

Fraud: Texas

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

Elements Generally

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

In Texas, a plaintiff asserting common law fraud must plead and prove that:

- The defendant made a factual and material representation (see Material Misrepresentation).
- The defendant made the representation:
 - with knowledge of its falsity; or
 - recklessly as a positive assertion without knowledge of its truth.
- The defendant intended for the plaintiff to act on the representation or to induce the plaintiff's reliance on the representation (see Scienter).
- The plaintiff reasonably and justifiably relied on the representation (see Reliance).
- The plaintiff suffered damages or injury as a result (see Remedies).

(*Int'l Bus. Mach. Corp. v. Lufkin Indus., LLC*, 573 S.W.3d 224, 228 (Tex. 2019); *Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC*, 572 S.W.3d 213, 219-20 (Tex. 2019); *Anderson v. Durant*, 550 S.W.3d 605, 614 (Tex. 2018); see also *Barrow-Shaver Res. Co. v. Carrizo Oil & Gas, Inc.*, 590 S.W.3d 471, 496-97 (Tex. 2019); *Mercedes-Benz USA, LLC v. Carduco, Inc.*, 583 S.W.3d 553, 558-59 (Tex. 2019).)

Material Misrepresentation

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

Under Texas law, a material misrepresentation is a false representation that would be likely to affect the conduct of a reasonable person regarding the transaction in question. A representation is false if it consists of words or other conduct that suggest to the plaintiff that a fact is true when it is not (*Barrow-Shaver Res. Co. v. Carrizo Oil & Gas, Inc.*, 590 S.W.3d 471, 496 (Tex. 2019); *Exxon Corp. v. Emerald Oil & Gas Co., L.C.*, 348 S.W.3d 194, 217 (Tex. 2011)).

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

Under Texas law, a representation is material if it would both:

- Be important to a reasonable person when making the decision at issue.
- Induce the person to act.

The representation does not need to be the only factor inducing the plaintiff to make the decision if the plaintiff relied on the representation (*Barrow-Shaver Res. Co. v. Carrizo Oil & Gas, Inc.*, 590 S.W.3d 471, 496 (Tex. 2019); *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 337 (Tex. 2011)).



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

Under Texas law, a plaintiff may not base a fraud claim on a defendant's statement that is:

- A pure expression of opinion or puffery. Under Texas law, a plaintiff's fraud claim generally must be based on a defendant's representation concerning a material fact and not a pure expression of the defendant's opinion. For example, an expression of opinion about monetary value is not a representation of fact that gives rise to actionable fraud. (*Transport Ins. Co. v. Faircloth*, 898 S.W.2d 269, 276 (Tex. 1995).) However, an opinion may support an action for fraud if:
 - the opinion is based on past or present facts and the defendant should have known the plaintiff would justifiably rely on defendant's special or superior knowledge;
 - the defendant has knowledge that the statement of opinion is false; or
 - the opinion is based on or supported with false facts.

(*Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 337-38 (Tex. 2011); *Transport Ins. Co.*, 898 S.W.2d at 277; *Trenholm v. Ratcliff*, 646 S.W.2d 927, 930 (Tex. 1983).)

- A prediction or statement about the future (*Country Vill. Homes, Inc. v. Patterson*, 236 S.W.3d 413, 435 (Tex. App.—Houston [1st Dist.] 2007, pet. granted, judgment vacated w.r.m.); *Paull v. Capital Res. Mgmt., Inc.*, 987 S.W.2d 214, 219 (Tex. App.—Austin 1999, pet. denied)). However, an opinion statement about future events may be actionable if:
 - the statement is made with present knowledge that the statement is false; or
 - the speaker purports to have special knowledge of facts that will occur or exist in the future.

(*Trenholm*, 646 S.W.2d 927, 930; *Nancarrow v. Whitmer*, 463 S.W.3d 243, 252 (Tex. App.—Waco 2015, no pet.); *Country Vill. Homes, Inc.*, 236 S.W.3d at 435.)
- About a point of law or the legal effect of a document, unless:
 - the defendant has superior knowledge and takes advantage of the plaintiff's ignorance;
 - the parties have a fiduciary or confidential relationship of trust;
 - there is a discrepancy in sophistication between the parties dealing at arm's length; or

- the defendant misrepresents a point of law intentionally.

(*Fina Supply v. Abilene Nat'l Bank*, 726 S.W.2d 537, 540 (Tex. 1987); *Matheson Tri-Gas, Inc. v. Maxim Integrated Prods., Inc.*, 444 S.W.3d 283, 290 (Tex. App.—Dallas 2014, pet. denied); *Cheung-Loon, LLC v. Cergon, Inc.*, 392 S.W.3d 738, 746 (Tex. App.—Dallas 2012, no pet.).)

- A representation of religious doctrine or belief (*Tilton v. Marshall*, 925 S.W.2d 672, 677 (Tex. 1996)).

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

Texas courts recognize a cause of action for fraudulent inducement, which is a sub-category of common law fraud. Fraudulent inducement and common law fraud share the same basic elements:

- The defendant made a factual and material representation.
- The defendant made the representation:
 - with knowledge of its falsity; or
 - recklessly as a positive assertion without knowledge of its truth.
- The defendant intended for the plaintiff to act on the representation or to induce the plaintiff's reliance on the representation.
- The plaintiff reasonably and justifiably relied on the representation.
- The plaintiff suffered damages or injury as a result.

(*Int'l Bus. Mach. Corp. v. Lufkin Indus., LLC*, 573 S.W.3d 224, 228 (Tex. 2019); *Zorilla v. Aypco Constr. II, LLC*, 469 S.W.3d 143, 153 (Tex. 2015); *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 304-05 (Tex. 2006) ("A contractual promise made with no intention of performing may give rise to an action for fraudulent inducement."))

However, a claim for fraudulent inducement will only lie where a defendant induces another to **enter into** a binding contract through one of more material misrepresentations. Except for claims sounding in fraudulent inducement, Texas courts have not recognized a claim for fraud based on a defendant's false promise to honor an **existing** contract.

Scienter

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

Yes. Under Texas law the plaintiff must prove that the defendant either:

- Knew the misrepresentation underlying the fraud claim was false.
- Made the misrepresentation recklessly without knowledge of its truth and as a positive assertion. A representation is reckless if the speaker:
 - knows that the speaker does not have enough information to support it; or
 - realizes that the speaker does not know whether the statement is true.

(*Exxon Corp. v. Emerald Oil & Gas Co., L.C.*, 348 S.W.3d 194, 217 (Tex. 2011); *Universal MRI & Diagnostics, Inc. v. Med. Lien Mgmt. Inc.*, 497 S.W.3d 653, 659 (Tex. App.—Houston [14th Dist.] 2016, no pet.))

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

Yes. Texas courts recognize constructive fraud, which is the breach of a legal or equitable duty that the law declares fraudulent because it violates a fiduciary relationship. Unlike actual fraud, constructive fraud does not require a showing of intent. (*Saden v. Smith*, 415 S.W.3d 450, 470 (Tex. App.—Houston [1st Dist.] 2013, pet. denied); *Tex. Integrated Conveyor Sys., Inc. v. Innovative Conveyor Concepts, Inc.*, 300 S.W.3d 348, 366 (Tex. App.—Dallas 2009, pet. denied); *Chien v. Chen*, 759 S.W.2d 484, 495 (Tex. App.—Austin 1988, no writ.) (with constructive fraud, the actor's mental state is immaterial); see Constructive Fraud.)

In addition, a plaintiff does not have to prove scienter to establish statutory fraud, which may be asserted if the transaction involves real estate, stock in a corporation, or stock in a joint-stock company (Tex. Bus. & Com. Code Ann. § 27.01(a)(1)). The elements of statutory fraud are essentially the same as common law fraud, except that the plaintiff is not required to establish that the defendant made the material misrepresentation recklessly or with knowledge of its falsity (*Ginn v. NCI Bldg. Sys., Inc.*, 472 S.W.3d 802, 823 (Tex. App.—Houston [1st Dist.] 2015, no pet.)).

Reliance

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

Under Texas law, a plaintiff must establish actual reliance. To prove reliance, a plaintiff must show that the plaintiff had knowledge of the defendant's representation underlying the fraud claim and that the plaintiff actually and justifiably relied on that misrepresentation. (*JPMorgan Chase Bank v. Orca Assets G.P., L.L.C.*, 546 S.W.3d 648, 653 (Tex. 2018); *Johnson & Johnson Med. Inc. v. Sanchez*, 924 S.W.2d 925, 930 (Tex. 1996); *Virginia Oak Venture, LLC v. Fought*, 448 S.W.3d 179, 187 (Tex. App.—Texarkana 2014, no pet.))

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

Under Texas law, a plaintiff's reliance on a misrepresentation must be justifiable. Reliance on a misrepresentation need not be reasonable to be justifiable (*Ginn v. NCI Bldg. Sys., Inc.*, 472 S.W.3d 802, 830 (Tex. App.—Houston [1st Dist.] 2015, no pet.)).

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

To prove reliance, a plaintiff must show that the plaintiff had knowledge of the representation underlying the fraud claim and that the plaintiff acted on the representation. To establish reliance, the plaintiff must prove that:

- The plaintiff actually relied on the defendant's representation. Actual reliance may be established by presenting evidence that the plaintiff:
 - read, heard, saw, or was otherwise exposed to the defendant's representation; and
 - took or refrained from taking action because of the representation.

(*O & B Farms, Inc. v. Black*, 300 S.W.3d 418, 421 (Tex. App.—Houston [14th Dist.] 2009, pet. denied).)
- The plaintiff's reliance on the defendant's representation was justifiable. A plaintiff may demonstrate that reliance was justifiable with proof of the plaintiff's characteristics, abilities, and appreciation of the facts and circumstances at or before the time the misrepresentation was made,

as well as the nature of the parties' relationship. (*Grant Thornton LLP v. Prospect High Income Fund*, 314 S.W.3d 913, 923 (Tex. 2010).) However, a plaintiff's reliance is not justifiable where:

- red flags indicate that reliance is unwarranted (*Barrow-Shaver Res. Co. v. Carrizo Oil & Gas, Inc.*, 590 S.W.3d 471, 496-97 (Tex. 2019); or
- the representation contradicts the terms of the written contract (*JPMorgan Chase Bank v. Orca Assets G.P., L.L.C.*, 546 S.W.3d 648, 655-60 (Tex. 2018)).

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

Under Texas law, a fraudulent representation underlying a common law fraud claim may be based on the defendant's misrepresentation to another if either:

- The defendant intended for the misrepresentation to be repeated to and deceive the plaintiff.
- The defendant knew the misrepresentation was especially likely to reach and influence plaintiff's conduct.

(*Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co.*, 51 S.W.3d 573, 578-80 (Tex. 2001).)

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

Under Texas law, a plaintiff generally has no duty to investigate whether a representation is fraudulent (*Koral Indus. v. Security-Connecticut Life Ins. Co.*, 802 S.W.2d 650, 651 (Tex. 1990)). However, the existence of "red flags" may indicate that reliance is unwarranted and trigger a duty to conduct further investigation (see *Lewis v. Bank of Am. N.A.*, 343 F.3d 540, 546 (5th Cir. 2003) (plaintiff's reliance on defendant's representation regarding tax consequences of transaction without conducting further investigation was not justified)).

Additionally, sophisticated parties in arm's-length transactions must exercise ordinary care for the protection of their own interests (*JPMorgan Chase Bank v. Orca Assets G.P., L.L.C.*, 546 S.W.3d 648, 658 (Tex. 2018)). A sophisticated party that fails to exercise ordinary care in entering the transaction will be charged with knowledge of any facts that would have been discovered by a similarly situated, reasonably prudent person

(*AKB Hendrick, LLP v. Musgrave Enters.*, 380 S.W.3d 221, 232 (5th Cir. 2012)).

Remedies

13. Must a fraud plaintiff elect its remedies in your jurisdiction? Are there any exceptions?

Under Texas law, a plaintiff may sue and seek damages on alternative theories but is not entitled to a double recovery (*Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 303 (Tex. 2006)). A plaintiff may recover under the theory that provides the greatest recovery for a single injury (*McCullough v. Scarbrough, Medlin & Assocs., Inc.*, 435 S.W.3d 871, 916 (Tex. App.—Dallas 2014, pet. denied).)

However, if the plaintiff shows that he has sustained distinct, separate injuries, the plaintiff may be allowed to recover damages on each independent theory (*Peterson Grp., Inc. v. PLTQ Lotus Grp., L.P.*, 417 S.W.3d 46, 63 (Tex. App.—Houston [1st Dist.] 2013, pet. denied)).

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

Under Texas law, damages for fraud include:

- General (also called direct) damages to compensate for loss that is the necessary and usual result of the defendant's wrongful acts, including:
 - benefit-of-the bargain damages; and
 - out-of-pocket damages.

(*Zorrilla v. Aypco Constr. II, LLC*, 469 S.W.3d 143, 153 (Tex. 2015); *Baylor Univ. v. Sonnichsen*, 221 S.W.3d 632, 636 (Tex. 2007).)
- Special (also called consequential) damages to compensate for those damages that result naturally, but not necessarily, from the defendant's wrongful acts (*Baylor Univ.*, 221 S.W.3d at 636). Special damages include:
 - losses on improvements to property purchased as a result of the fraud (*Trenholm v. Ratcliff*, 646 S.W.2d 927, 933 (Tex. 1983)); and
 - mental anguish (*Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 304 (Tex. 2006)).
- Exemplary damages, unless the award is based on constructive fraud (Tex. Civ. Prac. & Rem. Code

Ann. § 41.003(a)(1); *Tony Gullo Motors I, L.P.*, 212 S.W.3d at 304; *Trenholm*, 646 S.W.2d at 933).

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

Under Texas law, a fraud plaintiff may be entitled to:

- Rescission of an underlying contract (*Ginn v. NCI Bldg. Sys., Inc.*, 472 S.W.3d 802, 837 (Tex. App.—Houston [1st Dist.] 2015, no pet.)).
- Reformation of an underlying contract (*Orix Capital Mkts., LLC v. La Villita Motor Inns, J.V.*, 329 S.W.3d 30, 46 (Tex. App.—San Antonio 2010, pet. denied)).
- A constructive trust on the proceeds or property obtained by the underlying fraud (*Nwokedi v. Unlimited Restoration Specialists, Inc.*, 428 S.W.3d 191, 210 (Tex. App.—Houston [1st Dist.] 2014, pet. denied)).

Fraudulent Concealment

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

Texas courts recognize a cause of action for fraud by nondisclosure as a subcategory of common law fraud (*Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 181 (Tex. 1997)). To establish fraud by nondisclosure, a plaintiff must prove:

- The defendant deliberately failed to disclose material facts.
- The defendant had a duty to disclose those facts to the plaintiff.
- The plaintiff was ignorant of the facts and did not have an equal opportunity to discover them.
- The defendant knew plaintiff was ignorant of the facts and did not have an equal opportunity to discover them.
- The defendant intended that the plaintiff act or refrain from acting based on the nondisclosure.
- The plaintiff relied on the nondisclosure, which resulted in injury.

(*Bombardier Aerospace Corp. v. SPEG Aircraft Holdings, LLC*, 572 S.W.3d 213, 219-20 (Tex. 2018); *Reynolds v. Murphy*, 188 S.W.3d 252, 271 (Tex. App.—Fort Worth 2006, pet. denied).)

There is generally no duty to disclose absent a confidential or fiduciary relationship. However, there may be a duty to disclose when the defendant:

- Discovered new information that made its earlier representation untrue or misleading.
- Made a partial disclosure that created a false impression.
- Voluntarily disclosed some information, creating a duty to disclose the whole truth.

(*Bombardier Aero. Corp.*, 572 S.W.3d at 219-20; *Ginn v. NCI Bldg. Sys., Inc.*, 472 S.W.3d 802, 836 (Tex. App.—Houston [1st Dist.] 2015, no pet.)).

Constructive Fraud

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

Texas courts recognize constructive fraud as a subcategory of common law fraud. Constructive fraud is defined as the breach of some legal or equitable duty that, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive others, to violate confidence, or to injure public interests. (*Saden v. Smith*, 415 S.W.3d 450, 470 (Tex. App.—Houston [1st Dist.] 2013, pet. denied).)

Unlike actual fraud, constructive fraud requires the existence of a fiduciary or confidential relationship (*Houle v. Casillas*, 594 S.W.3d 524, 565 (Tex. App.—El Paso 2019, no pet.)). However, a plaintiff alleging constructive fraud is not required to show the defendant's intent to defraud (*Hubbard v. Shankle*, 138 S.W.3d 474, 483 (Tex. App.—Fort Worth 2004, pet. denied)).

Doctrines That Preclude Fraud Claims

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

Under Texas Law, the plaintiff may not recover fraud damages if the defendant's conduct would give rise to liability only because it breaches an agreement with the plaintiff. However, if the defendant's conduct would give

rise to liability independent of the fact that a contract exists between the parties, then the plaintiff may recover damages for fraud. (*Farah v. Mafrige & Kormanik, P.C.*, 927 S.W.2d 663, 674 (Tex. App.—Houston [1st Dist.] 1996, no writ).)

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

Under Texas law, the economic loss rule precludes tort claims when the only injury is the economic loss related to the subject matter of the contract. However, if the plaintiff establishes harm separate from the subject of the contract arising out of the defendant's fraud, the economic loss rule does not bar recovery of fraud damages. (*Peterson Grp., Inc. v. PLTQ Lotus Grp., L.P.*, 417 S.W.3d 46, 62 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (plaintiff's fraud claims based on misrepresentations made by the defendant not barred by economic loss rule since they were not in furtherance of the contract).)

Similarly, the economic loss rule does not preclude claims sounding in fraudulent inducement, even when a plaintiff suffers only economic losses related to the subject matter of the contract (*Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 45 (Tex. 1998)).

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

No. Texas law does not recognize any other doctrines or rules that preclude a common law fraud claim.

Procedural Issues

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

To sufficiently plead fraud, a petition must give fair and adequate notice of the facts upon which the claim is based (Tex. R. Civ. P. 45(b) and 47(a); *Bos v. Smith*, 556 S.W.3d

293, 306 (Tex. 2018); *Brooks v. Excellence Mortg., Ltd.*, 486 S.W.3d 29, 43 (Tex. App.—San Antonio 2015, pet. denied)). Although the courts construe pleadings liberally in favor of the pleader when the opposing party has not filed special exceptions, a court will not read into a petition a cause of action that was omitted (*Brooks*, 486 S.W.3d at 43; *Toles v. Toles*, 113 S.W.3d 899, 911-12 (Tex. App.—Dallas 2003, no pet.) (reference to "numerous improper actions" does not properly plead fraud), *abrogated on other grounds by Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 483 (Tex. 2015) (wrongful conduct by attorneys is not actionable if it was part of the discharge of the lawyer's duties to the client)). If the facts in the petition give fair and adequate notice, a fraud claim can be inferred without a plaintiff having specifically pleaded every element (*Ferguson v. DRG/Colony N., Ltd.*, 764 S.W.2d 874, 883-84 (Tex. App.—Austin 1989, writ denied)).

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

A plaintiff must prove fraud by a preponderance of the evidence (*Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC*, 572 S.W.3d 213, 221 (Tex. 2019)). However, an award of exemplary damages requires clear and convincing evidence (Tex. Civ. Prac. & Rem. Code Ann. § 41.003(a)(1); *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 306 n.26 (Tex. 2006)).

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

The statute of limitations for common law fraud in Texas is four years. The cause of action accrues on the date of the underlying misrepresentation. (Tex. Civ. Prac. & Rem. Code Ann. § 16.004(a)(4); *Seureau v. ExxonMobil Corp.*, 274 S.W.3d 206, 226 (Tex. App.—Houston [14th Dist.] 2008, no pet.).)

The limitations period is tolled until the plaintiff discovers or should have discovered the underlying fraud through reasonable diligence (*Hooks v. Samson Lone Star, L.P.*, 457 S.W.3d 52, 57 (Tex. 2015)).

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