform, an issue that arises in the context of determining whether a promise about a future event can be a fraudulent statement.<sup>6</sup> Likewise, intent to induce action is separate and distinct from the requirement that the speaker intentionally made the representation.<sup>7</sup>

Intent to deceive—as opposed to intent to induce action in reliance on a false statement—is not an element, although the distinction between the two is so subtle as to be almost religious.<sup>8</sup>

Intent to induce action can be a major distinction between fraud and negligent misrepresentation.<sup>9</sup>

## § 2.21 Fraud and misrepresentation—Common law fraud—Requirement of reliance

### Research References

West's Key Number Digest, Contracts ◊94(5); Fraud ◊19 C.J.S., Contracts §§ 136, 139 to 140, 156, 158 to 160, 168 to 171, 173 to 174; Fraud §§ 37, 39 to 49

Proof of Plaintiff's reliance on the defendant's misrepresentation or non-disclosure when there is a duty to disclose is a necessary element of a fraud case.<sup>1</sup> That being said, analysis of reliance raises issues with respect to comparative responsibility, duty to investigate, and whether the reliance must be justified.

Neither the Supreme Court's familiar list of the elements of fraud nor the PJC's require that the reliance be justified.<sup>2</sup> Nonetheless, many cases not only require justifiable reliance but also purport to hold that it is an issue for the trier of fact, even in

<sup>5</sup>Custom Leasing, Inc. v. Texas Bank & Trust Co., 516 S.W.2d 138, 144 (Tex. 1974).

<sup>6</sup>See Spoljaric v. Percival, 708 S.W.2d 432 ("A promise to do an act in the future is actionable fraud when made with the intention, design and purpose of deceiving, and with no intention of performing the act.")

<sup>7</sup>Custom Leasing, 516 S.W.2d at 144.

<sup>8</sup>Wilson v. Jones, 45 S.W.2d 572 (Tex.Com.App. 1932, holding approved).

<sup>9</sup>Blue Bell v. Peat, Marwick, Mitchell & Co., 715 S.W.2d 408, 415 (Tex.App.—Dallas 1986, writ ref'd

n.r.e.) (holding accountant liable for negligent misrepresentation for false statements in financial statements that accountant could expect third party to rely on but not for fraud in absence of proof that accountant intended to induce third party to rely on statements).

### [Section 2.21]

<sup>1</sup>Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171, 181 (Tex. 1997); Trenholm v. Ratcliff, 646 S.W.2d 927, 931 (Tex. 1983); PJC 105.2.

<sup>2</sup>Trenholm, 646 S.W.2d at 930; PJC 105.2.

cases where it was not submitted to the jury.<sup>3</sup> Indeed, the comments to the pattern jury instruction seem to read the Texas Supreme Court has having held that the reliance need not be justified.<sup>4</sup>

## § 2.22 Fraud and misrepresentation—Common law fraud—Obligation to investigate truth of assertions

### Research References

West's Key Number Digest, Contracts ⇨94(5); Fraud ⇨22  
C.J.S., Contracts §§ 136, 139 to 140, 156, 158 to 160, 168 to 171, 173 to 174; Fraud §§ 37, 39 to 44, 47 to 49

Generally, the courts do not require that a person receiving a false representation use due diligence to investigate the truth of the representation, although, it has been held that “[i]n an arm’s length transaction the defrauded party must exercise ordinary care for the protection of his own interests and is charged with knowledge of all facts which would have been discovered by a reasonably prudent person similarly situated.”<sup>1</sup> Despite some confusion in the case law pertaining to the defrauded party’s duty to investigate, if the defrauded party has reason to be suspicious of potential fraud, a duty to investigate can arise.<sup>2</sup> Nevertheless, a defrauded party does not have the duty to suspect and discover the statements are false.<sup>3</sup> Adding some confusion, however, are a handful of older cases, which have not been expressly overruled, which have held that a “party claiming fraud has a duty to use reasonable diligence in protecting his own affairs.”<sup>4</sup>

Failure to use due diligence to suspect or discover someone’s fraud will not act to bar the defense of fraud to the contract or

<sup>3</sup>See, e.g., *Roberts v. United New Mexico Bank at Roswell*, 14 F.3d 1076, 1080 (5th Cir. 1994) (holding that the existence of any expertise or sophistication of grower buying land from bank based on bank’s representations of land’s quality “was a circumstance considered by the jury when it determined that the Roberts justifiably relied upon the Bank’s misrepresentations.”). See PJC 105.2.

<sup>4</sup>See PJC 105.2 (maintaining that reliance need not be justified under the court’s analysis in *Koral Industries v. Security-Connecticut Life Ins. Co.*, 802 S.W.2d 650 (Tex.1990)).

### [Section 2.22]

<sup>1</sup>*Thigpen v. Locke*, 363 S.W.2d 247, 251 (Tex. 1962). See also *Trenholm*, 646 S.W.2d 927.

<sup>2</sup>*Andress v. Condos*, 672 S.W.2d 627, 630 (Tex.App.—Fort Worth 1984, writ ref’d n.r.e.).

<sup>3</sup>*Kerrville HRH, Inc. v. City of Kerrville*, 803 S.W.2d 377, 385 (Tex.App.—San Antonio 1990, writ denied).

<sup>4</sup>*Thigpen*, 363 S.W.2d at 251. (Parties to a contract “have an obligation to protect themselves by reading what they sign.”).

defeat reliance.<sup>5</sup> Consequently, the wrongdoer cannot complain that the person relying on his misrepresentations “should have disbelieved his solemn statements.”<sup>6</sup> Accordingly, only actual knowledge that misrepresentations were in fact not true would relieve the wrongdoer of culpability.<sup>7</sup> For example, the *Koral Industries* court relieved an insurance company from paying on a policy procured by fraud, even though the jury found that the insurance company was aware of facts that would have caused a prudent person to make an inquiry that would have uncovered the fraudulent statements.<sup>8</sup>

The Court’s recent decision in *Schlumberger* is of great significance. The Court held that execution of a release which disclaims reliance on representations will, in some

situations, preclude a claim that the release was fraudulently induced.<sup>9</sup>

Some of the past debate over justifiable reliance is perhaps attributable to the all-or-nothing nature of this intentional tort; absent a comparative fault scheme, courts found a way to import contributory fault into the analysis under the rubric that a party must be justified in relying on the fraudulent statement. That analytical difficulty may be eliminated by the proportionate responsibility scheme in Tex. Civ. Prac. & Rem. Code § 33.001 *et seq.*, which applies to cases filed after September 1, 1996.<sup>10</sup> However, this scheme is not entirely clear. For example, neither the Code nor cases state what kind of conduct on the part of a fraud plaintiff could cause him to be assigned a percentage responsibility for causing the harm for which recovery is sought. Thus, it is unclear whether mere negligence in investigating intentionally fraudulent statements can result in a proportionate reduction of damages, or perhaps even a complete bar to

<sup>5</sup>*Koral Indus.*, 802 S.W.2d at 651.

<sup>6</sup>*Koral Indus.*, 802 S.W.2d at 651, (citing *Western Cottage Piano & Organ Co. v. Anderson*, 45 Tex.Civ.App. 513, 101 S.W. 1061 (1907 writ ref’d)).

<sup>7</sup>*Koral Indus.*, 802 S.W.2d at 651 *Lutheran Brotherhood v. Kidder Peabody & Co.*, 829 S.W.2d 300, 308 (Tex.App.—Texarkana) *writ dismissed and judgment set aside following settlement*, 840 S.W.2d 384 (Tex. 1992) (“The rule is that one cannot recover for fraudulent representations when he knows the representation is false, or when he has relied solely on his own investigation rather than on the repre-

sentations of the other party.”).

<sup>8</sup>802 S.W.2d at 651.

<sup>9</sup>*Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 181 (Tex.1997).

<sup>10</sup>The proportionate responsibility scheme appears to apply to intentional torts, such as fraud, as well as to negligence causes of action. (“[T]his chapter applies to any cause of action based on tort in which a defendant, settling person, or responsible third party is found responsible for a percentage of the harm for which relief is sought.”) Tex. Civ. Prac. & Rem. Code §§ 33.002(a) and 33.003.

recovery.<sup>11</sup>

### § 2.23 Fraud and misrepresentation—Common law fraud—Injury requirement

#### Research References

West's Key Number Digest, Contracts ◊94(1); Fraud ◊25  
C.J.S., Contracts §§ 136, 139 to 140, 156 to 160, 170 to 171, 173 to 174;  
Fraud §§ 50 to 58, 61

Injury caused by reliance on the misrepresentation is a prima facie element of fraud.<sup>1</sup> Although injury is usually in the form of monetary loss, the injury equivalent can be met by proof of a party's incurring a legal liability as a result of the fraud.<sup>2</sup> In addition, loss of a legal right can also satisfy the injury requirement.<sup>3</sup>

### § 2.24 Fraud and misrepresentation—Common law fraud—Defenses

#### Research References

West's Key Number Digest, Contracts ◊94(1), 97; Fraud ◊35, 38;  
Frauds, Statute of ◊119(1)  
C.J.S., Contracts §§ 136, 138 to 140, 146, 156 to 160, 170 to 174, 186,  
188; Fraud §§ 92 to 93; Frauds, Statute Of §§ 2, 4, 107, 139, 149, 161

Defenses to common law fraud include ratification, waiver, statute of frauds, and statute of limitations. Ratification and waiver generally require the defrauded party to accept the benefits of the fraud while being aware of the fraud. Ratification occurs when a party retains the benefits of the transaction after acquiring full knowledge of the fraud.<sup>1</sup> Likewise, waiver occurs when a party, who claims fraudulent inducement to enter a contract, continues to accept benefits under the contract even after becoming aware of material facts concerning the fraud, or conducts himself or herself in a manner as to recognize the contract as binding.<sup>2</sup> In order for ratification of waiver to be effective, however, the party must have had full knowledge of the

<sup>11</sup>Tex. Civ. Prac. & Rem. Code §§ 33.001, 33.003, and 33.013.

#### [Section 2.23]

<sup>1</sup>*Trenholm*, 646 S.W.2d at 930; PJC 105.2.

<sup>2</sup>*Turner v. Houston Agr. Credit Corp.*, 601 S.W.2d 61, 64 (Tex.Civ.App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.) (holding that closure on deed of trust satisfied damage requirement.)

<sup>3</sup>*Lee v. Killian*, 761 S.W.2d 139, 141 (Tex.App.—Ft. Worth 1988, no writ) (finding injury where execution of release led to party's cause of action being barred.)

#### [Section 2.24]

<sup>1</sup>*Land Title Co. of Dallas, Inc. v. F.M. Stigler, Inc.*, 609 S.W.2d 754, 757 (Tex. 1980).

<sup>2</sup>*Oil Country Specialists, Inc. v. Philipp Bros.*, 762 S.W.2d 170, 176

fraud at the time of ratification or waiver and must intend to ratify the transaction or waive his or her rights.<sup>3</sup>

The statute of frauds, which requires certain contracts to be reduced to writing, can defeat a claim for fraud based on a contract which would violate the statute.<sup>4</sup>

Finally, the four-year statute of limitations governs fraud causes of action.<sup>5</sup> Limitations begin to run when the defrauded party discovers the fraud or could have discovered it in the exercise of reasonable diligence.<sup>6</sup>

## § 2.25 Fraud and misrepresentation—Statutory fraud

### Research References

West's Key Number Digest, Consumer Protection ◊8; Fraud ◊3, 13; Securities Regulation ◊278, 297  
C.J.S., Credit Reporting Agencies; Consumer Protection §§ 40 to 51, 64; Fraud §§ 7 to 8, 11 to 12, 17, 23 to 25, 29 to 30, 34 to 35, 59 to 60, 80; Securities Regulation and Commodity Futures Trading Regulation §§ 378, 418, 428

Texas Business and Commerce Code § 27.01 provides a statutory basis for fraud in a transaction involving real estate or stock in a corporation or joint stock company. The statute provides elements for fraud for misrepresentation of a fact and for a false promise. The reliance and materiality elements for statutory fraud do not differ from those of common law fraud.<sup>1</sup>

The elements of statutory fraud **under § 27.01(a)** for misrep-

(Tex.App.—Houston [1st Dist.] 1988), *writ denied per curiam*, 787 S.W.2d 38 (Tex. 1990).

<sup>3</sup>Sawyer v. Pierce, 580 S.W.2d 117, 122 (Tex.Civ.App.—Corpus Christi 1979, *writ ref'd n.r.e.*); B & R Dev. Inc. v. Rogers, 561 S.W.2d 639, 642 (Tex.Civ.App.—Texarkana 1978, *writ ref'd n.r.e.*).

<sup>4</sup>Flameout Design & Fabrication, Inc. v. Pennzoil Caspian Corp., 994 S.W.2d 830 (Tex.App.—Houston [1st Dist.] 1999, n.p.h.) (“A fraud cause of action is barred by the statute of frauds when the plaintiff seeks to gain the benefit of the bargain he would have obtained had the contract been performed.”)(citing *Leach v. Conoco, Inc.*, 892 S.W.2d 954, 960 (Tex.App.—Houston [1st Dist.] 1995, *writ dismissed w.o.j.*); *Benoit v. Polysar Gulf Coast, Inc.*, 728 S.W.2d 403, 408 (Tex.App.—Beaumont 1987, *writ ref'd n.r.e.*); *Web-*

*ber v. M.W. Kellogg Co.*, 720 S.W.2d 124, 129 (Tex.App.—Houston [14th Dist.] 1986, *writ ref'd n.r.e.*) (statute of frauds barred suit based on oral employment contract); *see also Collins v. Allied Pharmacy Mgmt. Inc.*, 871 S.W.2d 929, 936 (Tex.App.—Houston [14th Dist.] 1994, no writ) (“Application of the statute of frauds to a contract claim [in this case, an employment contract] vitiates a fraud claim based on the same facts, or a claim for negligent misrepresentation.”).

<sup>5</sup>*Williams v. Khalaf*, 802 S.W.2d 651, 658 (Tex. 1990); Tex. Civ. Prac. & Rem. Code § 16.004.

<sup>6</sup>*Berkley v. American Cyanamid Co.*, 799 F.2d 995, 998 (5th Cir. 1986).

### [Section 2.25]

<sup>1</sup>*See Fisher v. Yates*, 953 S.W.2d 370 (Tex.App.—Texarkana 1997), *writ denied per curiam*, 988 S.W.2d 730 (Tex. 1998).

resentation of a fact are: (1) a false representation of a past or existing material fact, when the false representation is (2) made to a person for the purpose of inducing that person to enter into a contract and (3) relied on by that person in entering into that contract.

The elements for making a false promise under § 27.01(a) are: (1) a false promise to do an act, when the false promise is (2) material; (3) made with the intention of not fulfilling it; (4) made to a person for the purpose of inducing that person to enter into a contract; and (5) relied on by that person in entering into that contract.

The main difference between factual and promissory fraud under § 27.01(a) is that, with respect to a factual misrepresentation, a party does not have to prove that the speaker knew the statement was false.<sup>2</sup>

Failure to disclose may be actionable under § 27.01(a).<sup>3</sup>

Actual and punitive damages are recoverable, under appropriate circumstances, from the person who makes a false representation or false promise.<sup>4</sup>

A third person—one who did not make the fraudulent statement—may also be liable for exemplary damages if the following conditions are satisfied: (1) the third person must have actual awareness of the falsity of the representation or promise made by another person, and (2) the third person fails to disclose the falsity to the person defrauded, and (3) the third person benefits from the false representation or promise.<sup>5</sup>

Attorney's fees, expert witness fees, costs for copies of depositions, and costs of court may also be recovered under § 27.01(e).

Specific Performance—Specific performance is available in lieu of “actual damages” as a remedy for statutory fraud in real estate transactions when the facts of the case require specific perfor-

<sup>2</sup>Brush v. Reata Oil and Gas Corp., 984 S.W.2d 720, 726 (Tex.App.—Waco 1998, pet. denied) (“The elements of statutory fraud under section 27.01 are essentially identical to the elements of common law fraud except that the statute does not require proof of knowledge or recklessness as a prerequisite to the recovery of actual damages.”).

<sup>3</sup>Ojeda de Toca v. Wise, 748 S.W.2d 449, 451 (Tex. 1988) (Court upholds DTPA verdict based on seller's failure to disclose that property was

subject to demolition order.).

<sup>4</sup>Tex. Bus. & Com. Code § 27.01(b), (c), and (d). Exemplary damages may be recovered for a false factual representation only upon showing that the representation was made with actual awareness of the statement's falsity. Tex. Bus. & Com. Code § 27.01(c).

<sup>5</sup>Tex. Bus. & Com. Code § 27.01(d). Actual awareness of falsity may be inferred where objective manifestations indicate that a person acted with actual awareness.

mance to ensure a just result.<sup>6</sup>

## § 2.26 Fraud and misrepresentation—Constructive fraud

### Research References

West's Key Number Digest, Contracts ◊94(1); Fraud ◊5  
C.J.S., Contracts §§ 136, 139 to 140, 156 to 160, 170 to 171, 173 to 174;  
Fraud § 4

Constructive fraud is “the breach of some legal or equitable duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive others, to violate confidence, or to injure public interests.”<sup>1</sup> It differs from actual fraud because it does not require intent to deceive or knowledge of falsity.

Constructive fraud arises most commonly out of breach of a duty based on a fiduciary or confidential relationship.<sup>2</sup> A fiduciary or confidential relationship may arise from circumstances of the particular case, but it must exist prior to, and apart from, the agreement made the basis of the claim.<sup>3</sup>

“Fraud on the community” is a judicially created concept based on the theory of

constructive fraud and involves a breach of a legal, equitable, or fiduciary duty between spouses.<sup>4</sup> However, there is no private cause of action for fraud between spouses when the damages are limited to the community estate.<sup>5</sup>

Certain formal legal relationships give rise to fiduciary duties as a matter of law.<sup>6</sup> For example, certain confidential relationships may give rise to fiduciary duties where one person comes to trust in and rely upon another whether the relationship is social, domestic, or personal.<sup>7</sup>

Generally, whether a confidential relationship gives rise to fi-

<sup>6</sup>Scott v. Sebree, 986 S.W.2d 364, 368–69 (Tex.App.—Austin, 1999, pet. denied).

#### [Section 2.26]

<sup>1</sup>Archer v. Griffith, 390 S.W.2d 735, 740 (Tex. 1964).

<sup>2</sup>Thames v. Johnson, 614 S.W.2d 612, 614 (Tex.Civ.App.—Texarkana 1981, no writ).

<sup>3</sup>Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171, 177 (Tex. 1997); Transport Ins. Co. v. Faircloth, 898 S.W.2d 269, 280 (Tex. 1995).

<sup>4</sup>In re Estate of Herring, 970

S.W.2d 583, 586 (Tex.App.—Corpus Christi 1998, no pet.).

<sup>5</sup>See Schlueter v. Schlueter, 975 S.W.2d 584 (Tex. 1998).

<sup>6</sup>Crim Truck & Tractor v. Navistar Int'l Trans. Corp., 823 S.W.2d 591, 593 (Tex. 1992). For a listing of these formal legal relationships that give rise to fiduciary duties and for a more detailed discussion of breach of fiduciary duties, see *infra* § 2.32.

<sup>7</sup>Page Airways, Inc. v. Associated Radio Svc. Co., 545 S.W.2d 184, 185 (Tex.Civ.App.—San Antonio 1976, writ *ref'd n.r.e.*).

duciary duties is a fact question for the jury, though it can be a question of law where no evidence exists to support a fiduciary relationship.<sup>8</sup>

In general, once a fiduciary relationship has been established, the plaintiff may request a jury instruction on the nature of the obligation that may include statements like the fiduciary "have a duty to act with the highest degree of loyalty, trust, and allegiance."<sup>9</sup>

It is not clear whether a four-year statute of limitations applies to constructive fraud, as it does to actual fraud, or whether the two-year statute applies.<sup>10</sup> In *Martz v. Weyerhauser Co.*,<sup>11</sup> the court held that even though the plaintiff had alleged a cause of action for constructive fraud and argued that the four year statute applied to that cause of action, all the claims in the suit sounded in tort and not fraud.<sup>12</sup> Therefore, the two year tort statute of limitations applied rather than the four year fraud statute of limitations.<sup>13</sup> In contrast, to *In Re Estate of Herring*,<sup>14</sup> the court held that the underlying cause of action on which the constructive fraud claim was based arose from a breach of fiduciary duty and therefore the four year statute of limitations applied. Apparently the essence of the claim controls whether the two or four year statute of limitations applies.

Damages recoverable for constructive fraud are the same as those recoverable for actual fraud, except that, with respect to exemplary damages, constructive fraud is not a sufficient predicate in and of itself for recovery of exemplary damages.<sup>15</sup> In addition, a constructive trust is available as a remedy for constructive fraud which is based on breach of fiduciary duty or actual fraud.<sup>16</sup>

## § 2.27 Fraud and misrepresentation—Damages

### Research References

West's Key Number Digest, Contracts ⇨94(1); Damages ⇨89, 103;

<sup>8</sup>*Crim Truck & Tractor*, 823 S.W.2d at 593 (distributor of heavy equipment not a fiduciary relationship with manufacturer).

<sup>9</sup>*FDIC v. Wheat*, 970 F.2d 124, 130 (5th Cir. 1992).

<sup>10</sup>*Compare* *McGill v. Goff*, 17 F.3d 729 (5th Cir. 1994)(four years) *with* *Clade v. Larsen*, 838 S.W.2d 277 (Tex.App.—Dallas 1992, writ denied) (two years).

<sup>11</sup>*Martz v. Weyerhauser Co.*, 965 S.W.2d 584 (Tex.App.—Eastland 1998, no pet.).

<sup>12</sup>*Martz*, 965 S.W.2d at 588–589.

<sup>13</sup>*Martz*, 965 S.W.2d at 588–589.

<sup>14</sup>*In Re Estate of Herring*, 970 S.W.2d 583, 587 (Tex.App.—Corpus Christi 1998, no pet.).

<sup>15</sup>Tex. Civ. Prac. & Rem. Code § 44.001(6).

<sup>16</sup>*Newman v. Link*, 866 S.W.2d 721, 725–26 (Tex.App.—Houston [14th Dist.] 1993), writ denied per curiam, 889 S.W.2d 288 (Tex. 1994); *Grace v. Zimmerman*, 853 S.W.2d 92, 97 (Tex.App.—Houston [14th Dist.] 1993, no writ).

Fraud ⇐59 to 61  
 C.J.S., Contracts §§ 136, 139 to 140, 156 to 160, 170 to 171, 173 to 174;  
 Damages §§ 129, 142, 198 to 200

Tort damages are recoverable for fraudulent inducement of a contract. In *Formosa Plastics Corp., U.S.A. v. Presidio Engineers and Contractors, Inc.*,<sup>1</sup> the Texas Supreme Court addressed an issue on which the courts of appeal had been split and held that tort damages are available for fraudulent inducement of contract claim. The Court went on to disapprove several appellate court opinions to the extent they held that “tort damages cannot be recovered for a fraudulent inducement claim absent an injury that is distinct from any permissible contract damages.”<sup>2</sup> “Tort damages are recoverable for a fraudulent inducement claim irrespective of whether the fraudulent representations are later subsumed in contract or whether the plaintiff only suffers an economic loss related to the subject matter of the contract.”<sup>3</sup> Moreover, the permissibility of tort damages also allows for the recovery of exemplary damages.

Damages can be measured using either of two measures: out-of-pocket expenses or benefit-of-the-bargain.<sup>4</sup> Out-of-pocket damages measure the difference between the value paid and the value received and thus compensate for actual pecuniary loss, not lost profits or other anticipated elements of the bargain. In contrast, benefit-of-the-bargain damages measure the difference between the value as represented and the value received; such damages therefore permit the recovery of lost profits.<sup>5</sup>

Lost profits must be proved with reasonable certainty, and determining whether lost profits have been proved with reasonable certainty is a fact intensive determination dependent upon the circumstances of each case.<sup>6</sup> Recovery of lost profits, however, does not require that the loss be susceptible of exact calculation.<sup>7</sup> Indeed, the “reasonable certainty” rule for proof of lost profits is intended to be flexible enough to accommodate the myriad circumstances in which claims for lost profits may arise.<sup>8</sup>

Benefit-of-the-bargain only compensates for the profits that

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<sup>1</sup>*Formosa Plastics Corp., U.S.A. v. Presidio Engineers and Contractors, Inc.*, 960 S.W.2d 41 (Tex. 1998).

<sup>2</sup>*Formosa Plastics*, 960 S.W.2d at 47.

<sup>3</sup>*Formosa Plastics*, 960 S.W.2d at 47.

<sup>4</sup>*Formosa Plastics*, 960 S.W.2d at 49; *W.O. Bankston Nissan, Inc. v.*

*Wulters*, 754 S.W.2d 127 (Tex. 1988).

<sup>5</sup>*Formosa Plastics*, 960 S.W.2d at 49–50.

<sup>6</sup>*Formosa Plastics*, 960 S.W.2d at 50, n.3.

<sup>7</sup>*Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 84 (Tex. 1992).

<sup>8</sup>*Texas Instruments, Inc. v. Teletron Mgt., Inc.*, 877 S.W.2d 276, 279 (Tex. 1994).

would have been made if the bargain had been performed as promised—in other words, profits on the bargain that was made, not a hypothetical bargain that would have been struck if the performing party had known the truth and not been duped by a fraudulent misrepresentation.<sup>9</sup>

Consequential damages that are foreseeable and directly traceable to the fraud and result from are recoverable and may include foreseeable profits from *other* business opportunities lost as a result of the fraudulent misrepresentation.<sup>10</sup> However, the Texas Supreme Court has held that lost contingency fees from other cases were not reasonably foreseeable damage that plaintiffs suffered as a result of client's failure to pay amounts due under hourly fee agreement.<sup>11</sup>

Finally, exemplary or punitive damages are recoverable upon proof of intentional fraud.<sup>12</sup> To recover exemplary damages under the statute, however, the claimant must prove “by clear and convincing evidence”—a heightened burden of proof—“that the harm with respect to which the claimant seeks recovery of exemplary damages results from fraud.”<sup>13</sup>

Rescission of the contract and restoring parties to their original position is also a remedy available to a fraud claimant.<sup>14</sup> Rescission and damages are separate and mutually exclusive remedies. A party fraudulently induced to enter into a transaction may sue for damages or to rescind the agreement, but he is not entitled to both remedies.<sup>15</sup>

## § 2.28 Fraud and misrepresentation—Negligent misrepresentation

### Research References

West's Key Number Digest, Contracts ◊94(1); Fraud ◊13(3)  
C.J.S., Contracts §§ 136, 139 to 140, 156 to 160, 170 to 171, 173 to 174;  
Fraud §§ 11 to 12, 17, 23 to 25, 30, 59 to 60, 80

Even a representation made with an honest belief in its truth

<sup>9</sup>*Formosa Plastics*, 960 S.W.2d at 41.003(a)(1).  
50.

<sup>10</sup>*Formosa Plastics*, 960 S.W.2d at 50. See also *Comty. Dev. Serv., Inc. v. Replacement Parts Mfg., Inc.*, 679 S.W.2d 721, 725 (Tex.App.—Houston [1st Dist.] 1984, no writ) (noting that lost profits from collateral contracts are generally classified as consequential damages).

<sup>11</sup>*Stuart v. Bayless*, 964 S.W.2d 920, 921–22 (Tex. 1998).

<sup>12</sup>Tex. Civ. Prac. & Rem. Code §

<sup>13</sup>Tex. Civ. Prac. & Rem. Code § 41.003(a).

<sup>14</sup>*Sawyer v. Pierce*, 580 S.W.2d 117, 127 (Tex.Civ.App.—Corpus Christi 1979, writ ref'd n.r.e.).

<sup>15</sup>*Smallwood v. Singer*, 823 S.W.2d 319, 322 (Tex.App.—Texarkana 1991, no writ); *Burroughs Corp. v. Farmers Dairies*, 538 S.W.2d 809, 810 (Tex.Civ.App.—El Paso 1976, writ ref'd n.r.e.).

may be actionable if made without reasonable care in ascertaining the facts underlying the representation. Courts have long recognized that a defendant may be liable for misleading words or acts, or non-disclosure of known facts. "The tort of negligent misrepresentation frequently involves a defendant's statement that a contract exists, upon which plaintiff relies, only to later discover that the contract has been rejected or was never completed."<sup>1</sup>

In *Federal Land Bank Association of Tyler v. Sloan*,<sup>2</sup> the Texas Supreme Court defined the elements of negligent misrepresentation based on § 552 of the Restatement (Second) of Torts. The elements of a cause of action for the breach of this duty are: (1) the representation is made by a defendant in the course of his business, or in a transaction in which he has a pecuniary interest; (2) the defendant supplies false information for the guidance of others in their business; (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information; and, (4) the plaintiff suffers pecuniary loss by justifiably relying on the representation.

Similarly, under the pattern jury charge, negligent misrepresentation occurs when: (1) a party makes a representation in the course of his business or in a transaction in which he has a pecuniary interest; (2) the representation supplies false information for the guidance of others in their business; and, (3) the party making the representation did not exercise reasonable care or competence in obtaining or communicating the information.<sup>3</sup>

As noted above, Texas has largely adopted the definition of "negligent misrepresentation" found in § 552 of the Restatement (Second) of Torts, which states:

1. One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

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**[Section 2.28]**

<sup>1</sup>*Airborne Freight Corp. v. C.R. Lee Enters.*, 847 S.W.2d 289, 294 (Tex.App.—El Paso 1992, writ denied).

<sup>2</sup>*Federal Land Bank Association of Tyler v. Sloan*, 825 S.W.2d 439 (Tex. 1991).

<sup>3</sup>PJC 105.16. The comment to PJC 105.16 notes that justifiable reli-

ance is an element of the negligent misrepresentation tort (even though not an element of fraud) and that contributory negligence is a defense to negligent misrepresentation. *See Fed. Land Bank Ass'n. of Tyler v. Sloane*, 793 S.W.2d 692, 696 n.4 (Tex.App.—Tyler 1990) *aff'd in part, rev'd in part*, 825 S.W.2d 439 (Tex. 1991).

2. Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered:
  - (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it;
  - (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.
3. The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created in any of the transactions in which it is intended to protect them.

### § 2.29 Fraud and misrepresentation—Negligent misrepresentation—Limits of the cause of action

#### Research References

West's Key Number Digest, Contracts ◊94(1); Fraud ◊13(3)  
 C.J.S., Contracts §§ 136, 139 to 140, 156 to 160, 170 to 171, 173 to 174;  
 Fraud §§ 11 to 12, 17, 23 to 25, 30, 59 to 60, 80

Texas courts, like many around the country, have limited liability for negligent misrepresentation by, among other things, narrowly defining the kinds of actionable misrepresentations, severely limiting the group of persons to whom the defendant may be liable, and requiring that the plaintiff's reliance was justifiable.

Thus, the only types of information for which the tort of negligent misrepresentation permits recovery are misrepresentations of existing fact.<sup>1</sup> In addition, as in fraud claims, pure expressions of opinion generally are not actionable, nor are promises of future conduct.<sup>2</sup>

There is some question whether a failure to disclose can provide the basis for a negligent misrepresentation. The Restatement clearly requires that liability be based on an affirmatively false representation. But some courts have stated that liability "for negligent misrepresentation may be based not only on a false statement, but on omissions to state a material fact necessary to

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#### [Section 2.29]

<sup>1</sup>*E.g.*, *Williams v. City of Midland*, 932 S.W.2d 679, 684 (Tex.App.—El Paso 1996, no writ); *Air-*

*borne Freight Corp.*, 847 S.W.2d at 294.

<sup>2</sup>*See, e.g.*, *Sloane*, 825 S.W.2d at 442.

make other statements not misleading.”<sup>3</sup>

Courts have also limited the cause of action by holding some misrepresentations to be nonmaterial. A representation is material if the plaintiff was justified in acting upon it. Clearly, there are misrepresentations which are so trivial or so far unrelated to anything of substance in the transaction that the plaintiff cannot claim that such misrepresentations genuinely affected his or her conduct.<sup>4</sup> One Texas court has concluded that a misrepresentation is material only if it actually induced the complaining party to enter into or refrain from entering into a transaction.<sup>5</sup> A misrepresentation may be material even if it is not the sole cause of entering into or refraining from entering into a transaction—so long as the claimant relied on the misrepresentation.<sup>6</sup>

Although the decisions necessarily turn on the facts of each case, courts have held the following types of misrepresentations to be immaterial: the defendant's social, political or religious associations; his or her motive or purpose for entering into the transaction; the identity of a party for whom a purchase is made, and even a false financial statement which still provides an accurate picture.<sup>7</sup> A common example of an immaterial misrepresentation is the statement during negotiations that an offer is “final” or “non-negotiable.” While such a statement may be false and designed to induce assent, courts uniformly hold that such a misrepresentation is not material or basic to a transaction and in no sense is an offeree entitled to rely upon it. However, in *Marburger v. Seminole Pipeline Co.*,<sup>8</sup> the court noted that “where a representation is made that all landowners had been and necessarily would be offered the same set price, as alleged in this case, a landowner might reasonably infer from it that factors beyond Seminole's mere willingness to compromise affected its ability to do so; i.e., because Seminole was representing to landowners that it would treat them all alike, it was obligated to do so.” The court went on to hold that those landowners that had attempted to counteroffer or negotiate further had not justifiably relied on the representation as a matter of law, but that a fact is-

<sup>3</sup>See, e.g., *Lutheran Brotherhood v. Kidder Peabody & Co.*, 829 S.W.2d 300, 306 (Tex.App.—Texarkana 1992), writ dismissed and judgment set aside following settlement, 840 S.W.2d 384 (Tex. 1992).

<sup>4</sup>See *Am. Med. Int'l, Inc. v. Giurintano*, 821 S.W.2d 331, 338 (Tex.App.—Houston [14th Dist.] 1991, no writ).

<sup>5</sup>*Giurintano*, 821 S.W.2d at 338.

<sup>6</sup>See *Miller v. Latham*, 276 S.W.2d 858, 866 (Tex.Civ.App.—Amarillo 1954, writ refused n.r.e.).

<sup>7</sup>See, e.g., *Guadalupe-Blanco River Auth. v. City of San Antonio*, 145 Tex. 611, 200 S.W.2d 989, 997 (1947).

<sup>8</sup>*Marburger v. Seminole Pipeline Co.*, 957 S.W.2d 82, 87-88 (Tex.App.—Houston [14th Dist.] 1997, writ denied).

sue existed as to materiality of the representation to those landowners that allegedly refrained from negotiating further based on representation that the offer was non-negotiable.<sup>9</sup>

Many courts seem to conflate materiality with justifiable reliance.<sup>10</sup> Justifiable reliance is said to comprise two elements: (1) the plaintiff must in fact rely on the information, and (2) the reliance must be reasonable. The “justifiableness” of the reliance is judged in light of the plaintiff’s intelligence and experience.<sup>11</sup> Accordingly, at least one court has suggested that Texas courts are “particularly disinclined to entertain claims of justifiable reliance when a sophisticated plaintiff has access to information that would reveal fraud at a time when harm could be averted.”<sup>12</sup>

The only persons to whom a defendant may be liable for negligently supplying information are those persons to whom the information was supplied. The defendant also may be liable to others if he knew at the time the misrepresentation was made that the recipient intended to disseminate the information.<sup>13</sup> This issue of standing is of particular significance in negligent misrepresentation claims founded on professional malpractice (e.g., accountants’ liability). In such cases, third parties may seek to hold a professional liable for information provided to a client and the standing rule limits the group of plaintiffs to whom the professional owes a duty.<sup>14</sup>

Relatedly, the “limited group” rule appears frequently in accounting malpractice cases. In *Scottish Heritable Trust v. Peat Marwick Main & Co.*,<sup>15</sup> for example, potential investors unsuccessfully sought to hold an accounting firm liable for allegedly false information the firm had supplied to its client, a corporation.<sup>16</sup> Moreover, Texas now allows negligent misrepresentation claims to be asserted by a non-client against an attorney

<sup>9</sup>*Marburger*, 957 S.W.2d at 87–88. (2d Cir. 1984).

<sup>10</sup>*E.g.*, *Dorsett Bros. v. Safeco Title Ins. Co.*, 880 S.W.2d 417, 420 (Tex.App.—Houston [14th Dist.] 1993, writ denied) (“Justifiable reliance is a necessary element of . . . negligent . . . misrepresentation.”).

<sup>11</sup>*Haralson v. E.F. Hutton Group*, 919 F.2d 1014, 1025 (5th Cir. 1990); *Geosearch, Inc. v. Howell Petroleum Corp.*, 819 F.2d 521, 526 (5th Cir. 1987).

<sup>12</sup>*Haralson v. E.F. Hutton Group*, 919 F.2d 1014, 1025 (5th Cir. 1990) (citing *Grumman Allied Indus., Inc. v. Rohr Indus., Inc.*, 748 F.2d 729, 737

<sup>13</sup>*See, e.g.*, *Spring Garden 79U, Inc. v. Stewart Title Co.*, 874 S.W.2d 945, 950 (Tex.App.—Houston [1st Dist.] 1994, no writ) (“One to whom a representation is not directed is not entitled to rely on that representation.”).

<sup>14</sup>*See, e.g.*, *Blue Bell, Inc. v. Peat, Marwick, Mitchell & Co.*, 715 S.W.2d 408, 411 (Tex.App.—Dallas 1986, writ ref’d n.r.e.).

<sup>15</sup>81 F.3d 606 (5th Cir. 1996).

<sup>16</sup>*But see Hendricks v. Thornton*, 973 S.W.2d 348 (Tex.App.—Beaumont 1998, pet. denied) (holding that the discovery rule applied to toll the stat-

who gives an opinion or evaluation to the non-client if the attorney intends that the non-client rely on the opinion or evaluation.<sup>17</sup>

## § 2.30 Fraud and misrepresentation—Negligent misrepresentation—Defenses

### Research References

West's Key Number Digest, Contracts ◊97(1); Fraud ◊35, 38; Frauds, Statute of ◊119(1)  
 C.J.S., Contracts §§ 138, 146, 156, 172, 186, 188; Fraud §§ 92 to 93; Frauds, Statute Of §§ 2, 4, 107, 139, 149, 161

There are a number of defenses to a claim of negligent misrepresentation. First, the statute of limitations for negligent misrepresentation is only two years.<sup>1</sup> In addition, at least one court of appeals has held that contributory negligence is a defense to a negligent misrepresentation claim (but courts have not been clear in explaining how this issue differs from either the materiality of the representation, or the plaintiff's justifiable reliance).<sup>2</sup>

By its terms, the proportionate responsibility statute in Chapter 33 of the Texas Civil Practices & Remedies Code applies to negligent misrepresentation claims. Section 33.002 states that the statute applies to "any cause of action based on tort . . .," and does not exclude claims of intentional or negligent misrepresentation.

Texas courts have also held that the application of the statute of frauds to a contract claim likewise bars a claim for negligent

ute of limitations for third party investors (not clients of the accountants) who sued accounting firm for negligent misrepresentation).

<sup>17</sup>McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787, 794 (Tex. 1999) ("Liability is limited to situations in which the attorney who provides the information is aware of the nonclient and intends that the nonclient rely on the information. In other words, a [negligent misrepresentation] cause of action is available only when information is transferred by an attorney to a known party for a known purpose. A lawyer may also avoid or minimize the risk of liability to a nonclient by setting forth (1) limitations as to whom the representation is directed and who

should rely on it, or (2) disclaimers as to the scope and accuracy of the factual investigation or assumptions forming the basis of the representation or the representation itself."); *see also* Estate of Arlitt v. Paterson, 995 S.W.2d 713 (Tex.App.—San Antonio 1999, *pet. denied*).

### [Section 2.30]

<sup>1</sup>*See* Tex. Civ. Prac. & Rem. Code § 16.003(a); Milestone Props., Inc. v. Federated Metals Corp., 867 S.W.2d 113, 119 (Tex.App.—Austin 1993, *no writ*).

<sup>2</sup>*See* Fed. Land Bank Ass'n of Tyler v. Sloane, 793 S.W.2d 692, 696 n.4 (Tex.App.—Tyler 1990), *aff'd in part, rev'd in part*, 825 S.W.2d 439 (Tex. 1991).

misrepresentation.<sup>3</sup>

Finally, both waiver and estoppel may provide a valid defense to a negligent misrepresentation claim.<sup>4</sup>

### § 2.31 Fraud and misrepresentation—Negligent misrepresentation—Damages

#### Research References

West's Key Number Digest, Damages ⇨103; Fraud ⇨59  
C.J.S., Damages §§ 129, 142

Texas courts have strictly limited damages in negligent misrepresentation cases to pecuniary losses. Further, such losses are restricted to the damages suffered in reliance on the negligent misrepresentation, not the failure to obtain the benefit of a bargain.<sup>1</sup> Relying on § 552B of the Restatement (Second) of Torts the *Sloane* court imposed the pecuniary loss rule on negligent misrepresentation claims largely for policy reasons, "including a lower degree of fault indicated by a less culpable mental state, and the need to keep liability proportional to risk."<sup>2</sup> Thus, the only damages recoverable for negligent misrepresentation are of pocket losses, not lost profits or the benefit of a bargain.<sup>3</sup>

<sup>3</sup>*E.g.*, *Collins v. Allied Pharmacy Mgmt., Inc.*, 871 S.W.2d 929, 936 (Tex.App.—Houston [14th Dist.] 1994, no writ) ("Application of the statute of frauds to a contract claim vitiates a fraud claim based on the same facts, or a claim for negligent misrepresentation."); *Flo Trend Systems, Inc. v. Allwaste, Inc.*, 948 S.W.2d 4, 9–10 (Tex.App.—Houston [14th Dist.] 1997, writ ref'd). The *Collins* court held that a party barred from enforcing an employment contract by the statute of frauds also is barred from pursuing a negligent misrepresentation claim. *Collins*, 871 S.W.2d at 936.

<sup>4</sup>*See, e.g.*, *First Interstate Bank of Texas, N.A. v. SBFI, Inc.*, 830 S.W.2d 239 (Tex.App.—Dallas 1992, no writ); *see also Sun Expl. & Prods. Co. v. Benton*, 728 S.W.2d 35, 37 (Tex. 1987); *Steubner Realty 19 v. Cravens Road 88*, 817 S.W.2d 160 (Tex.App.—Houston [14th Dist.] 1991, no writ).

#### [Section 2.31]

<sup>1</sup>*See Sloane*, 825 S.W.2d at 442–

43.

<sup>2</sup>*Sloane*, 825 S.W.2d at 443; *see also D.S.A. Inc. v. Hillsboro Independent School District*, 973 S.W.2d 662, 663 (Tex. 1998).

<sup>3</sup>*See Sloane*, 825 S.W.2d at 442–43; *Ludlow v. DeBerry*, 959 S.W.2d 265, 276 (Tex.App.—Houston [14th Dist.] 1997, no writ)(affirming summary judgment on negligent misrepresentation claims because only damages sought were benefit of the bargain damages); *see also Metropolitan Life Ins. Co. v. Haney*, 987 S.W.2d 236, 246–47 (Tex.App.—Houston [14th Dist.] 1999, rev. denied). In addition, the Texas Supreme Court has expressly excluded damages for emotional distress from any recovery for negligent misrepresentation. *D.S.A. Inc.*, 973 S.W.2d at 663; *Sloane*, 825 S.W.2d at 443.

The PJC reflects the limitation on damages recoverable for negligent misrepresentation by permitting jurors to consider only the following elements of damages and none other: (1) The difference, if any, between the

## § 2.32 Fraud and misrepresentation—Breach of fiduciary duty

### Research References

West's Key Number Digest, Contracts ⇨94(1); Fraud ⇨7  
 C.J.S., Contracts §§ 136, 139 to 140, 156 to 160, 170 to 171, 173 to 174;  
 Fraud § 4

"A fiduciary duty is a formal, technical relationship of confidence and trust imposing greater duties upon a fiduciary as a matter of law."<sup>1</sup> The term fiduciary implies and refers to "integrity and fidelity."<sup>2</sup>

The duty owed by a fiduciary is one of loyalty and good faith, strict integrity, fair dealing, and honest performance.<sup>3</sup> Thus, there is a "general prohibition against the fiduciary's using the relationship to benefit his personal interest, except with full knowledge and consent of the principal."<sup>4</sup>

Fiduciary duty encompasses, but goes beyond the duty of good faith and fair dealing.<sup>5</sup> A fiduciary relationship is an extraordinary one and will not be lightly created; the mere fact that one subjectively trusts another does not alone indicate that he placed confidence in another in the sense demanded by a fiduciary relationship, because something apart from the transaction between the parties is required.<sup>6</sup>

In a fiduciary relationship, one person "binds himself to subvert his own interest to those of his principal. If the relationship between two parties does not involve the element of a solely subordinated interest, . . . it is not a fiduciary relationship."<sup>7</sup>

The law imposes fiduciary duties on certain relationships based

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value of what the plaintiff has received in the transaction and the purchase price or value given. (2) The pecuniary loss, if any, otherwise suffered as a consequence of the plaintiff's reliance on the misrepresentation. PJC 110.21.

#### [Section 2.32]

<sup>1</sup>*Arce v. Burrow*, 958 S.W.2d 239 (Tex.App.—Houston [14th Dist.] 1997), *aff'd in part, rev'd in part*, 997 S.W.2d 229 (Tex. 1999) (citing *Central Sav. & Loan Ass'n v. Stemmons Northwest Bank, N.A.*, 848 S.W.2d 232, 243 (Tex.App.—Dallas 1992, no writ)).

<sup>2</sup>*Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 138 Tex. 565, 160 S.W.2d 509, 512 (1942).

<sup>3</sup>*Ludlow v. Deberry*, 959 S.W.2d 265 (Tex.App.—Houston [14th Dist.]

1997, no writ).

<sup>4</sup>*Chien v. Chen*, 759 S.W.2d 484, 495 (Tex.App.—Austin 1988, no writ).

<sup>5</sup>*Associated Indem. Corp. v. Cat Contracting*, 918 S.W.2d 580, 597 (Tex.App.—Corpus Christi 1996), *aff'd in part, rev'd in part*, 964 S.W.2d 276 (Tex. 1998); *Crim. Truck & Tractor v. Navistar Intern.*, 823 S.W.2d 591, 594 (Tex. 1992).

<sup>6</sup>*Associated Indem. Corp.*, 918 S.W.2d at 596; *Stephanz v. Laird*, 846 S.W.2d 895, 901-02 (Tex.App.—Houston [1st Dist.] 1993, writ denied).

<sup>7</sup>*Walker v. Federal Kemper Life Assurance Co.*, 828 S.W.2d 442, 452 (Tex.App.—San Antonio 1992, writ denied).

on the nature of the relationship. A fiduciary relationship exists when one person has a duty to act for or give advice for the benefit of another.<sup>8</sup> These relationships include: attorney client,<sup>9</sup> trustee-beneficiary and estate executor,<sup>10</sup> spouse-spouse with respect to the handling of the community estate,<sup>11</sup> executive non-participating royalty interest owners,<sup>12</sup> agent principal,<sup>13</sup>

<sup>8</sup>See *Kline v. O'Quinn*, 874 S.W.2d 776, 786 (Tex.App.—Houston [14th Dist.] 1994, writ denied).

<sup>9</sup>*Cantu v. Butron*, 921 S.W.2d 344, 350–51 (Tex.App.—Corpus Christi 1996, writ denied); *Thompson v. Vinson & Elkins*, 859 S.W.2d 617, 623 (Tex.App.—Houston [1st Dist.] 1993, writ denied).

The fiduciary duties apply in a joint defense privilege context. *N.M.E. v. Godbey*, 924 S.W.2d 123, 132 (Tex. 1996). The fiduciary duty extends to law firms as well as lawyers. *Gen. Resources Organization, Inc. v. Deadman*, 907 S.W.2d 22, 31–32 (Tex.App.—San Antonio 1995), *writ denied with concurring opinion*, 932 S.W.2d 485 (Tex. 1996). An attorney owes no duty to third parties who are not his clients, even if the third parties are damaged by the attorney's negligent representation of his client. *Barcelo v. Elliott*, 923 S.W.2d 575, 577–78 (Tex. 1996); *Gamboa v. Shaw*, 956 S.W.2d 662, 664 (Tex.App.—San Antonio 1997, no writ). However, an attorney who intends a non-client to rely on the attorney's opinions or evaluations may be subject to a claim for negligent misrepresentation. *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 794 (Tex. 1999).

<sup>10</sup>*Evans v. First Nat'l Bank of Bellville*, 946 S.W.2d 367 (Tex.App.—Houston [14th Dist.] 1997, writ denied); *Huie v. DeShazo*, 922 S.W.2d 920, 923–25 (Tex. 1996) (note that when trustee seeks legal representation, trustee, not beneficiary is client of attorney). *Humane Soc'y of Austin & Travis Cty v. Austin Nat'l Bank*, 531 S.W.2d 574, 577 (Tex. 1975).

<sup>11</sup>*Winkle v. Winkle*, 951 S.W.2d

80 (Tex.App.—Corpus Christi 1997, writ denied). *Zieba v. Martin*, 928 S.W.2d 782, 789 (Tex.App.—Houston [14th Dist.] 1996, no writ). However, in *Schlueter v. Schlueter*, 975 S.W.2d 584 (Tex. 1998), the Court held that no independent tort cause of action for breach of fiduciary duty or fraud exists between spouses when one spouse deprives the community estate of assets. The Court continued to recognize the concept of “fraud on the community” which can be considered by a court in the division of property. When addressing the Plaintiff's argument that a separate tort cause of action is necessary in order to provide for punitive damages, the Court went on to hold that if actual fraud is proven, the court can consider the fraud when making the “just and right” property division in lieu of punitive damages. While spouses may have a fiduciary duty to each other because of the trust relationship as to the community property controlled by each spouse, the fiduciary duty does not include the management of income from a spouse's separate property from his/her separate estate. *Carnes v. Meador*, 533 S.W.2d 365, 370 (Tex.Civ.App.—Dallas 1975, writ ref'd n.r.e.); *Cleaver v. Cleaver*, 935 S.W.2d 491, 496 (Tex.App.—Tyler 1996, no writ). The fiduciary duty terminates with the dissolution of the marriage. *Grossnickle v. Grossnickle*, 935 S.W.2d 830, 846 (Tex.App.—Texarkana 1996, writ denied).

<sup>12</sup>*Luecke v. Wallace*, 951 S.W.2d 267, 276 (Tex.App.—Austin 1997, no writ)(non-participating royalty interest owner may recover exemplary damages for the executive right holder's intentional, malicious, fraudulent or grossly negligent breach of duty);

corporate officers, directors, and majority shareholders,<sup>14</sup> guardian ad litem—minor plaintiff,<sup>15</sup> the guardian or attorney of an estate,<sup>16</sup> law firm partners and associates,<sup>17</sup> ERISA plan administrators.<sup>18</sup>

In certain factual contexts, the law imposes fiduciary duties on

*Manges v. Guerra*, 673 S.W.2d 180, 183 (Tex. 1984) (executive right holder must acquire for the non-executive every benefit that was exacted for the executive); see also *HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 887 (Tex. 1998) (noting that in *Andretta v. West*, 415 S.W.2d 638, 641 (Tex. 1967), the Texas Supreme Court “held that a fiduciary relationship exists between an owner of the executive rights and non-participating royalty owners in *Andretta’s* position because the former has the power to make and amend the lease and thereby affect the latter’s rights”).

<sup>13</sup>*Maryland Ins. Co. v. Head Indus. Coatings & Services, Inc.*, 906 S.W.2d 218, 233 (Tex.App.—Texarkana 1995), rev’d on other grounds, 938 S.W.2d 27 (Tex. 1996); *Southland Lloyd’s Ins. Co. v. Tomberlain*, 919 S.W.2d 822, 831 (Tex.App.—Texarkana 1996, writ denied). These include: (1) Stock broker-customer relationship, *Rauscher Pierce Refsnes v. GSW*, 923 S.W.2d 112, 115 (Tex.App.—Houston [14th Dist.] 1996, no writ). However, a stockbroker’s fiduciary duty does not include a duty to ascertain the client’s mental competency. *Edward D. Jones & Co. v. Fletcher*, 975 S.W.2d 539 (Tex. 1998). (2) Real estate broker-customer relationship. *Southern Cross Ind., Inc. v. Martin*, 604 S.W.2d 290 (Tex.Civ.App.—San Antonio 1980, writ ref’d n.r.e.). (3) Operator that undertakes to market interest owner’s gas has limited fiduciary duty to interest owner consisting of duty to account for monies received for selling gas, avoid conflicts of interest, and to not act as an adverse party in its capacity as the seller of his gas. *Holloway v. Atlantic Richfield Co.*, 970 S.W.2d 641, 643 (Tex.App.—Tyler 1998, no pet.). (4) Managing partners. *M.R. Champion, Inc. v. Mizell*, 904

S.W.2d 617, 618 (Tex. 1995); *Ludlow v. Deberry*, 959 S.W.2d 265 (Tex.App.—Houston [14th Dist.] 1997, no writ); *Hughes v. St. David’s Support Corp.*, 944 S.W.2d 423, (Tex.App.—Austin 1997, writ denied); *Hawthorne v. Guenther*, 917 S.W.2d 924, 934 (Tex.App.—Beaumont 1996, writ denied); *Ferguson v. Williams*, 670 S.W.2d 327, 331 (Tex.App.—Austin 1984, writ ref’d n.r.e.); *Fitz-Gerald v. Hull*, 150 Tex. 39, 237 S.W.2d 256, 264–65 (1951); *Fuqua v. Taylor*, 683 S.W.2d 735, 738 (Tex.App.—Dallas 1984, writ ref’d n.r.e.); see also *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 176 (Tex. 1997) (finding of partnership precluded due to lack of evidence of profit sharing).

<sup>14</sup>*GNG Gas Systems, Inc. v. Dean*, 921 S.W.2d 421, 427 (Tex.App.—Amarillo 1996, writ denied); *Stubblefield v. Belco Mfg. Co., Inc.*, 931 S.W.2d 54, 55 (Tex.App.—Austin 1996, no writ); Tex. Bus. Corp. Act art. 5.14; *Cleaver*, 935 S.W.2d at 496; *DSC Communications v. Next Level Communications*, 107 F.3d 322, 326 (5th Cir. 1997); *UTAIC v. Mackeen & Bailey, Inc.*, 99 F.3d 645, 650–51 (5th Cir. 1996).

<sup>15</sup>*Grunewald v. Technibilt Corp.*, 931 S.W.2d 593, 595–97 (Tex.App.—Dallas 1996, writ denied).

<sup>16</sup>*Henderson v. Viesca*, 922 S.W.2d 553, 557–58 (Tex.App.—San Antonio 1996, writ denied).

<sup>17</sup>*Bray v. Squires*, 702 S.W.2d 266, 270 (Tex.App.—Houston [1st Dist.] 1985, no writ)

<sup>18</sup>*Texas Life v. Gaylord Entertainment Co.*, 105 F.3d 210, 214 (5th Cir. 1997); *Variety Corp. v. Howe*, 516 U.S. 489, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996). A “claim for breach of fiduciary duty relating to the administration of an ERISA plan falls within the exclu-

less formal, but nonetheless confidential, relationships. In 1992, the Supreme Court reaffirmed that some special, informal, confidential relationships give rise to a fiduciary duty.<sup>19</sup> However, the relationships are not created lightly, and for such a relationship to arise in a business transaction, the relationship must exist prior to, and apart from the agreement made the basis of the suit.<sup>20</sup>

While the Court has said that other relationships exist, scant case law exists to define the necessary parts of these ad hoc relationships. No one fact determines the existence of a confidential relationship. "The problem is one of equity and the circumstances of which a fiduciary relationship will [arise] are not subject to hard and fast lines."<sup>21</sup> For example, familial relationships alone will not establish a fiduciary relationship; even adding handling of the family member's financial affairs will not suffice to create a fiduciary relationship. Similarly, one businessman's mere trust of another is insufficient.<sup>22</sup> Even the adding the handling of the family member's financial affairs will not suffice. Similarly, mere trust by one businessman of another is insufficient.

<sup>23</sup>

For there to be a fiduciary duty, there must be trust and reliance by one person upon another, whether the relation is a moral, social, domestic, or purely personal one.<sup>24</sup>

Where there is a contract, the tort duties imposed on parties arises not from the contract, but from a "special relationship" between the parties.<sup>25</sup> Subjective trust or mere reliance by one party on another's promise to perform a contract does not rise to the level of a confidential relationship for purposes of establishing a

sive jurisdiction of the federal courts." *Bodine v. Webb*, 992 S.W.2d 672, 677 (Tex.App.—Austin 1999, rule 53.7(f) motion filed); see *Old Sec. Life Ins. v. Continental Ill. Nat'l Bank & Trust Co.*, 740 F.2d 1384, 1395 (7th Cir. 1984).

<sup>19</sup>*Crim. Truck & Tractor v. Navistar Intern.*, 823 S.W.2d 591, 593–95 (Tex. 1992).

<sup>20</sup>*Schlumberger v. Swanson*, 959 S.W.2d 171, 176 (Tex. 1997).

<sup>21</sup>*Texas Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 508 (Tex. 1980).

<sup>22</sup>*Moore*, 595 S.W.2d at 508; *Ev-*

*ans v. First Nat'l Bank of Bellville*, 946 S.W.2d 367 (Tex.App.—Houston [14th Dist.] 1997, writ denied).

<sup>23</sup>*Crim Truck & Tractor*, 823 S.W.2d at 594–95; *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962).

<sup>24</sup>*Crim Truck & Tractor*, 823 S.W.2d at 594; *Ludlow v. Deberry*, 959 S.W.2d at 279; *Fitz-Gerald v. Hull*, 150 Tex. 39, 237 S.W.2d 256, 261 (1951).

<sup>25</sup>*Manges*, 673 S.W.2d at 183; *Sanus/NY v. Dube-Seybold-Sutherland*, 837 S.W.2d 191, 199 (Tex.App.—Houston [1st Dist.] 1992, no writ); *Aranda v. INA*, 748 S.W.2d 210, 212 (Tex. 1988).

fiduciary duty.<sup>26</sup>

While the existence of a confidential relationship is generally a fact question for the jury, when there is no evidence of a confidential relationship, the existence of a fiduciary duty is a question of law.<sup>27</sup>

Although some relationships impose a fiduciary duty as a matter of law, courts have held that some relationships do not impose those duties as a matter of law, including: Insurer-third party claimant,<sup>28</sup> oil lessee-royalty owner,<sup>29</sup> lender-borrower,<sup>30</sup> franchisor-franchisee,<sup>31</sup> general contractor-subcontractor,<sup>32</sup> supplier-distributor,<sup>33</sup> mortgagor-mortgagee.<sup>34</sup>

The statute of limitations governing breach of fiduciary duty claims is a four-year statute.<sup>35</sup> The discovery rule often applies in breach of fiduciary duty cases. The discovery rule begins to run when the claimant knew or should have known of facts that in the exercise of reasonable diligence would have discovered the wrongful act.

<sup>26</sup>Garrison Contractors v. Liberty Mut. Ins. Co., 927 S.W.2d 296, 301 (Tex.App.—El Paso 1996), *aff'd*, 966 S.W.2d 482 (Tex. 1998); Inv. Co. v. CNA Lloyd's Ins. Co., 812 S.W.2d 647, 651 (Tex.App.—Dallas 1991, writ denied).

<sup>27</sup>*Crim Truck & Tractor*, 823 S.W.2d at 594.

<sup>28</sup>Transport Ins. Co. v. Faircloth, 898 S.W.2d 269, 279–80 (Tex. 1995); Vaughn v. Sturm-Hughes, 937 S.W.2d 106, 119–11 (Tex.App.—Fort Worth 1996, writ denied) (no fiduciary duty to disclose to attorney and car wreck plaintiff the identity of defendant driver prior to limitations). Maryland Ins. Co. v. Head, 938 S.W.2d 27, 28 (Tex. 1996) (no duty of good faith and fair dealing in third-party insurance cases.).

<sup>29</sup>HECI Exploration Co. v. Neel, 982 S.W.2d 881, 888 (Tex. 1998). Surety-Principal Assoc. Indem. Corp. v. CAT Contracting, Inc., 964 S.W.2d 276 (Tex. 1998) (no fiduciary duty existed between surety and contractor based on indemnity agreement because no prior fiduciary relationship existed to create special relationship and indemnity agreement was an arms-length transaction). Ins. Co. of North America v. Morris, 981 S.W.2d

667, 675 (Tex.1998) (“[M]ost courts have held that in general a surety owes no [fiduciary duty] to a principal in a leveraged instrument contract.”).

<sup>30</sup>Bank One, Texas, N.A. v. Stewart, 967 S.W.2d 419, 442 (Tex.App.—Houston [14th Dist.] 1998, pet. denied); Farah v. Mafrige & Kormanik, 927 S.W.2d 663, 675 (Tex.App.—Houston [1st Dist.] 1996, no writ); FDIC v. Coleman, 795 S.W.2d 706, 708–09 (Tex. 1990); *but see* State Nat'l. Bank v. Farah Mfg. Co., 678 S.W.2d 661 (Tex.App.—El Paso 1984, writ dismissed by agr.) (fiduciary duty where lender exercised excessive control over and influence in borrower's business).

<sup>31</sup>*Crim Truck & Tractor*, 823 S.W.2d at 596.

<sup>32</sup>Electro Assocs., Inc. v. Harrop Constr. Co., 908 S.W.2d 21, 22 (Tex.App.—Houston [1st Dist.] 1995, writ denied).

<sup>33</sup>Adolph Coors Co. v. Rodriguez, 780 S.W.2d 477, 481 (Tex.App.—Corpus Christi 1989, writ denied).

<sup>34</sup>Lovell v. Western Nat'l Life Ins. Co., 754 S.W.2d 298, 303 (Tex.App.—Amarillo 1988, writ denied).

<sup>35</sup>Tex. Civ. Prac. & Rem. Code § 16.004 (a) (5)

<sup>36</sup> Texas Courts have previously found a fiduciary's misconduct to be "inherently undiscoverable" because the person to whom a fiduciary duty is owed is either unable to inquire into the fiduciary's actions or unaware of the need to do so.<sup>37</sup>

A fiduciary duty generally terminates upon the end of the relationship that gave rise to the duty.<sup>38</sup>

For example, the guardian-ward fiduciary relationship terminates when the minor ward reaches maturity at age 18.<sup>39</sup>

Although money damages may of course be recovered for breach of fiduciary duty, because the tort originated in equity, a number of equitable remedies are also available, including: removal of an independent executor,<sup>40</sup> fee forfeiture,<sup>41</sup> rescission,<sup>42</sup> imposition of a constructive trust,<sup>43</sup> money damages,<sup>44</sup> including exemplary damages,<sup>45</sup> and injunctive relief.<sup>46</sup>

### § 2.33 Duress, coercion, and undue influence

#### Research References

West's Key Number Digest, Contracts ⇌95, 96, 98

C.J.S., Contracts §§ 3, 136 to 137, 139 to 140, 145, 153 to 155, 157, 171, 173 to 185, 187 to 194

"Generally speaking, any coercion of another, either mental, physical or otherwise, causing him to act contrary to his own free will or submit to a situation or a condition against his own voli-

<sup>36</sup>Little v. Smith, 943 S.W.2d 414, 420 (Tex. 1997) (all plaintiffs claims barred by statute of limitations and discovery rule inapplicable in suits to assert rights of inheritance by adoptees) (citing Slay v. Burnett Trust, 143 Tex. 621, 187 S.W.2d 377, 394 (1945)).

<sup>37</sup>Murphy v. Campbell, 964 S.W.2d 265, 270 (Tex. 1997)(accountant); Willis v. Maverick, 760 S.W.2d 642, 645 (Tex. 1988) (attorney) Slay, 187 S.W.2d at 394 (trustee); S.V. v. R.V., 933 S.W.2d 1, 8 (Tex. 1996).

<sup>38</sup>S.V. v. R.V., 933 S.W.2d at 8; see also Maeberry v. Gayle, 955 S.W.2d 875 (Tex.App.—Corpus Christi 1997, no writ).

<sup>39</sup>Maeberry v. Gayle, 955 S.W.2d 875 (Tex.App.—Corpus Christi 1997, no writ).

<sup>40</sup>Sammons v. Elder, 940 S.W.2d 276, 283 (Tex.App.—Waco 1997, writ

denied).

<sup>41</sup>Kinzbach Tool Co. v. Corbett-Wallace Corp., 138 Tex. 565, 160 S.W.2d 509, 514 (1942); Burrow v. Arce, 997 S.W.2d 229 (Tex. 1999).

<sup>42</sup>Wils v. Robinson, 934 S.W.2d 774, 782 (Tex.App.—Houston [14th Dist.] 1996) *vacated without reference to merits*, 938 S.W.2d 717 (Tex. 1997), ; Miller v. Miller, 700 S.W.2d 941, 945 (Tex.App.—Dallas 1985, writ ref'd n.r.e.).

<sup>43</sup>Thigpen v. Locke, 363 S.W.2d at 252; Chien, 759 S.W.2d at 495.

<sup>44</sup>Manges, 673 S.W.2d at 184; DSC Communications, 107 F.3d at 328-30.

<sup>45</sup>Hawthorne, 917 S.W.2d at 936; Int'l Bankers Life Ins. v. Holloway, 368 S.W.2d 567, 584 (Tex. 1963).

<sup>46</sup>DSC Communications, 107 F.3d at 328.