

Fraud: Ohio

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

ELEMENTS GENERALLY

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

In Ohio, a plaintiff asserting a fraud claim must plead and prove that:

- The defendant made:
 - a representation; or
 - omission, where the defendant had a duty to disclose.
- The representation or omission was material to the transaction at hand.
- The defendant made the representation or omission:
 - knowing it was false; or
 - with such utter disregard and recklessness for the truth or falsity that a fact finder may infer that that the representation or omission was knowingly false.
- The defendant intended to mislead the plaintiff into relying on the representation or omission.
- The plaintiff justifiably relied on the defendant's representation or omission.
- The plaintiff's reliance on the defendant's representation or omission proximately caused the plaintiff's injury.

(*Volbers-Klarich v. Middletown Mgt., Inc.*, 125 Ohio St.3d 494, 501, 2010-Ohio-2057, 929 N.E.2d 434, ¶ 27; *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 475, 700 N.E.2d 859 (1998).)

MATERIAL MISREPRESENTATION

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

In Ohio, a plaintiff asserting a material misrepresentation must plead and prove that the defendant made a false statement or omission about a material existing fact (*Rieger v. Podeweltz*, 2nd Dist. Montgomery No. 23520, 2010-Ohio-2509, ¶ 8; *Ford v. Brooks*, 10th Dist. Franklin No. 11AP-664, 2012-Ohio-943, ¶ 25).

However, some exceptions to this general rule apply (see Question 4).

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

Under Ohio law, a misrepresentation of fact is material when it is "likely, under the circumstances, to affect the conduct of a reasonable person with reference to the transaction" (*Leal v. Holtvogt*, 123 Ohio App. 3d 51, 76, 702 N.E. 2d 1246 (2nd Dist. 1998)).

Ohio courts generally apply an objective standard to determine whether a fact is material (*Calypso Asset Mgt., LLC v. 180 Indus., LLC*, 10th Dist. Franklin No. 18AP-53, 2019-Ohio-2, 127 N.E.3d 507, ¶ 46 (objective materiality standard "generally precludes the consideration of any idiosyncratic qualities of the plaintiff"); but see *Saxe v. Dlusky*, 10th Dist. Franklin No. 09AP-673, 2010-Ohio-5323, ¶ 48-51 (subjective standard applies to determine materiality of a misrepresented fact where the defendant made a misrepresentation knowing that the plaintiff is "peculiarly disposed to attach importance to a particular subject")).

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

Under Ohio law, a misrepresentation generally is not actionable if it is:

- A promise of future action unless the defendant had no intent to perform the promise when the defendant made it (*Deitrick v. Mortg. Sols., Inc.*, 10th Dist. Franklin No. 05AP-154, 2007-Ohio-839, ¶

16-18; *Patel v. Univ. of Toledo*, 2017-Ohio-7132, 95 N.E.3d 979, ¶ 37-41 (10th Dist.)).

- A representation of law unless the parties are in a fiduciary relationship (*Barnes v. Res. Energy Expl.*, 7th Dist. Belmont No. 14BE-0013, 2016-Ohio-4805, ¶ 28).
- A matter of opinion (*Rieger v. Podeweltz*, 2nd Dist. Montgomery No. 23520, 2010-Ohio-2509, ¶ 8; *Sobony v. Osobo Games & Toys, Inc.*, 8th Dist. Cuyahoga No. 51720, 1987 WL 9861, *5 (April 16, 1987); but see *Stancik v. CNBC*, 420 F. Supp. 2d 800, 807 (N.D. Ohio 2006) (opinions may form the basis for fraudulent misrepresentation if the opinions were “fraudulently made”) (applying Ohio law)).
- A statement considered sales “puffery” made by a seller (*Diemert v. Lincoln Wood Prods., Inc.*, N.D. Ohio No. 11-cv-358, 2012 WL 84968, *3 (Jan. 11, 2012) (applying Ohio law); *Akers v. Classic Prods., Inc.*, 12th Dist. Warren No. CA2003-03-035, 2003-Ohio-5436, ¶ 21-23).

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

Under Ohio law, a plaintiff may not bring a fraud and breach of contract action if the fraud claim arises out of the same facts as the breach of contract claim (*Thornton v. Cangialosi*, S.D. Ohio No. 2:09-CV-585, 2010 WL 2162905, *2-4 (May 26, 2010) (applying Ohio law); see Question 18). An exception to this rule applies when the defendant makes a promise concerning a future action, occurrence, or conduct but, at the time the defendant makes it, has no intention of keeping the promise (*RAE Assocs., Inc. v. Nexus Commc’ns, Inc.*, 10th Dist. No. 14AP-482, 2015-Ohio-2166, 36 N.E.3d 757, ¶ 16.)

SCIENTER

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

Under Ohio law, the plaintiff must plead and prove that the defendant made a false statement with both:

- Knowledge that the statement was false.
- An intent to mislead the plaintiff into relying on the false statement.

(*Janos v. Murduck*, 109 Ohio App. 3d 583, 590-91, 672 N.E.2d 1021 (9th Dist. 1996); *Karst v. Goldberg*, 88 Ohio App. 3d 413, 420, 623 N.E.2d 1348 (10th Dist. 1993).)

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

A constructive fraud claim does not require the plaintiff to allege and prove scienter (see *First Energy Sols. v. Gene B. Glick Co.*, 9th Dist. Summit No. 23646, 2007-Ohio-7044, ¶ 13; *Heller v. Bohecker’s Bus. Coll., Inc.*, 12th Dist. Butler No. CA92-03-046, 1992 WL 276540, *2 (Oct. 5, 1992)). However, constructive fraud only exists where the parties have “a special confidential or fiduciary relation which affords the power and means to one to take undue advantage or exercise undue influence over another” (*Heller*, 1992 WL 276540, *2; see Question 17).

RELIANCE

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

Ohio courts require the plaintiff to plead and prove actual reliance on the defendant’s misrepresentation (*Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 475, 700 N.E.2d 859 (1998); *Reiner v. Kelly*, 8 Ohio App. 3d 390, 392, 457 N.E.2d 946 (10th Dist. 1983)).

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

Under Ohio law, the standard for reliance is justifiable reliance. Whether a plaintiff justifiably relied on the defendant’s representations is a fact question, focusing on:

- The parties’ relationship.
- The plaintiff’s qualities and characteristics.
- The specific circumstances of the case.

(*Amerifirst Sav. Bank of Xenia v. Krug*, 136 Ohio App. 3d 468, 495-496, 737 N.E.2d 68 (2d Dist. 1999); *Mar Jul, L.L.C. v. Hurst*, 4th Dist. Washington No. 12CA6, 2013-Ohio-479, ¶ 61; see Question 10.)

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

Under Ohio law, a plaintiff satisfies the reliance standard by showing that both:

- The defendant’s representation did not appear unreasonable on its face.
- Under the circumstances, the plaintiff had no apparent reason to disbelieve the defendant’s representation.

(*Mar Jul, L.L.C. v. Hurst*, 4th Dist. Washington No. 12CA6, 2013-Ohio-479, ¶ 61.)

In determining whether the plaintiff’s reliance was justified, fact finders consider:

- The circumstances of the parties’ transaction.
- The representation’s form and materiality.
- The parties’:
 - relationship;
 - intelligence;
 - experience;
 - age;
 - mental and physical condition; and
 - knowledge, including how they acquired that knowledge.

(*Mar Jul, L.L.C.*, 2013-Ohio-479, ¶ 62; *Bencivenni v. Dietz*, 11th Dist. Lake No. 2012-L-127, 2013-Ohio-4549, ¶ 49.)

However, a plaintiff cannot satisfy the justifiable reliance standard when the facts are equally available to both parties (*Takis, L.L.C. v. C.D. Morelock Prods., Inc.*, 180 Ohio App. 3d 243, 2008-Ohio-6676, 905 N.E.2d 204, ¶ 30).

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 Ohio law, a fraud claim cannot be based on misrepresentations made to third parties (*Lucarell v. Nationwide Mut. Ins. Co.*, 152 Ohio St. 3d 453, 2018-Ohio-15, 97 N.E.3d 458, ¶ 66; *McWreath v. Cortland Bank*, 11th Dist. Trumbull No. 2010-T-0023, 2012-Ohio-3013, ¶ 63).

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

Generally, a plaintiff it is not required to investigate the truthfulness of a defendant's representation and a plaintiff's reliance on the representation is justified if both:

- The defendant's representation does not appear unreasonable on its face.
- Under the circumstances, the plaintiff had no apparent reason to disbelieve the defendant's representation.

(*Heinz & Assoc., Inc. v. Diamond Cellar Holdings, L.L.C.*, 10th Dist. Franklin No. 11AP-688, 2012-Ohio-1422, ¶ 21; *Hubbard Family Tr. v. TNT Land Holdings, LLC*, 4th Dist. No. 12CA833, 2014-Ohio-772, 9 N.E.3d 411, ¶ 33.)

Whether a plaintiff justifiably relied on a defendant's representation is a question of fact concerning the parties' relationship (*Pacifica Loan Five, LLC v. Fifth Third Bank*, S.D. Ohio No. 1:09-CV-930, 2011 WL 13228111, *8 (April 14, 2011); see Question 10).

However, a plaintiff must conduct a reasonable investigation if it is "put on notice as to any doubt" concerning the truthfulness of a defendant's representation (*Pacifica Loan Five, LLC*, 2011 WL 13228111, *8).

REMEDIES

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

Under Ohio law, a plaintiff alleging that it was fraudulently induced into a contract must elect between rescission or damages when the two remedies are inconsistent. Rescission and damages are inconsistent remedies when a plaintiff seeks to rescind the contract and recover contractual damages representing the loss of the benefit of the bargain. (*Bennice v. Bennice*, 82 Ohio App. 3d 594, 597-98, 612 N.E.2d 1256 (6th Dist. 1992).)

The plaintiff may, however, rescind a fraudulently induced contract and seek damages caused by the defendant's fraudulent inducement. For example, the plaintiff may rescind a fraudulent lease agreement and recover the rents that the defendant collected during the period when the defendant fraudulently controlled the property. However, it would be inconsistent if the plaintiff attempted to rescind a lease agreement and recover the future rents contemplated by the agreement. (*Turner v. Paradise*, 12th Dist. Warren No. CA93-12-098, 1995 WL 321725, *2 (May 30, 1995).)

A party cannot recover damages under theories of both fraud and negligence based on the same course of conduct, as negligence and willfulness are mutually exclusive mental states (*Textron Fin. Corp. v. Nationwide Mut. Ins. Co.*, 115 Ohio App. 3d 137, 148, 684 N.E.2d 1261, 1269 (9th Dist. 1996)).

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

Under Ohio law, a fraud plaintiff may recover:

- In fraud actions based on a breach of contract, benefit-of-the-bargain damages, which are the difference in value between what the plaintiff received and the actual value of what the plaintiff would have received if the defendant's representations were true (*Helfrich v. Strickland*, Fifth Dist. No. 008 CA 101, 2009-Ohio-4828, 2009 WL 2933736, ¶ 33 (Sept. 11, 2009)).
- Out-of-pocket damages, which are the plaintiff's monetary losses resulting from the defendant's fraudulent conduct. Ohio courts typically use the out-of-pocket rule to determine a plaintiff's damages in fraudulent misrepresentation actions. (*Northpoint Props. v. Charter One Bank*, 8th Dist. Cuyahoga No. 94020, 2011-Ohio-2512, ¶ 32-38.)
- Punitive damages if the plaintiff can establish "malice" (see *Malone v. Courtyard by Marriott L.P.*, 74 Ohio St. 3d 440, 659 N.E.2d 1242 (1996) (defining "malice" necessary for punitive damages)).
- Attorneys' fees.
- Consequential damages, such as future lost profits. However, consequential damages are "severely limited by concepts such as proximate cause, foreseeability, mitigation, remoteness and speculation." (*Telxon Corp. v. Smart Media of Del., Inc.*, 9th Dist. Summit No. 22098, 2005-Ohio-4931, ¶ 101.)

(*Auto Chem Labs., Inc. v. Turtle Wax, Inc.*, S.D. Ohio No. 3:07CV156, 2010 WL 3769209, *6-10 (Sept. 24, 2010) (applying Ohio law).)

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

In Ohio, a plaintiff entering into a contract based on the defendant's fraud may rescind the contract (*Barnes v. Res. Energy Expl.*, 7th Dist. Belmont No. 14BE-0013, 2016-Ohio-4805, ¶ 17).

FRAUDULENT CONCEALMENT

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

Ohio law recognizes fraudulent concealment claims. To plead and prove fraudulent concealment under Ohio law, the plaintiff must establish that:

- The defendant:
 - concealed a material fact;
 - with knowledge of the concealed fact; and
 - with the intent to mislead the plaintiff into relying on the concealment.

- The plaintiff:
 - justifiably relied on the concealment; and
 - suffered damages as a result of relying on the concealment.

(*Volbers-Klarich v. Middletown Mgt., Inc.*, 125 Ohio St. 3d 494, 501, 2010-Ohio-2057, 929 N.E.2d 434, ¶ 27; *Li-Conrad v. Curran*, 11th Dist. Lake No. 2015-L-085, 2016-Ohio-1496, 50 N.E. 3d 573, ¶ 36; *Bencivenni v. Dietz*, 11th Dist. Lake No. 2012-L-127, 2013-Ohio-4549, ¶ 42.)

CONSTRUCTIVE FRAUD

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

Ohio courts recognize a claim for constructive fraud where the parties have a special confidential or fiduciary relationship which allows one party to unduly influence the other. Unlike actual fraud, a plaintiff claiming constructive fraud need not plead or prove fraudulent intent. (*Schmitz v. Natl. Collegiate Athletic Assn.*, 8th Dist. No. 103525, 2016-Ohio-8041, 67 N.E.3d 852, ¶ 62-64; *Heller v. Bohecker's Bus. Coll., Inc.*, 12th Dist. Butler No. CA92-03-046, 1992 WL 276540, *2 (Oct. 5, 1992).)

DOCTRINES THAT PRECLUDE FRAUD CLAIMS

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

Under Ohio law, the plaintiff generally may not base a fraud claim on the defendant's breach of contract because "a breach of contract does not create a tort claim" (*Textron Fin. Corp. v. Nationwide Mut. Ins. Co.*, 115 Ohio App. 3d 137, 151, 684 N.E.2d 1261 (9th Dist. 1996)). However, a plaintiff may bring breach of contract and fraud claims in the same lawsuit if both:

- The defendant breached a duty owed to the plaintiff that was separate from any duty created by the contract (in other words, the defendant breached a duty owed to the plaintiff even if the contract did not exist).
- The fraud creates additional damages beyond the damages caused by the breach of contract.

(*Textron Fin. Corp.*, 115 Ohio App. 3d at 151; *22 Exchange, L.L.C. v. Exchange St. Assocs., L.L.C.*, 9th Dist. Summit No. 27472, 2015-Ohio-1719, ¶ 27-28.)

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

Ohio's economic loss doctrine does not apply to intentional torts, such as fraud (see *Eysoldt v. ProScan Imaging*, 194 Ohio App. 3d 630, 2011-Ohio-2359, 957 N.E.2d 780, ¶ 19-23 (1st Dist.); *King v. G4S Secure Sols. (USA) Inc.*, N.D. Ohio No. 1:18 CV 448, 2019 WL 858672, *8 (Feb. 22, 2019) (holding that "the economic loss rule does not apply to intentional torts, like fraud or fraudulent misrepresentation") (applying Ohio law); *Pride of Hills Mfg. Inc. v. Range Resources-Appalachia, LLC*, N.D. Ohio No. 5:09CV02764, 2011 WL 2116455, *6-7

(May 27, 2011) (holding that the economic loss rule did not bar fraud action because it is an intentional tort) (applying Ohio law)).

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

Under Ohio law, the only doctrine or rule that precludes a common law fraud claim is the prohibition on duplicative fraud and contract claims (see Question 18).

PROCEDURAL ISSUES

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

Under Ohio law, a plaintiff must plead fraud with particularity by alleging:

- The time, place, and content of the false representation.
- The misrepresented facts.
- A description of what was given or received as a result of the fraud.

(Ohio Civ. R. 9(b); *Carter-Jones Lumber Co. v. Denune*, 132 Ohio App. 3d 430, 433, 725 N.E.2d 330 (10th Dist. 1999).)

Plaintiffs may generally allege:

- Malice.
- Intent.
- Knowledge.
- Any relevant mental state.

(Ohio Civ.R. 9(B); see *Arales v. Furs By Weiss, Inc.*, 8th Dist. Cuyahoga No. 81603, 2003-Ohio-3344, ¶ 36 (in fraud actions, because "intent is rarely provable by direct evidence, it may be inferred from the 'totality of the circumstances'"); *Schluter v. PSL, Inc.*, 5th Dist. Richland No. 96-CA-110, 1998 WL 172770, *6 (Feb. 3, 1998) (because it is difficult to prove fraudulent intent using direct evidence, fact finders usually infer the defendant's fraudulent intent from circumstantial evidence).)

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

Under Ohio law, the plaintiff's burden of proof in a fraud action depends on the remedy it seeks. If the plaintiff seeks:

- Money damages, it must prove fraud by a preponderance of the evidence.
- Equitable relief, like a declaratory judgment, or reformation or rescission of a contract, it must prove fraud by clear and convincing evidence.

(*Andrew v. Power Mktg. Direct, Inc.*, 10th Dist. No. 11AP-603, 2012-Ohio-4371, 978 N.E.2d 974, ¶ 47; *In re McZeal*, Bankr. N.D. Ohio No. 14-15947, 2019 WL 1271398, *8 (March 14, 2019) (applying Ohio law).)

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

The plaintiff must bring its fraud claim within the four-year statute of limitations period unless the plaintiff did not discover the fraud despite exercising reasonable diligence (R.C. § 2305.09(C); *Cundall v. U.S. Bank*, 122 Ohio St.3d 188, 2009-Ohio-2523, 909 N.E.2d 1244, ¶ 24).

A fraud cause of action accrues, and the statute of limitations period begins to run, when either:

- The plaintiff discovers the fraud.
- The plaintiff should have discovered the fraud if it had exercised reasonable diligence (that is, when the plaintiff learns of facts that “would lead a fair and prudent man, using ordinary care and thoughtfulness, to make further inquiry”).

(*Cundall*, 122 Ohio St.3d 188, ¶ 29; *Fordyce v. Hattan*, 2nd Dist. Montgomery No. 28342, 2019-Ohio-3199, ¶ 27.)

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