



Basic Elements Of A Fraud Action

Deceit and fraud are defined separately in statutes. Deceit is defined in Civ. Code §§1709 and 1710, while fraud is defined in Civ. Code §§1572 (actual fraud) and 1573(constructive fraud). Liability for actual fraud under Civ. Code §1572 is limited to acts committed by or with the connivance of a party to a contract with the intent to deceive another party to the contract and induce that party to enter into the contract.

Deceit: One who willfully deceives another with intent to induce the other to alter his or her position to his or her injury or risk is liable for any damage suffered as a result of the deceit. [Civ. Code §1709] There are four categories of deceit [Civ. Code §1710]:

- the suggestion, as a fact, of that which is not true, by one who does not believe it to be true, commonly referred to as intentional misrepresentation;
- the assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true, commonly referred to as negligent misrepresentation;
- the suppression of a fact, by one who is bound to disclose it or who gives information of other facts which are likely to mislead for want of communication of that fact, commonly referred to as concealment; and
- a promise, made without any intention of performing it, commonly referred to as false promise;

Actual Fraud: Actual fraud consists of any of the following acts, committed by or with the connivance of a party to a contract with intent to deceive another party to the contract, or to induce the other party to enter into the contract [Civ. Code §1572]:

1. the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
2. the positive assertion, in any manner not warranted by the information of the person making it, of that which is not true, though the person making the assertion believes it to be true;

3. the suppression of that which is true, by one having knowledge or belief of the fact;
4. a promise made without any intention of performing it; and
5. any other act fitted to deceive.

Constructive Fraud: Constructive fraud consists of any breach of duty which, without actual fraudulent intent, gains an advantage to the person in fault, or any one claiming under the person in fault, by misleading another to the prejudice of the person misled, or to the prejudice of anyone claiming under the person misled. [Civ. Code §1573(1)] In addition, constructive fraud consists of any act or omission that the law specially declares to be fraudulent, without respect to actual fraud. [Civ. Code §1573(2)]

Election Of Remedies: A plaintiff who has entered into a contract in reliance on the fraud of a defendant may elect either the contract remedy, consisting of restitution based on rescission of the contract, or the tort remedy, by affirming the contract and seeking damages. A plaintiff can file a complaint stating causes of action in both contract and tort, but may be required to elect one remedy or the other at some time before judgment.

General Procedural Outline:

No two cases are alike and procedures vary with the nature and complexity of the legal and evidentiary issues involved. The following is a very general outline of the stages of a civil action.

Complaint Filing

Every case begins with the filing and service of a Summons and Complaint. The Complaint will contain one or more "causes of action" such as "Breach of Contract" or "Fraud".

Service Of Complaint

After the Summons and Complaint have been filed with the court, they must be properly served on the defendant(s). If the defendant(s) will accept service, he/she may sign an Acknowledgment of Service." Otherwise the documents will have to be formally served.

Response To Complaint

The Defendant(s) have 30 days from the date of service of the Summons and Complaint to serve on the Plaintiff(s) either an Answer to the Complaint or a pleading challenging the sufficiency of the the Complaint. Responses challenging the sufficiency of the Complaint include a motion called a "Demurrer" and a "Motion To Strike"

Hearing Of Challenges To Sufficiency Of Complaint (If Applicable)

If the defendant(s) decide to file a demurrer or motion to strike, these motions must be heard and ruled upon before the matter may proceed. This can take up to 2 months. If such motion is sustained and the court grants leave to amend the Complaint, a new complaint must be drafted and served and the process starts over. Sometimes a second demurrer or motion will be filed causing more delays.

Discovery

Once the Complaint and Answer have been filed both parties commence "discovery" procedures by which the evidence necessary to prosecute both sides of the case. Depending on the nature and complexity of the case, one or more of the following discovery devices may be used by the parties:

- Interrogatories: Written questions which must be answered under oath.
- Request For Production Of Documents: Demands for production of documents by the parties involved.
- Requests For Admission: Requiring the parties to say which allegations they affirm and which they deny.
- Deposition: The parties may be required to appear in the opposing attorney's office to answer questions under oath in front of a court reporter. Depositions can also be taken from 3rd parties.
- Subpoena Documents From Third Party: Documents may be subpoenaed from 3rd parties such as banks and employers.

Discovery Motions (If Applicable)

If a party fails or refuses to comply with discovery requests, it may be necessary for the party propounding the discovery to make a motion in court to compel responses. If the court grants the motion, further responses will be made. If those responses are still inadequate, another motion may be made and the court can sanction (fine) the resisting party. In extreme cases the court can even terminate the action in favor of the moving party.

Trial Setting:

Throughout the case the court will set a series of Case Management Conferences to be attended by attorneys for all parties. These hearings are designed to determine whether the case is ready for trial. When the court feels that a case is ready for trial, it will set the date for trial and make orders concerning completion of discovery and final preparation for trial.

Settlement Negotiations:

Settlement negotiations may proceed throughout the trial. Often the court will require the parties to try a mediation of the issues or will set a "Mandatory Settlement Conference" (MSC) before the trial date. Settlement negotiations generally become more intense as the trial date approaches.

Trial:

The vast majority of cases settle before trial. However if the parties cannot settle the case, the only way to resolve the issues is by way of trial.

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