

2019 EDITION

Virginia Business Torts

**Editors: Edward B. Lowry
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Virginia Business Torts

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VIRGINIA LAWYERS PRACTICE HANDBOOK

VIRGINIA
BUSINESS TORTS

Fourth Edition

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CHAPTER 2

COMMON LAW TORTS

2.1 INTRODUCTION

A common law tort can form a component of almost any business dispute when competitors or parties to a contract disagree. Common law torts can also appear in disputes with former employees, especially when those employees become competitors. The controlling policy consideration underlying tort law is the protection of persons and property from losses resulting from injury.

In recent years, the trend among federal courts in Virginia and elsewhere has been to return to the core meaning of employment discrimination laws by reading federal anti-discrimination statutes more strictly. An inevitable reaction to this narrow interpretation of federal employment law has been a marked increase in the number of employees and former employees seeking redress in state courts under state common law. In addition to federal and state statutory claims for unfair or prohibited business practices, claims based on the parties' agreements, and state common law claims for wrongful termination, there are a number of state tort claims that may be asserted by victimized or terminated employees.

This chapter describes some of the more commonly asserted state law claims. These "tort" claims include other types of related claims created by Virginia statutes. Counsel should be aware that, for a number of these claims, the leading cases in Virginia may not have been decided in a business law context and that the same legal term may have different meanings in different contexts. For example, when discussing the tort of battery, "malice" can mean something quite different from what it means in defamation law. Additionally, the concept of an agent acting within the "scope" of the agency or employment may mean radically different things for purposes of the Workers' Compensation Act and for the doctrine of respondeat superior. The torts of conversion and conspiracy to injure a business are covered in separate chapters of this book.¹

¹ See Chapters 4 and 8 of this book, respectively.

2.2 FRAUD

2.201 In General. Allegations of fraud may arise in an employment dispute, in a claim between competing businesses, or when a sale or merger is contemplated. For example, after an employment relationship has soured, an employee may allege that the employer fraudulently induced the employee to leave a prior position or to perform an executory contract.

2.202 Actual Fraud.

A. Elements.

1. In General. In order to recover in an action for actual fraud, a plaintiff must prove (i) a false representation; (ii) of a material fact; (iii) made intentionally and knowingly by the defendant or the defendant's agent; (iv) with intent to mislead; (v) upon which the plaintiff reasonably relied; (vi) resulting in damage to the plaintiff.²

2. False Representation of Material Fact. Under Virginia law, for statements to amount to fraud, they must be "positive statements of fact and not mere expressions of opinion."³ A matter "susceptible of exact knowledge when the statement is made, is usually considered as a matter of fact."⁴ The misrepresentation cannot be vague or inconclusive or a mere expression of opinion.⁵ In *Woodring v. Board of Grand Trustees*,⁶ the plaintiff alleged that when, before starting work, he expressed a fear to the defendant that he might be fired, the defendant's agent told him "don't worry about it." When his prediction proved true, he filed a claim for fraudulent inducement.

² *Evaluation Research Corp. v. Alequin*, 247 Va. 143, 148, 439 S.E.2d 387, 390 (1994); see also *Bank of Am., N.A. v. Sands*, 488 Fed. Appx. 704, 708 (4th Cir. 2012) (listing same six elements); *Anthony v. Verizon Va., Inc.*, 288 Va. 20, 34, 758 S.E.2d 527, 534 (2014) (listing same elements); *Flippo v. CSC Assocs. III, L.L.C.*, 262 Va. 48, 66, 547 S.E.2d 216, 227 (2001) ("An allegation of fraud requires a showing by clear and convincing evidence of an intentional and knowing misrepresentation of a material fact, made with the intent to mislead, and relied upon by another to his or her detriment.").

³ *Barnes v. Barnes*, 207 Va. 114, 148 S.E.2d 789, 795 (1966).

⁴ *Poe v. Voss*, 196 Va. 821, 86 S.E.2d 47, 49 (1955).

⁵ *Woodring v. Board of Grand Trs.*, 633 F. Supp. 583, 591 (W.D. Va. 1986) (granting summary judgment to the defendant on the plaintiff's claim of fraudulent inducement); see also *Saxby v. Southern Land Co.*, 109 Va. 196, 63 S.E. 423 (1909) (holding that mere opinions do not amount to fraud). But see *Environmental Staffing Acquisition Corp. v. Beamon Enters.*, CL09-2688, 2011 Va. Cir. LEXIS 65, at *13 (Portsmouth Cir. Ct. Feb. 22, 2011) ("[I]n situations where the defendant is a sophisticated party or has information not equally open to plaintiff and the plaintiff is an unsophisticated party or does not have equal access to information, a court may be able to base a cause of action for fraud on statements of opinion rather than misrepresentations of fact.").

⁶ 633 F. Supp. 583, 587 (W.D. Va. 1986).

The court, however, found the defendant's statement vague and therefore insufficient to support a finding of fraud.⁷

The rationale for why a statement of mere opinion cannot form the basis for a claim of fraud has been aptly explained as follows:

The mere expression of an opinion, however strong and positive the language may be, is no fraud. Such statements are not fraudulent in law, because . . . they do not ordinarily deceive or mislead. Statements which are vague and indefinite in their nature and terms, or are merely loose, conjectural or exaggerated, go for nothing, though they may not be true, for a man is not justified in placing reliance upon them.⁸

No bright-line test has been established to determine whether a false representation is a matter of fact or opinion. Instead, "each case must . . . be adjudged upon its own facts, taking into consideration the nature of the representation and the meaning of the language used as applied to the subject matter and as interpreted by the surrounding circumstances."⁹

Generally, it appears that whether a statement is one of fact or opinion depends on whether it was reasonable for the plaintiff to rely on the statement and whether the statement is provably true or false. Thus, "[c]ommentary statements, trade talk, or puffing, do not constitute fraud because statements of this nature are generally regarded as mere expressions of opinion which cannot rightfully be relied upon, at least where the parties deal on equal terms."¹⁰ For example, the Virginia Supreme Court has held that a vendor's promises of how a product would perform in the future or a builder's statement that a new dwelling was of the highest quality are non-actionable statements of opinion.¹¹

⁷ *Id.* at 591-92.

⁸ *Mortarino v. Consultant Eng'g Servs., Inc.*, 251 Va. 289, 292, 467 S.E.2d 778, 781 (1996) (quoting *Saxby*, 109 Va. at 198, 63 S.E. at 424).

⁹ *Packard Norfolk, Inc. v. Miller*, 198 Va. 557, 562, 95 S.E.2d 207, 211 (1956); see also *Garrett v. Finch*, 107 Va. 25, 28, 57 S.E. 604, 605 (1907) ("The relative knowledge of the parties dealing, their intentions and all of the surrounding circumstances, which can only be gathered from the evidence, affect the interpretation which the courts put upon the representations in determining whether they be of fact or opinion.").

¹⁰ *Tate v. Colony House Builders, Inc.*, 257 Va. 78, 84, 508 S.E.2d 597, 600 (1999).

¹¹ *McMillion v. Dryvit Sys., Inc.*, 262 Va. 463, 552 S.E.2d 364 (2001) (holding that vendor's statement regarding expected performance of siding was a statement of opinion); *Tate*, 257 Va. 78, 508 S.E.2d 597 (holding that seller's statement that new dwelling was of the highest quality was statement of opinion); see

On the other hand, *objective* statements of quality, such as a representation that the product or structure lacks any material defects, have been held to go beyond mere seller's talk and to constitute statements of fact on which a claim for fraud may be sustained.¹² Similarly, a statement that a car "would be in perfect condition, thoroughly checked, gone over carefully and in as good running condition as it could be when delivered" is also a statement of fact.¹³ Additionally, that special expertise is required to ascertain a fact and the fact is relied on to reach an expert opinion will not convert a statement of fact into one of opinion.¹⁴

Similar to statements of opinion, "[i]n general, 'a misrepresentation or misunderstanding of the law does not amount to actionable fraud.'"¹⁵ However, exceptions to this general rule include statements that are more in the nature of fact than law or when there is a special relationship between the parties justifying reliance.¹⁶

To be actionable as fraud, the alleged misrepresentation also "must relate to a present or pre-existing fact, and cannot ordinarily be predicated on unfulfilled promises, or statements as to future events."¹⁷ But

also *RML Corp. v. Lincoln Window Prods.*, 67 Va. Cir. 545 (Norfolk 2005) (holding that "puffing" in connection with sale of windows was unactionable opinion).

¹² *Tate*, 257 Va. 78, 508 S.E.2d 597 (holding that statement that new dwelling house was constructed in a workmanlike manner and was free from structural defects was a statement of fact); see also *Yuzefovsky v. St. John's Wood Apartments*, 261 Va. 97, 112, 540 S.E.2d 134, 142 (2001) (finding that "the specific statements that the development was crime-free, that police officers lived there, and that police vehicles patrolled the development are not matters of opinion or puffing, especially when, as is alleged, the employees knew these statements to be objectively false").

¹³ *Packard*, 198 Va. at 562-63, 95 S.E.2d at 210-11.

¹⁴ See *Mortarino v. Consultant Eng'g Servs., Inc.*, 251 Va. 289, 294, 467 S.E.2d 778, 781-82 (1996) (holding that statement in report that expert investigator and consultant found nothing on the property to indicate wetlands are present is a statement of fact, notwithstanding that the report included a disclaimer stating that the ultimate finding regarding the presence of wetlands was "so opinionated that there is always the possibility that a different interpretation could be made"); see also *Cashion v. Smith*, 286 Va. 327, 337, 749 S.E.2d 526, 532 (2013) (finding statement not opinion when it is "an allegation of fact capable of being proven true or false, such as through expert opinion testimony").

¹⁵ *Monroe v. GSH Residential Real Estate Corp.*, 67 Va. Cir. 264, 266 (Norfolk 2005) (quoting *Hicks v. Wynn*, 137 Va. 186, 119 S.E. 133 (1923)) (holding that expression of the legal effect of a document is not a representation of fact that can support a claim of fraud).

¹⁶ *Humphreys v. Baird*, 197 Va. 667, 90 S.E.2d 796 (1956) (holding that husband's statement that he had obtained a divorce decree for a previous marriage was statement of fact not law and that even if statement was one of law, relationship of trust between defendant and fiancée justified reliance); *Brown v. Rice's Adm'r*, 67 Va. 467, 26 Gratt. 467 (1875).

¹⁷ *Mortarino*, 251 Va. at 293, 467 S.E.2d at 781 (quoting *Soble v. Herman*, 175 Va. 489, 500, 9 S.E.2d 459, 464 (1940)); see also *Blair Constr. v. Weatherford*, 253 Va. 343, 485 S.E.2d 137 (1997) (holding that representation to perform certain work at a set price is a promise to perform work in the future, not a statement of present fact); *Tate*, 257 Va. 78, 508 S.E.2d 597 (holding that representation that buyers

one recognized exception to the general rule that “statements about future events” cannot form the predicate for a fraud claim is a promise made with the “present intention not to perform.”¹⁸ Accordingly, although failure to perform a term of a contract does not constitute fraud, when a defendant “makes a promise, intending not to perform, his promise is a misrepresentation of *present* fact, and if made to induce the promisee to act to his detriment, is actionable as an actual fraud.”¹⁹ Additionally, fraudulent inducement is not limited to the formation of a contract but can also extend to fraudulently inducing another to perform under a contract.²⁰ Although the defendant’s failure to perform a promise may constitute a breach of the parties’ contract, it cannot be fraud unless there was a present intention not to perform at the time the promise was made.²¹

The misrepresented fact is “material” only when it “influences a person to enter into a contract, when it deceives him and induces him to act, or when without it the transaction would not have occurred.”²² A fact is material if it influences a person to act, even if the person anticipates that he or she will only obtain nonmonetary benefits as a result of the transaction.²³

“would enjoy quiet possession in the sense that apart from minor corrective work, no significant work would be required by way of restoration, rebuilding, or extensive repair” is a representation of a future event that cannot support an action for constructive fraud).

¹⁸ *Elliott v. Shore Stop, Inc.*, 238 Va. 237, 245, 384 S.E.2d 752, 756 (1989).

¹⁹ *Colonial Ford Truck Sales, Inc. v. Schneider*, 228 Va. 671, 325 S.E.2d 91, 94 (1985) (denying motion to dismiss when plaintiff “expressly alleged that [defendant’s] promises” that plaintiff would not lose money on the contract with a third party and that defendant would pay for all parts given to the third party “were known to be false and fraudulent when made, that they were made to induce [plaintiff] to supply the goods to [the third party], and that the [plaintiff] relied and acted upon those promises to its detriment”); see also *Gelber v. Glock*, 293 Va. 497, 530, 800 S.E.2d 800, 819 (2017) (quoting *SuperValu, Inc. v. Johnson*, 276 Va. 356, 368, 666 S.E.2d 335, 342 (2008)) (for same proposition); *Sea-Land Serv., Inc. v. O’Neal*, 224 Va. 343, 351, 297 S.E.2d 647, 651-52 (1982).

²⁰ *Devine v. Buki*, 289 Va. 162, 175, 767 S.E.2d 459, 466 (2015); see also *Modern Oil Corp. v. Cannady*, No. 141839, 2015 Va. Unpub. LEXIS 16, at *12 (Va. Dec. 30, 2015) (“Fraudulent inducement claims involve one of two types: fraudulent inducement to enter into a contract, and fraudulent inducement to perform a contract.”).

²¹ *Blair Constr.*, 253 Va. at 348, 485 S.E.2d at 139 (1997); see also *Zaklit v. Global Linguist Solutions, LLC*, No. 1:14cv314 (JCC/JFA), 2014 U.S. Dist. LEXIS 92623, at *57, 2014 WL 3109804 (E.D. Va. July 8, 2014) (“Significantly, the ‘mere failure to perform’ is ‘generally not evidence of a lack of intent to perform at the time’ the promise was made.”) (quoting *Cyberlock Consulting, Inc. v. Information Experts, Inc.*, 876 F. Supp. 2d 672, 681 (E.D. Va. 2012)); *SuperValu, Inc.*, 276 Va. at 368, 666 S.E.2d at 342 (“if a defendant makes a promise that, when made, he has no intention of performing, that promise is considered a misrepresentation of present fact and may form the basis for a claim of actual fraud”).

²² *Packard Norfolk, Inc. v. Miller*, 198 Va. 557, 563, 95 S.E.2d 207, 211-12 (1956) (citations omitted).

²³ *J.E. Robert Co. v. J. Robert Co.*, 231 Va. 338, 343 S.E.2d 350 (1986) (holding that father’s promise to son that commissions would not be withheld from salesmen who left to work for son was material even though son would not receive a portion of the commissions but would benefit in nonmonetary ways from his workers’ receiving the commissions).

Finally, fraud may be based on concealment as well as on affirmative misstatements. “[C]oncealment of a material fact by one who knows that the other party is acting upon the assumption that the fact does not exist constitutes actionable fraud.”²⁴ In addition, concealment by “half-truths” constitutes a statement of fact on which a fraud claim can be based.²⁵ However, “[p]roof of fraud by nondisclosure ‘requires evidence of a knowing and deliberate decision not to disclose a material fact.’”²⁶

3. Made Intentionally or Knowingly with Intent to Mislead. To recover in an action for actual fraud, a plaintiff must prove that the false representation was made intentionally and knowingly by the defendant or the defendant’s agent and that the defendant made the misrepresentation with the intent to mislead the plaintiff.²⁷ As stated above, fraud claims often arise when the plaintiff alleges that fraudulent inducement by the defendant caused the plaintiff to take some detrimental action. Accordingly, in an actual fraud case, the plaintiff carries the burden of proving that the defendant knowingly made a false promise with the intent of inducing the plaintiff to enter a contract or to perform the plaintiff’s part of an executory contract.²⁸ In other words, whatever the promise of the defendant, it must be made with a present intention not to perform.²⁹

²⁴ *Allen Realty Corp. v. Holbert*, 227 Va. 441, 450, 318 S.E.2d 592, 597 (1984) (citations omitted); *see also Devine*, 289 Va. at 175-76, 767 S.E.2d at 466 (concealment of fact, knowing other party is acting upon the assumption that such fact doesn’t exist, is fraud); *Nationwide Mut. Ins. Co. v. Hargraves*, 242 Va. 88, 92, 405 S.E.2d 848, 851 (1991) (“[t]he injured party must have been damaged as a result of his reliance on the misrepresentation which may take the form of silence or the failure to speak.”); *Spence v. Griffin*, 236 Va. 21, 28, 372 S.E.2d 595 (1988) (holding that “concealment, whether accomplished by word or conduct, may be the equivalent of a false representation, because concealment always involves deliberate nondisclosure designed to prevent another from learning the truth”).

²⁵ *Murphy v. McIntosh*, 199 Va. 254, 99 S.E.2d 585 (1957) (holding that seller’s agent’s responses to buyers’ questions regarding the presence of termites were actionable fraud because the answers included only part of the truth and concealed the full facts to lull buyers into a false sense of security and thus avoid any independent investigation).

²⁶ *Cohn v. Knowledge Connections, Inc.*, 266 Va. 362, 368, 585 S.E.2d 578, 581 (2003) (quoting *Lambert v. Downtown Garage, Inc.*, 262 Va. 707, 714, 553 S.E.2d 714, 718 (2001)); *see also Modern Oil Corp. v. Cannady*, No. 141839, 2015 Va. Unpub. LEXIS 16, at *12 (Va. Dec. 30, 2015) (“Under Virginia law, ‘concealment always involves deliberate nondisclosure designed to prevent another from learning the truth.’”) (quoting *Van Deusen v. Snead*, 247 Va. 324, 328, 441 S.E.2d 207, 209 (1994)).

²⁷ *Evaluation Research Corp. v. Alequin*, 247 Va. 143, 148, 439 S.E.2d 387, 390 (1994); *see also Flipppo v. CSC Assocs. III, L.L.C.*, 262 Va. 48, 66, 547 S.E.2d 216, 227 (2001).

²⁸ *Ware v. Scott*, 220 Va. 317, 319-20, 257 S.E.2d 855, 857 (1979). Fraudulent inducement to perform may arise from an affirmative misrepresentation or from the concealment of a material fact. *Id.* at 320, 257 S.E.2d at 857.

²⁹ *Sea-Land Serv., Inc. v. O’Neal*, 224 Va. 343, 351, 297 S.E.2d 647, 651 (1982); *see also Nargi v. Camac Corp.*, 820 F. Supp. 253 (W.D. Va. 1992) (granting the defendant summary judgment on a claim of fraudulent inducement because of insufficient evidence of a then-present intention not to perform); *Becker v. Corp. Presentation Servs., Inc.*, At Law No. 225420 at 6 (Fairfax Feb. 23, 2005) (finding sufficient