Jurisdictionary®

Presents

Causes of Action

&

Civil Defenses

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Table of Contents

Essential Elements

Think of a lawsuit like a recipe for baking a pineapple cake. There are certain ingredients you must put in if the cake is to turn out right. If you're trying to make a pineapple cake and don't add any pineapple or pineapple flavoring, you're not going to get a pineapple cake. You might get something else, and it might taste yummy, but it won't be pineapple cake unless you add that essential ingredient.

The essential ingredients to a lawsuit are called the elements of causes of action.

Every lawsuit must state at least one cause of action (e.g., breach of contract, negligence, fraud, etc.) that is recognized by the jurisdiction where it's filed.

Each cause of action, in turn, requires certain ingredients to be included in the allegations of fact that purport to state the cause of action … ingredients we lawyers call the elements of that particular cause of action. Each cause of action, like each kind of cake, has different essential elements. That's what this book explains.

For example, if you sue (or are sued) for breach of contract, the complaint must include at least three (3) essential ingredients, the elements of the cause of action we call "breach of contract". If you fail to state all elements, you fail to state the cause of action.

1. Existence of an enforceable contract.
2. Acts of the defendant that constitute his breach of the contract.
3. Damages to the plaintiff resulting from defendant's breach.

Failure to include all 3 essential ingredients (i.e., elements of the cause of action called breach of contract) exposes the complaint to a motion to dismiss.

What do we call the motion to dismiss? Why, it's called a *Motion to Dismiss for Failure to State a Cause of Action*, that's what!

I told you this isn't rocket science.

Of course, just saying what's stated in the 3-point list above isn't enough to create an effective, winning complaint. You not only need to state all the essential elements but you must also state all the ultimate facts that substantiate and corroborate those elements.

For example, in stating a cause of action for breach of contract you should state all facts that support the elements of the cause of action, as the following example shows:

COUNT ONE: BREACH OF CONTRACT

23. This is an action for breach of contract.

24. On April 1st of this year the defendant offered to sell plaintiff his famous prize bull for $200.

25. Plaintiff and defendant signed a written contract agreeing to the terms of the bargain, and plaintiff gave defendant $200 in cash. (Copy of the written contract is attached as Exhibit 1.)

26. Later that same afternoon, while visiting a local tavern where the defendant goes to drink himself silly every day, plaintiff learned that defendant had been bragging how the bull had died the week before.

27. Plaintiff made demand for the live bull he bargained and paid for.

28. Defendant failed and refused to deliver the bull or return plaintiff's money, thus breaching the written contract between them.

29. Defendant suffered $200 in money damages.

WHEREFORE plaintiff prays the Court will award him money damages and such other relief as may be reasonable and just under the circumstances including plaintiff's reasonable attorney's fees and costs.

That's how it's done!

See? It's truly easy, once you see the common-sense of it.

All facts are alleged that need to be alleged to set forth all elements of the cause of action for breach of contract, and additional facts are alleged to put the court on notice what the case is about and what the plaintiff intends to prove … i.e., what he needs to prove to win.

Of course there's more to winning lawsuits than knowing the elements of causes of action (whether you're a plaintiff bringing the lawsuit or a defendant trying to make it go away), however it is essential for both parties to know the elements of every cause of action in the case … whether they are suing or being sued.

This tutorial explains the elements of common causes of action and defenses that may be asserted successfully. Whether you're suing someone for damages you say *they* caused or being sued for damages they say *you* caused, it just makes good sense to know the elements of every cause of action … because a case improperly stated cannot be won!

The following pages list most common causes of action and some of the defenses that may be raised. The list is in alphabetical order. If you'd like to see explanations for causes of action or defenses not included, please email attorney@jurisdictionary.com, and we'll try to include additional causes and defenses future editions of this tutorial.

For more information, visit www.jurisdictionary.com to order *all* our tutorials and learn how to win lawsuits.

NOTE: Elements of Causes of Action may differ somewhat between jurisdictions. Check rules and case law for details in your local jurisdiction before proceeding. Jurisdictionary® tutorials are not a substitute for experienced legal counsel. If in doubt about any matter discussed herein, consult an attorney.

Abuse of Process

A cause of action for the tort of abuse of process arises when one intentionally uses the legal system to attain a wrongful result, thus causing another unjust injury.

The term "process" applies to the summons that attaches to a complaint served to initiate a lawsuit. The term may also apply to witness subpoenas or other special orders or writs issued by the court that command persons to do certain things. It is the abuse of the court's "process" and injury caused by that abuse that gives rise to this cause of action.

The person injured by such abuse has the cause of action and may sue upon it. As stated above, however, the injured person must properly state his cause of action and support it with facts sufficient to win his case.

For example, suppose Smith sues Jones for fraud just to keep Jones from closing a deal with Miller. Smith thinks when Miller sees Jones has been sued for fraud he'll doubt Jones' honesty and refuse to go forward with the deal. Smith wants to stop the deal, so he abuses the legal process to attain a wrongful result … in this case an unrelated purpose.

In order for Jones to sue Smith for abuse of process, however, Jones must show that Smith intentionally used the legal system to attain a wrongful result. If Jones was, in fact, guilty of fraud the Jones cannot sue Smith for abuse of process, because Smith had a legitimate right to sue Jones in the first place.

The underlying wrong that gives rise to the cause of action is perversion of our legal system for an improper purpose, i.e., a purpose the law never intended. If Smith had a legitimate purpose for suing Jones for fraud, there is no perversion and Jones has no cause of action for abuse of process.

Abuse of process may arise where a person either sues another in civil court or applies to the criminal system to achieve an improper purpose the law does not intend.

It may not be necessary for Jones to win the underlying lawsuit brought by Smith, provided he can show in his action against Smith for damages arising from Smith's abuse of process that Smith intentionally proceeded against him for an improper purpose.

The maliciousness or lack of foundation of the action itself is irrelevant. It is the improper purpose that gives rise to the cause of action, a purpose not intended by law, an ulterior purpose for which our laws were not designed, a purpose that abuses the system itself.

Elements

For a plaintiff to adequately plead a cause of action for abuse of process, he must allege ultimate facts sufficient to establish the following elements:

1. Defendant illegally or improperly perverted the legal system against plaintiff.
2. Defendant had ulterior motive or purpose exercising such perverted use of the system.
3. Plaintiff suffered damage as a direct result.

Each of these three elements must be expanded with actual facts to fully explain how the element exists in the situation, and to win the case plaintiff must prove each and every essential fact necessary to allege all the elements.

Defenses

Absolute Immunity

So long as the acts of the court or a judge has some relation to the proceeding, the court system and the judge are protected by absolute immunity from suit for abuse of

process. Statements amounting to perjury, libel, slander, and defamation do not give rise to an action for abuse of process.

Act After Process Issues

Before the cause of action of abuse of process can arise, the court must issue some form of process (usually the summons that commands a civil defendant to appear in court and answer the complaint the summons is attached to when served on the defendant), and the process must be used for the improper purpose. No act occurring prior to issuance of the court's process can give rise to the cause of action.

Intended Purpose

There is no cause of action for abuse of process unless the process was used for a purpose other than that for which the law intended it. If the process is used to accomplish a proper result (e.g., bringing a civil defendant before the court to answer a complaint that is itself predicated on legitimate causes of action) there is no abuse of process, even if the process furthers another purpose separate from its legitimate purpose.

If a person sued for abuse of process had a legitimate purpose for the process that caused damage to the other unrelated to the legitimate purpose, the cause of action does not arise. There is no abuse of process if process is used to accomplish a legitimate result, even if there is a separate, wrongful motive behind it.

In most cases, abuse of process arises from some form of extortion, i.e., it is used to compel another to do something he would not otherwise be lawfully compelled to do. If the one using the process has a legitimate reason to do so, however, there is no abuse, and the cause of action must be dismissed.

Counterclaim

In jurisdictions where the complaining party need not prevail in the underlying action as a pre-requisite to brining this cause of action, one may file a counterclaim seeking damages for abuse of process.

Unless the counterclaim itself stands on a solid footing, however (i.e., unless the counterclaim is justified by the facts, rather than being a retaliatory tactic without merit in its own right), the party filing the counterclaim may be charged with abusing process.

Check local rules and case law to determine if abuse of process requires as one of its essential elements a termination of the action in favor of the person against which the allegedly abusive process was issued in the first place.

Accord and Satisfaction

- A Defense -

An accord arises where two parties agree to settle some prior existing debt by the substitution of performance different from the original obligation.

For example, in the example of the farmer who promised to sell his prize bull for $200 to his neighbor who didn't know the bull was dead, an accord could be reached if the owner of the dead bull promised to substitute his best sheep dog for the bull. If this agreement for a substitute is accepted, an accord is reached. If the sheep dog is actually delivered as a substitute for the bull, there has also been satisfaction.

Now, if the disgruntled holder of that contract for a bull goes into court to sue for breach of contract, the defendant can raise the defense of accord and satisfaction. While it is true he promised a prize bull, it is also true the buyer agreed to accept the sheep dog as a substitute for the bull. Delivery of the sheep dog as a substitute for the bull constituted an accord and satisfaction, a complete defense to breach of contract on the bull bargain.

An accord and satisfaction erases the former obligation, and the earlier contract is as if it never existed, since the promise of a bull has been erased by acceptance of a sheep dog instead!

Think of it as compromise. Performance of the second promise satisfies the first.

This is only true, however, if there is first an accord, i.e., if the parties agree to a substitute in lieu of the first promise. The man owing a bull cannot unilaterally deliver the dog to discharge his debt unless the buyer first agrees to accept the dog in full satisfaction of the promise to deliver a bull.

If the creditor accepts debtors substitute promise, and the debtor performs fully on the substitute promise, buyer loses his right to sue. There has been accord and satisfaction of the original debt.

If the debtor gets sued by the creditor after reaching an accord and delivering the substitute, he can file an affirmative defense to the complaint (which should be filed with his answer and not be delayed to a later time when it might be deemed waived), and if he is able to prove the accord and satisfaction (i.e., if he can prove the creditor agreed to take the substitute and can prove he delivered the substitute) then the debtor is absolved of all further liability on the debt.

Elements

For a defendant to adequately plead the defense of accord and satisfaction, he must allege ultimate facts sufficient to establish the following elements:

1. Existence of a pre-existing dispute over an enforceable obligation.
2. Both parties intended to settle their dispute by entering into a substitute agreement.
3. Both parties acted in accordance with the substitute agreement, i.e., the debtor tendered and the creditor accepted the substitute performance agreed upon.

If all three factual elements of this defense are proven to exist, debtor's obligation on the underlying debt should be discharged, and plaintiff's case should is dismissed on the defendant's motion after hearing and presentation of evidence of the accord and the satisfaction.

Comments

In order to comprise a complete defense to the creditor's claim, the agreed upon performance must fully discharge the underlying debt. Partial satisfaction is no defense.

Accounting

A cause of action for an accounting arises where there is a fiduciary relationship, such as where one party has a dispute with a guardian, trustee, receiver, or other fiduciary who has control over assets of the party complaining. Accountings may also be ordered where the issues in a contract case, for example, are so complicated that it is not clear if the facts can be ascertained any other way and always where the underlying contract has provided for an accounting in the event of a dispute. When the complaining party has no separate access to the records, such as where a fiduciary like a trustee or guardian has the books, an accounting will almost never be denied, since the complaining party may have no other way to ascertain if the fiduciary has carried out his duties faithfully.

Elements

To successfully plead for an accounting, one should assert the following:

1. The existence of a fiduciary relationship or contract demands that are so extensive and complicated that it is not clear that money damages alone are adequate.
2. Necessity for the accounting.

The remedy sought is one in equity, therefore the court has broad discretion in whether or not it will grant the relief sought. It is important, therefore, to allege sufficient facts to make clear that justice and fairness demand that an accounting be given.

Defenses

If the matter into which the other party seeks an accounting is one that is simple on its face, e.g., an oral agreement for performance of a clear-cut duty that involves no

fiduciary entrustment of assets, then this should be raised as a defense by way of motion to strike or dismiss.

Comments

The remedy of an accounting is almost always performed by a judge or special master appointed by the judge. Accountings are almost never submitted to a jury, because it is usually impractical for a jury to undertake the process.

Winding up of partnerships almost always involves necessity for accounting to determine respective parties' interests. This also applies to closely held corporations in which the business has come to a standstill because of deadlock between directors.

Account Stated

This cause of action arises where parties have engaged in a prior course of dealing with each other (i.e., a history of trade and transactions between them) and debtor refuses to deny the amount claimed by creditor's invoices (or other billing notices or demands).

If the debtor does anything to acknowledge the account stated in the invoices but refuses to pay, creditor can bring this cause of action to collect the debt. The longer the course of dealing and clearer the debtor's acknowledgment, the easier it is to win.

This cause of action is frequently abused by people unfamiliar with its elements. Many mistakenly believe they can "invoice" someone for a debt, saying in the invoice, "If we do not hear from you within 10 days," or words to that effect, "we will assume you acknowledge the debt." This may work against naï ve or poorly-represented defendants, however it will not work where the essential elements of the cause of action do not exist.

Elements

To successfully plead a case for account stated, one should assert the following:

1. The parties engaged in prior dealings out of which the account arose. Mere statement of a liquidated amount due on a contract for fixed price alone (that the defendant is clearly obligated to pay) does not give rise to an action for account stated.
2. At the time the account was presented, debtor had a prior liability to pay. There can be no action for account stated if, when the account was presented, the debtor had no liability to pay.
3. The defendant either expressly or implicitly promised to pay the balance of the account stated. An express promise is easy to prove. An implied promise, however, cannot be established by the defendant's mere failure to dispute the debt. There must be more, such as a well-established practice of periodic billing in the regular course of dealing to which no objection is made within a reasonable[1] time.

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1 The term "reasonable" is a concept essential to our American system of justice. To learn more about this and many other legal terms, visit **Juris dictionary**® at www.jurisdictionary.com.

Defenses

The most common way to defeat an action for account stated is to show that the debt claimed is new, i.e., that there was no prior course of dealing between the parties.

If there was prior dealing and a long history of periodic billing that the defendant timely and routinely paid over an extended course of time prior to the invoice in question, the defendant is put to the difficult task of proving (1) he did not assent to the amount of the debt stated in the invoice or demand, (2) that he had no obligation to do so, (3) that he never received the goods or services for which the invoice applies, or (4) he paid the debt.

Comments

Sending an invoice or other demand for payment of a debt that includes language such as, "Failure to dispute the amount of this debt will result in the creditor's assumption that the debt is owed," may intimidate some people into paying. A lawsuit on this cause of action may actually result in a judgment if the defendant is unfamiliar with the law. A savvy litigator familiar with Jurisdictionary® teachings will not be taken in, however.

Failure to respond to a demand letter, without more, is insufficient to give rise to this cause of action.

Suing for account stated when essential elements are clearly absent, may expose the party bringing the action to a counterclaim for abuse of process.

Assault

Contrary to popular belief assault has nothing to do with slapping, striking, biting, kicking, scratching, or any other physical touching. The cause of action arises whenever a person is placed in well-founded fear of imminent injury by the intentional threat or offer of another to cause him bodily injury by force. (The cause of action arising from injury is called battery, covered later on in this book.)

If I phone you from Wisconsin, while you're comfortably seated poolside at your cozy home in South Florida and say, "I will now bash in your nose," you have no action, because you've not been placed in well-founded fear of imminent injury. I cannot hit you from Wisconsin if you're lounging by your pool in sunny Florida.

If I walk up to you in a tavern and, a beer bottle clenched in my uplifted fist, shout in your face, "I will now bash in your nose," you have a cause of action for assault. If you have witnesses to testify on your behalf, you'll probably win.

The measure of damages you can recover, i.e., how much money the lawsuit may be worth, depends on severity of the threat and degree of fear the court believes it would cause a reasonable person in the same or similar circumstances (typically a jury decision).

Elements

To successfully plead a count for assault, one should assert each of the following:

1. An intentional threat or offer to cause bodily injury by force, or force directed toward another, regardless of whether any injury is caused.
2. The threat was not lawful nor authorized by the plaintiff.
3. Circumstances surrounding the threat created a well-founded (i.e., reasonable) fear of imminent peril of bodily injury.
4. Defendant had apparent present ability to cause the threatened injury if not prevented.

As you can see, my threatening you over the phone cannot give rise to this cause of action, however if I threaten to club you on the nose with a beer bottle while we're standing face-to-face in a tavern or throw a beer bottle at you from across the bar, I've committed the civil tort of assault, and all elements exist to support the cause of action.

It is up to you, then, to allege all facts necessary to state each element in your complaint. And, if you omit any element (or any element is not, in fact, present) I can move to dismiss for your failure to state the cause of action.

Comments

Keep in mind that the cause of action arises not from violence itself but from the defendant's threat or offer to do violence, and there must be actual fear, reasonable fear, fear of imminent (i.e., immediate) bodily injury.

A threat to do injury to property is not assault.

Defenses

Any communication or act done in pure self-defense is a defense. Thus, if you threaten me first with a beer bottle, and I wave an umbrella over my head shouting, "Do it, and I'll crush your head with this umbrella," you have no cause of action against me.

Any communication or act done in defense of property is a defense. Thus, if you are in the act of stealing potatoes from my garden, and I run toward you waving a shovel over my head, shouting, "Get out of my garden or I'll pound you with this spade," I have a defense to your cause of action against me for assault.

Spoken words alone do not constitute sufficient justification for assault. The old adage, "Sticks and stones may break my bones, but words will never hurt me," applies in

cases where a threat of imminent bodily harm resulted from one person telling another, "You are by far the ugliest mortal I have ever witnessed!"

To respond to such a statement with, "Hold still, you little varmint, while I pound your head with this beer bottle," will subject you to civil liability for the tort of assault.

Caveat

Threats to cause severe bodily injury may be justified only if made in response to a well-founded fear of imminent bodily injury to yourself. Threats to cause mortal injury by lethal force, however, are only justified in response to threats of lethal force or force capable of causing *severe* physical injury (i.e., threats that cause a well-founded fear of imminent death or *severe* physical injury). Whether the severity of a threat is sufficient to justify the responsive threat is typically a jury question.

One cannot be excused for threatening to kill potato thieves.

You can, however, chase them out of your garden with a shovel. ☺

If it is possible to withdraw from threatening situations, wisdom counsels you to do so, rather than actually cause physical harm to others for which you may become the unwilling defendant in a financially-destructive, character-assassinating lawsuit.

Respond with force or threats of force only when absolutely necessary.

Use of force or threat of force greater than what is privileged, even when acting in self-defense, may subject you to civil liability and possibly severe criminal charges.

Assumption of Duty

Most jurisdictions have reached the conclusion that an action taken for the benefit of another, whether for payment or reward or even when gratuitously rendered, imposes an obligation on the person taking the action to do so with reasonable care. Failure to exercise reasonable care gives rise to a cause of action for assumption of duty.

In law school they tell the story of a young man enjoying the sunshine on a beach crowded with many others when a cry for help is heard beyond the breakers. Dashing to the water's edge he plunges into the surf ahead of several other well-wishers who might otherwise have attempted the rescue. But, seeing our hero already ahead of them, a dozen strong swimmers wait anxiously in the surf observing the rescuer's powerful swimming and praying for the soul in distress now only a few yards beyond his reach. At this point, however, the would-be-rescuer sees the attempt may put him also at risk and turns back. Before the others in the surf can swim out to replace him, the drowning soul disappears beneath the waves, forever lost.

Some might say the first fellow who started swimming to the rescue has no duty and cannot be liable to the person drowning since, after all, he was under no duty to begin with. The courts have held otherwise.

One who undertakes to act for the benefit of another comes immediately under an obligation to do so with reasonable care.

Had our swimmer not begun his rescue attempt, he would have no duty, and the family of the unfortunate drowned person would have no cause of action. As it turns out, however, his attempt dissuaded others from trying … others who might have succeeded.

A duty was breached, and a cause of action arises accordingly.

Elements

It is important to note that the elements constrain this cause of action to certain fact situations so as not to create a chilling effect on those who might otherwise attempt to render a

id.

1. Defendant undertook, gratuitously or for consideration, to render services to another in circumstances a reasonable man would recognize as necessary for protection of the other person or the other person's property.
2. Plaintiff suffered physical harm resulting from defendant's failure to exercise reasonable care to perform the services he undertook to perform.
3. Defendant's failure to exercise reasonable care increased risk of plaintiff's harm.
4. Plaintiff's harm resulted from reasonable and justifiable reliance on defendant's undertaking to render services.

The courts have clearly settled the issue. If you undertake to act for another's benefit in a manner reasonable persons would agree as necessary for the safety of the other person or his property, you have assumed a duty to do so with reasonable care and can be held liable for injury to that person resulting from your failure to act with reasonable care.

Defenses

Good Samaritan Act

Some jurisdictions have enacted statutory clarifications that limit the liability of persons who render assistance, medical or otherwise, in "emergency" situations. These statutes do not remove liability for those who act without reasonable care but clarify the standard of care that must be observed. Be aware of these statutory clarifications in your

jurisdiction and the case law that further refines those clarifications with regard to specific fact circumstances.

Performance Not Begun

If the defendant has not actually undertaken to begin rendering service, regardless of preparatory actions taken by him, the law will not hold him liable where the assumed duty has not begun. He is only liable to act with reasonable care *after* he assumes that duty by beginning.

Battery

A cause of action for the tort of battery arises when the plaintiff actually suffers harm or humiliation resulting from an intentional, uninvited, offensive touching. It isn't necessary that the touch cause physical injury. Herein we are warned by the law.

Some years ago a carpet-layer came to me complaining he'd been sued for battery as a result of merely touching one of his customers on the shoulder while telling her, "We don't have to finish this job, you know!" He had no intent to cause physical harm. All he did was touch her with his outstretched index finger to punctuate what he was saying in response to her unreasonable demand that he use left-over remnants from the living room to carpet her hallway (a demand outside their written contract). She had raised her voice demandingly when he refused, and he punctuated his response by touching her with his finger. That was all the excuse she needed. The woman sued him for battery, because he did intend to touch her, and part of his intent in touching her was to cause "offense", mild though it was. I was able to prevent her from obtaining a judgment, however disruption to his business and the consequent emotional strain on his family resulted in great suffering, all because he touched someone with the tip of his index finger!

That's battery.

Elements

To successfully state a cause of action for battery, one must allege:

1. Plaintiff suffered a harmful or offensive contact caused by defendant.
2. Defendant intended the contact and the resulting harm or offense or acted with reckless disregard for whether or not his acts would result in the contact complained of and the harm or offense caused thereby.
3. Defendant acted unlawfully or without authority or consent.

The degree of force is immaterial, except that it may be considered by the court in determining the amount of money damages to be awarded to the plaintiff.

It is not the degree of force or even the degree of hostile intent that gives rise to this cause of action. The cause of action arises where the touching is not authorized!

Comments

Negligently touching another does not give rise to a cause of action for battery, however, if the person touched is unusually sensitive, the person negligently touching him, may still be liable for damages resulting from negligence—but not from battery.

Battery is an intentional tort, i.e., a cause of action that requires defendant's intent as a necessary factual element that must be stated as part of the pleadings.

Defenses

Insanity

Since intent is a requisite element for the tort of battery, insanity (or in some cases extreme intoxication) may be a defense. The question is one of degree, i.e., whether the defendant possessed the requisite mental capacity to intend his act. A merely intoxicated person may (in some cases) avoid liability for battery yet remain liable for negligence, if it is determined his intoxication was, itself, intentional.

Self Defense

One is authorized to use reasonable force against another to protect oneself from physical harm. Thus, it is a defense to battery if one resisted physical force with physical force that was reasonable under the circumstances.

Words Alone

As explained under the heading for assault, spoken words alone do not constitute sufficient justification for battery. The adage, "Sticks and stones may break my bones, but words will never hurt me," applies in cases where the defendant causes the plaintiff bodily harm for saying, "You are by far the ugliest mortal I have ever witnessed!" Words, no matter how demeaning or embarrassing, never constitute a defense to either assault or battery, i.e., to the threat of harmful touching or the touching itself. Hold your peace and avoid being sued.

Caveat

As stated under the heading for assault, bodily injury may be justified only if in response to a well-founded fear of imminent bodily injury to yourself. Whether severity of a threat is sufficient to justify the response is typically a jury question.

If it is possible to withdraw from threatening situations, wisdom counsels you to do so, rather than actually cause physical harm to others for which you may become the unwilling defendant in a financially destructive, character assassinating lawsuit.

Respond with force or threats of force only when absolutely necessary.

Use of force or threat of force greater than what is privileged, even when acting in self-defense, may subject you to civil liability and possibly severe criminal charges.

Sexual battery arises from any non-consensual sexual contact. Moreover, if Sue consents to sexual contact with Sam, and Sam knows Sue is ignorant of the fact that he carries a sexually transmitted disease, Sue has a cause of action against Sam for sexual battery, even though their contact was consensual.

Breach of Contact

Existence of a contract, breach of the contract, and damages resulting from the breach. What could be simpler?

Actually, there are many pitfalls for the unwary in breach of contract cases.

First, a contract must be enforceable at law to provide the basis for a suit. Many contracts aren't. For example, a contract in contemplation of marriage (e.g., Harriet tells Harry she will give him title to her farm if he will marry her) is not enforceable in most jurisdictions today. Contracts for the sale of goods valued at more than $500 cannot be enforced in most jurisdictions today unless committed to a writing that is signed by the defendant, and contracts for the performance of services that cannot be performed in the space of one year are only enforceable if committed to a writing signed by the defendant. So, the first pre-requisite is that the contract be enforceable at law.

Second, the breach must be committed without justification. For example, if Tom promises to deliver 75 bushels of apples to Bill on Tuesday for $25, and Tom shows up a day late with the apples, Bill has no obligation to pay, and Tom has no cause of action for breach of contract. Tom breached first.

Finally, damages suffered must be a *direct* result of the breach. Consequential or incidental damages are ordinarily not recoverable. The most famous example is the case of Hadley v. Baxendale, an English case in the Court of Exchequer (1854), brought by a mill owner against a millwheel crankshaft repairman.

The learned judges wrote in their opinion, after reviewing the jury verdict against the mill owner Hadley, "We think that there ought to be a new trial in this case; but, in so doing, we deem it to be expedient and necessary to state explicitly the rule which the Judge, at the next trial, ought, in our opinion, to direct the jury to be governed by when they estimate the damages. It is, indeed, of the last importance that we should do this; for, if the jury are left without any definite rule to guide them, it will, in such cases as these, manifestly lead to the greatest injustice."

The court's instruction in law to the jury follows and should be noted carefully by all students of law and particularly those seeking damages for breach of contract. "Now we think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in

the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them."

In other words, damages resulting from breach of contract cannot arise from more than the obligation agreed to by the breaching party. Baxendale didn't agree or consider that he'd be liable to Hadley for lost profits while the millwheel shaft was repaired. He only undertook to repair it as quickly as was reasonably within his power to do, and the court decided (in an opinion that continues to be honored by courts today) that damages for breach of contract should only be those contemplated by the parties, i.e., damages for which they agreed in their contract to be liable one to the other … not consequential or incidental damages.

So, that being said, the essential elements in their barest form follow.

Elements

1. Existence of an enforceable contract.
2. Acts of the defendant that constitute his breach of the contract.
3. Damages to the plaintiff resulting from defendant's breach.

As stated at the beginning of this book, merely listing the elements in this form exposes the complaint to a motion to dismiss, because each element must be fleshed out with all facts necessary to establish each element.

Comments

When does a contract arise? What constitutes a contract? These, too, are questions that should be understood and answered by parties involved in a breach of contract case.

In its simplest form, a contract arises whenever two parties exchange promises. A contract is nothing more than a promise for a promise.

There must, however, be a meeting of the minds in order for a contract to arise. For example, in the hypothetical case about the sale of a prize bull discussed early in this book, there was no meeting of the minds about the bull being dead or alive. The buyer reasonably believed the bull was still living. The seller knew the bull was dead. There was, therefore, no meeting of their minds … and no enforceable contract. If the seller had delivered the dead bull and demanded his $200, the buyer could refuse to pay without being liable for breach of contract. There was no contract, because there was no meeting of the minds.

If Jones makes an offer, and Smith accepts the offer before Jones withdraws the offer, a contract is formed between them. If their contract is enforceable at law, either can sue the other for breach and recover damages within the contemplation of the parties. At the moment the offer is accepted, a contract is formed. Both are bound by their mutual promises.

If Jones withdraws his offer before Smith accepts, no contract is formed. The law of offer and acceptance, when an offer is accepted, when an offer by mail can be accepted by telephone, and such like issues is beyond the scope of this book. Jurisdictionary® will soon publish a book on the law of contracts. In the meantime you are referred to local case law and statutes for authority.

Defenses

Abandonment

If the plaintiff has abandoned his contract with the defendant through some overt act (e.g., pursuing performance through a separate contract with another), the defendant may have an affirmative defense to breach of contract. As with all affirmative defenses, he should plead abandonment with the filing of his answer or by motion to dismiss.

Act of God

If hurricane, lightning, flood, or other unforeseeable and unpreventable effects of nature make performance of the contract impossible, there arises a defense to breach, as the defendant was unable to perform due to causes beyond his control.

Breach by Other Party

If the plaintiff breaches first (e.g., refusal to deliver or pay sums when due), then there arises a defense to his complaint that should result in dismissal. Where there is only a partial breach, however, the defendant may be held liable for portions of the contract and damages to the plaintiff resulting therefrom.

Duress

One compelled by force or threat of force to enter a contract is relieved of liability to perform it. Such a contract is not deemed void, however it is voidable if the defendant can prove he entered it under duress.

Failure of Consideration

A plaintiff who has not paid all of the purchase price, for example, is not entitled to sue for delivery (unless the contract contemplated that delivery would be tendered before full payment received). Moreover, if a contract is a unilateral promise without a countervailing promise in return, it is unenforceable *ab initio*. For example, the promise

of a purely gratuitous gift cannot be enforced, since there is no consideration flowing from the other side.

Fraud in the Inducement

Like contracts obtained by duress, contracts obtained by fraud cannot be enforced. This defense is explained in detail later in this book. Like a cause of action, this defense has essential elements that must be pled and proven to prevail.

Hindrance of Performance

This defense is predicated on the common-sense doctrine that one who hinders or prevents another from performing his contract should not be heard to sue on his contract. It's that simple!

Illegality

No contract that is in itself illegal or contemplates an illegal result can be enforced at law. This defense is an absolute bar to enforcement.

Impossibility

A contract that cannot possibly be performed, like delivery of a particular living prize bull that has died, is not enforceable at law. However, any consideration given for performance must be repaid, i.e., the parties must be put in the same position as they were in before entering their agreement, to the extent it is possible to do so.

Mistake

A party may avoid the consequence of a contract if, after exercising due care, he can successfully prove he was excusably mistaken in his understanding of its terms and obligations. The mistake must go to a material element of the contract and comprise a substantial part of the value bargained for. Therefore, if one promises to pay $6 million for the building on the corner of Maple and Elm only to later discover the property being

sold is at Main and Chestnut, the court may excuse performance if the mistake is not the result of an inexcusable lack of due care or the other party has so detrimentally relied on the contract that it would be inequitable to deny enforcement.

Breach of Fiduciary Duty

The gist of this cause of action is that one person should not be permitted to gain an advantage over another as a result of the trust that other person places in him. Thus, if the defendant acquires and abuses his influence over the plaintiff, and plaintiff is thereby injured, the plaintiff has a cause of action for breach of fiduciary duty.

The term fiduciary comes from the Latin for faith. A fiduciary (e.g., a guardian, trustee, or even an attorney) is one in whom others are permitted by law to entrust their faith. If that faith is abused to the plaintiff's injury, the cause of action arises.

Elements

1. Existence of trust relationship or influence based on plaintiff's faith. The plaintiff's faith in defendant must be reasonable, i.e., it must arise from circumstances that would cause a reasonable person to believe the defendant owed plaintiff the duty of acting in good faith obligation and meeting obligations of the plaintiff's trust.
2. Breach of the duty or abuse of the trust.
3. Damages to the plaintiff directly caused by the breach of duty or abuse of trust.

Comments

There is no fiduciary duty or trust arising from an arm's length agreement. The fact that two persons exchange promises and enter into a contract does not impute to them any obligation to act for the benefit or protection of the other party, nor does it require either of them to disclose facts that the other could have discovered by its own diligence. A fiduciary duty arises only where one party, either explicitly or implicitly, assumes and obligation of trust and the other reasonably reposes that trust in him.

To establish a fiduciary duty, the plaintiff must allege some dependency on the defendant and prove the defendant undertook to advise, counsel, or protect him.

Breach of fiduciary duty may be either intentional or negligent. The difference is in computing the amount of damages. One who intentionally breaches a fiduciary duty may be held responsible for all the plaintiff's damages and possibly for punitive damages as well. One who negligently, i.e., not intentionally, abuses the duty may be held liable for only such damages as are consistent with the degree of his negligence.

Conspiracy

To prevail in an action for civil conspiracy, one must prove two or more persons acted in concert to effect some wrongful result for their individual advantage. Each has to have been seeking an advantage for himself in order to be liable for plaintiff's damages. The acts must be either unlawful, willful, or malicious (a broad range of behavior).

When pleading a count for conspiracy, one is compelled to also plead at least one other count seeking damages for the wrongful act itself, such as tortious interference with an advantageous business relationship. A count for conspiracy standing alone is without basis. Typically, the plaintiff will sue for one or more other causes of action then add a count for conspiracy, alleging the wrongs were committed in concert by the defendants acting as co-conspirators.

Elements

1. Intentional commission of an unlawful act or a lawful act by unlawful means through the combined effort of more than one actor. Acts need not be criminal, so long as they are forbidden by civil or criminal law.
2. Each conspiratorial act advances or supports the goal of the conspirators. Any act that does not advance the goal of the conspiracy is not a conspiratorial act. All acts must be in furtherance of the conspiracy.
3. Overt act of each conspirator. Mere agreement or consent does not suffice.
4. Damage to the plaintiff resulting directly from the conspiracy.

The gist of conspiracy is not conspiracy itself, but the civil wrong accomplished by the conspiracy that results in damage to the plaintiff. There must be, therefore, some independent wrong that would give rise to a separate cause of action if committed by one person.

Comments

Civil conspiracy arises from an agreement, confederation, or other combination of two or more persons, each of whom must intend some benefit to himself from the wrong that results … the meeting of two or more independent minds intent on one purpose. The benefit need not be money or property. It could be advantage over a previously enjoyed circumstance. The benefit proves intent … a requisite element of the tort.

If Harry and Bob conspire to destroy Sam's business, and Bob does the dirty work while Harry sits back in his office participating by nothing more than letting Bob use his car, Harry is responsible for every act Bob commits *just as if he were there in person.* By Harry's agreement and the overt act of supplying Bob with a car, the law will hold Harry liable for all of Sam's damages, just as if Harry had acted alone. We say that each of the conspirators is jointly and severally liable for damages caused by every act of the other conspirators.

The act of one is the act of all!

The mafia boss who orders a hit is responsible for the murder, even though he is nowhere near when the killing occurs. If he furthered the act by promising to pay for the hit (either by money, property, or some other advantage), it is as if he pulled the trigger.

The same applies in civil conspiracies. A businessman who makes a deal with the officers of his competitor firm to walk out and destroy their employer's business (if he provides financing for the defecting employees to start a new business somewhere else after their walkout destroys his competitor), is liable for civil conspiracy to destroy his competitor … even though his lending the employees money was, in itself, lawful.

Constructive Fraud

(See also Fraud)

This cause of action arises in equity where one person either occupies a fiduciary relationship to the other, or the other suffers mental weakness or similar infirmity that prevents his or her from understanding. For example, if an elderly person of weakened mental ability signs a deed transferring his or her home to another for substantially less than the home is worth, a presumption of constructive fraud arises. The action arises in equity to prevent the unjust consequence of the defendant's wrong.

Constructive fraud may exist even where the defendant had not intent to defraud.

The gist of the cause arises from the duty of each of us to do justice to others. The old adage of *caveat emptor* (let the buyer beware) has been displaced by society's need to protect innocent people from unjustly enriching wrongdoers, either through ignorance or inability to understand – whether or not the wrongdoer is aware of his wrong.

The duty each of us owes to all others arises from moral, social, domestic, and even personal obligations imposed by equity in our courts.

If is from this duty and to protect innocent people from the wrongs of those who breach this duty that the cause of action for constructive fraud arises.

Also may be called unjust enrichment.

Elements

1. Plaintiff, through no fault of his own, reposed trust in the defendant.
2. Defendant abused the trust, obtaining unjust enrichment from plaintiff's injury.

It is not necessary for the defendant to occupy a relationship of trust with plaintiff, however such a relationship does strengthen plaintiff's case, for in each case the cause of action arises from defendant's abuse of plaintiff's trust … imputed, implied, or actual. It may be based on misrepresentation or concealment, however in every case the defendant gains an improper advantage that equity abhors as a wrong. The facts that can result in an action for constructive fraud are widely varied, but in each case the defendant has taken unjust advantage of the plaintiff.

Conversion

The civil action of conversion is similar to criminal theft, however it involves the taking of tangible personal property only (the taking of money or real property does not give rise to this cause of action). The gist of it is exercising dominion or control over the tangible property of another (like a fountain pen, automobile, or computer system) that is inconsistent with the owner's right of possession, i.e., conversion deprives the rightful owner of his property without consent.

The wrong is not in the taking but in the depriving.

The depriving need not be permanent. Any wrongful deprivation of the right of an owner of property to enjoy possession of his property is (if the property is not money or real property, e.g., land and buildings attached to the land) conversion.

Elements

1. Deprivation of the plaintiff's right to enjoy possession of tangible personal property, either temporarily or permanently.
2. Plaintiff's demand for return and defendant's refusal to return. (Not necessary where plaintiff can show the demand would be futile or impossible.)
3. Damages to plaintiff.

Demand and refusal is an essential element in some jurisdictions. To overcome the necessity of this element (in jurisdictions that permit it) plaintiff must show evidence that demonstrates the futility or impossibility of demand. Mere alleging it will not suffice.

The element of intent may not be necessary in some jurisdictions.

The damage award for conversion is the fair market value of the thing converted at the time of the conversion plus legal interest to the time of the verdict. (See Replevin)

Defenses

Consent

There is no conversion where the plaintiff gave defendant permission to possess plaintiff's property. This is true even where plaintiff gave only temporary permission and defendant continued to hold the property past the date when it was to be returned.

Failure to Demand

Plaintiff's failure to demand (see notes above) may be a defense if defendant can show he lacked intent to convert and would have returned the property promptly if the plaintiff demanded its return. The defense arises where defendant had the mistaken belief that he had the right to possess. Very gray area. Check local case law.

Money

Money being a fungible item (like grains of wheat in a Kansas silo) a count for conversion will not stand unless the particular instruments of money can be identified. A coin collection, for example, can be converted, even though it is technically "money". In most cases a cause of action for conversion of money will not stand against this defense.

Ownership

If the defendant can show the plaintiff did not have an ownership interest in the property at the time of conversion, this defense arises. Only plaintiffs with ownership interests in the property can assert the cause. Arguably, one who purchased property from another after it had been converted does not have this cause but must pursue his remedy against the one from whom the property was purchased.

Declaratory Judgment

A cause of action for declaratory judgment does not seek money damages. Instead it seeks to have the court declare something, e.g., *bona fide* disputes over what is or is not covered by an insurance policy.

Suppose Jones is sued by Smith for tortious interference with an advantageous business relationship (cause of action explained later), and Jones is covered by a business liability policy he believes should pay for his defense in the lawsuit and, if judgment is entered against him, money damages claimed by Smith. The insurance company, on the other hand, may believe Smith's lawsuit involves an intentional tort (tortious interference is an intentional tort that cannot arise from mere negligence) and that its policy does not protect policy-holders from damages resulting from their intentional acts. In such cases it is common for insurance companies to file an action in court seeking a declaration that its policy does not cover the losses Smith claims.

The gist of the action is to determine rights, not to award money damages.

Declaratory actions can only be brought in narrow circumstances, however. For example, one cannot seek the court's declaration that a particular tax is unconstitutional, unless the party seeking declaration can show a special injury to himself that is different from that allegedly suffered by other taxpayers.

The purpose of the cause of action is to provide parties with relief from insecurity and uncertainty with respect to rights, status, or other legal and equitable relationships.

In most jurisdictions the cause of action is created by statute so, before filing an action for declaratory judgment, consult state or federal statutes (depending on the court you'll be filing in) along with local rules and applicable case law for the jurisdiction.

Elements

A party seeking declaratory relief must first make clear to the court that:

1. There is a *bona fide*, actual, present, practical need for the declaration sought.
2. The declaration deals with present, ascertained or ascertainable state of facts or present controversy as to a state of facts. Anticipated future controversies will not support the action.
3. Some right, power, privilege, or immunity of the complaining party is dependent on the facts or the law applicable to the facts.
4. Some person has or may have an actual, present, adverse, and antagonistic interest in the subject matter, either in fact or law.
5. The adverse and antagonistic interest is before the court by proper process or class representation.
6. The relief sought is not merely the giving of legal advice by the court or an answer to questions founded merely in curiosity.

The first question to be reached by the court (and first issue the defendant should raise to avoid or dismiss the action) is not whether the plaintiff will succeed in getting the declaration he seeks but whether he is entitled to a declaration in the first place. Each of the foregoing elements must exist and be alleged by the complaint, or the defendant can succeed on a motion to strike or dismiss the complaint. The fact that the court may refuse to declare what the plaintiff seeks or declare otherwise than what the plaintiff wishes does not divest the plaintiff of his day in court *if each of the elements is present.*

Unless the plaintiff shows he has a *bona fide* need for the declaration, based on present, ascertainable facts, the court not only lacks jurisdiction to render relief sought but also lacks jurisdiction to entertain the action, which it may dismiss *sua sponte*[2].

[2] The term "*sua sponte*" means on the court's own initiative. To learn more about this and many other legal terms, visit **Juris dictionary**® at www.jurisdictionary.com.

Defenses

As stated above, the first defense is by way of a motion to dismiss for failure to state a cause of action, i.e., if any of the essential elements is missing. For example, if what the plaintiff actually seeks is what amounts to an advisory opinion, based on a hypothetical state of facts which have not arisen and are only contingent, uncertain, and rest entirely in the future, the court lacks jurisdiction to even entertain the complaint.

Defamation

A cause of action for defamation arises from false, unprivileged communication that exposes plaintiff to distrust, hatred, contempt, ridicule, or obloquy or which causes the plaintiff to be avoided or has a tendency to injure plaintiff in his office, occupation, business, or employment. If the natural and proximate consequence necessarily causes injury to the plaintiff in his personal, social, official, or business relationships, wrong and injury are presumed or implied, and such publication is actionable *per se*[3].

If the publication is communicated in print, as in a letter or newspaper article, the defamation constitutes libel.

If communicated verbally, as by a TV newscaster or politician making a speech, the defamation constitutes slander.

Both libel and slander fall under the heading of defamation.

Elements

1. Publication (by speech or print) of a false and defamatory statement regarding a private person (as contrasted with public figures, see below).
2. Unprivileged communication of the publication to at least one other person.
3. Fault amounting to at least negligence on the part of the publisher (i.e., at least lack of reasonable care as to the truth or falsity of the communication).
4. Publication is actionable *per se* or caused plaintiff provable or presumable damages.

The most important thing to consider before filing suit on this cause of action is in determining the amount of your money damages. The fact someone calls you a thief may be defamation, however unless the defamation causes you actual, measurable damages, a lawsuit for defamation is worthless except to prove the statement false. Plaintiffs suing

[3] The term "per se" means in itself, taken alone, without more. To learn more about this and many other legal terms, visit **Juris dictionary**® at www.jurisdictionary.com.

for defamation frequently spend many thousands of dollars on costs and legal fees only to recover a nominal amount … because they cannot prove actual damages.

For example, if you're a bank president and lost your job because the head teller told the board of directors you're a thief, your damages are provable or presumable. If you are a newspaper boy embarrassed by one of your delivery customer's shouting down the street after you, "Thief!" … it's not likely you'll collect enough by filing a lawsuit to make it worth your while. You might be given a chance to prove in court that you're not a thief (though, of course, proving a negative is the hardest thing we ever prove in life), but it's improbable your damages in terms of money could be more than a few dollars at best. Courts sometimes award merely one-dollar nominal damages in defamation cases, establishing on the public record that the publication about you was false but providing nothing in the way of financial compensation for your trouble or embarrassment.

If in doubt about the ability to prove the amount of money damages proximately resulting from the false publication, unless it is extremely important to prove the falsity of the publication in a court of law, let it go. Not all wrongs can be righted in court, and nowhere is this more true than in defamation cases.

Caveat

If you are a "public figure" (e.g., politician or professional athlete) you may be unable to sue for defamation unless you can show the publisher intended his statement to injury you, i.e., that he made the false statement about you with actual malice. This is why we so often hear comedians making fun of public figures, saying things that are certainly unlikely if not in fact untrue, yet doing so "in jest". Unless actual malice (intent to cause injury) can be proven, however, the public figure cannot bring an action for

defamation. [Jurisdictionary® disagrees with this doctrine, however it law by a decision of the U.S. Supreme Court in New York Times v. Sullivan, 376 U.S. 254 (1964).[4]

Defenses

Truth

If the allegedly defamatory statement is true, there can be no action, and plaintiff has the burden of proving falsity. The defendant does not have the burden to prove truth. This raises an important fact about arguments in general in that it is far harder to prove a falsehood than to prove a truth … another reason why wisdom counsels against brining an action for defamation except in the most extreme cases where it is necessary to do so.

Absolute Privilege

Allegedly defamatory statements made in judicial proceedings are privileged. If this were not so, every party prevailing in a lawsuit could sue the other party for making false statements during the case. Statements made "out in the hall", however, are not privileged.

First Amendment

Courts may refuse to hear cases brought against representatives of religious orders or denominations because of the First Amendment proscription against government being entangled with religion, however the allegedly false and defamatory statement must be so entangled that the court would be unable to sort out the truth without crossing the line.

Class of Persons

If the allegedly defamatory statement is made about a collective, race, religion, or other large group, the courts may refuse to hear the case. Of course, if the statement is, "Bob and Harry are thieves," that's not a large group, and the injured person has a cause

[4] This and other pivotal cases can be accessed at www.jurisdictionary.com

of action. On the other hand, if the statement is, "All Nazis are murderers," no court will hear an action brought by a single member of the Nazi party claiming he or she has been injured by the statement because he or she, individually, is not a murderer.

Public Official

If the would-be plaintiff is a public official, he or she must prove the defendant acted with actual malice, i.e., intent to injure by making false statements. Actual malice is proven by showing the statements were known to be false or were made with a reckless disregard for whether they were true or false. The reason more public officials don't file suit against comedians and media pundits is that doing so exposes them to discovery of their closeted skeletons and, as stated above, wisdom counsels against suing except where absolutely necessary.

Pure Opinion

Everyone is entitled to an opinion. If you say to a neighbor, "I think our mailman is a Communist," the mailman cannot sue, because you're entitled to an opinion, right or wrong. If you say, "Our mailman ***is*** Communist," and it gets back to the Post Office, and your mailman loses his job, prepare for battle. Only pure opinion is protected.

Duress

Duress is a cause of action and a defense. It arises where one person "forces" another to take some action damaging to himself in circumstances that allowed no other reasonable course. Coercion is not a proper way to get others to do things, and if one party coerces another to do something injurious to the other, then the injured party has a cause of action for duress to recover his damages. If, on the other hand, one is coerced into signing a contract, for example, and the person coercing sues the person coerced for breach of contract, then the person sued has the defense of duress, i.e., an opportunity to argue that he should not be bound by the contract, since the contract was obtained by coercion, i.e., duress.

The fact issue before the court in such cases is always whether and to what extent the power of duress was in fact irresistible, which is also to say whether the party coerced had alternative choices by which he might have avoided the result. For example, if one says to the other, "I won't go to the prom with you unless you sign this contract," that's not sufficient grounds for coercion. On the other hand, if one says to the other, while pointing a loaded .38 revolver to the other's head, "Sign zee paper, old man!" a cause of action for duress is available, and the coerced party will prevail <u>if</u> he can prove that he had no alternative by which he could avoid being shot!

The dividing line between these two extremes, of course, is somewhere in the middle. Where, exactly, is a fact issue for the court to decide. Too far to the threat of not going to the prom, and the plaintiff's case will be dismissed at the outset or won by summary judgment after some discovery is had. Too far to the threat of having a pistol

bullet pass through the brain, and the plaintiff will most surely win if he can prove the threat was real and no alternative was available.

Elements

The elements are simple to explain but difficult of proof.

1. One side involuntarily accepted the terms of another.
2. Circumstances permitted no reasonable alternative.
3. Circumstances resulted from the coercive acts of the other.

Note the word "reasonable" in the second element.

Clearly, the old man coerced at gunpoint could disarm the one threatening him by unscrewing a table leg and beating the other to death, however the courts will not require such an "unreasonable" alternative. Coercion must be real, material (go to the heart of the issue), and reasonably unavoidable.

Defenses

Legal Right

It is not coercion to threaten to do what one has a legal right to do. For example, if one of two neighboring farmers enraged in a feud threatens to raise pigs if the other does not stop planting tomatoes, the tomato farmer might complain to the court that pigs are a very smelling and sometimes noisy animal, and that he's being forced to raise tomatoes under duress. In fact, if the pig farmer has a legal right to raise pigs, the tomato farmer has no cause of action whatever, and his case should be dismissed for failure to state.

Reasonable Alternative

If a party claiming he was coerced into signing a contract during a long-distance telephone call from another 500 miles away threatening to punch him in the nose, a court might rule the threatened party had reasonable alternatives. The threat was not imminent.

The threatened party could notify the police. The threatened party could avoid the other party or take any of several alternative courses to avoid being punched in the nose, each of which would constitute a reasonable alternative that defeats the cause of action.

Free Choice

If the party allegedly threatening the other can show that the other actually acted out of his own will, i.e., that the act did not result from any threat, then the party alleging to have acted under duress loses his cause of action. The cause of action only arises where the act in response to the alleged coercion was involuntary.

Comments

Duress is similar to undue influence, another cause of action arising where free will of an individual has been overcome by influence of another. See "Undue Influence" below for details on this related cause of action.

Fraud

In order for fraud to give rise to the right to sue (i.e., a cause of action) defendant must do more than merely state a falsehood. It's true that making a false statement is fraud, however it is not "actionable fraud", i.e., merely lying doesn't by itself give rise to a right to sue. In order for a plaintiff to have a cause of action he can sue upon, it is necessary that the lie be coupled with other elements. Only then can a court give the plaintiff a remedy by way of a money judgment for damages that resulted from the fraud.

Moreover, the underlying facts pled in a complaint for fraud must be very specific in setting out the elements. General statements will likely result in a motion to dismiss for failure to state the cause of action. The plaintiff must specify the facts that set out each of the essential elements of this cause of action.

Fraud may be called misrepresentation or fraud in the inducement. The elements that must be alleged in the complaint and proven by a greater weight of the evidence are the same, regardless of the name.

Elements

1. A false statement (verbal or in writing).
2. The false statement concerns a material fact, i.e., a fact that goes to the heart of the plaintiff's damages.
3. Defendant knew the statement was false at the time he made the false statement.
4. Defendant intended the plaintiff to act in reliance on the false statement.
5. Plaintiff reasonably relied on the statement and acted upon it. (Some authorities say the reliance must be "justified". Reasonable or justified, it is the same meaning, and the plaintiff must act in reliance on the false statement of material fact.
6. Plaintiff suffered damages by relying on the false statement.

If an inebriated patron in a local tavern suddenly exclaims, "Oh, my God! There's a giant elephant sitting on your car, Phil!", and Phil jumps up to go look, stumbling over

the legs of his own bar stool in the process and falling flat on his face, Phil has no cause of action against the other fellow, because it wasn't *reasonable* to rely on the statement.

On the other hand, if a travel agent promises Phil a trip "around the world" in a luxury liner for $7,000 when, in fact, the agent knows the "luxury liner" is a rusty island freighter carrying lumber from Miami to Jamaica and returning a week later with a hold full of pineapples and bananas then, if Phil pays his money before discovering the false promise, he has a cause of action for fraud. All essential elements are met. (He also has an action for breach of contract, both of which should be pleaded.)

Defenses

The following may be defenses to a cause of action for fraud.

Bad Faith

In some jurisdictions, the court will require a further showing that the false statement was made in "bad faith" or with reckless disregard for consequence of relying on the statement. This is not necessary in the majority of courts.

Class Actions

In some jurisdictions, courts will not allow fraud as a cause of action brought by a class of persons. The theory behind this position is that fraud is directed at individuals, not groups of individuals.

In Pari Delicto

If the would-be plaintiff in a fraud case is, himself, guilty of participating in the fraud, courts may refuse to award damages. The theory is that one should never receive the court's benefit from the consequence of a plaintiff's own wrongs.

Promise

A promise to do something in the future normally does not give rise to a cause of action for fraud. It may give rise to a breach of contract action, however unless the false statement concerns a material matter in the past or present, a cause of action for fraud normally does not arise. If the promise was made with intent never to perform the promise, then a cause of action for fraud may arise, however proving intent not to perform is a steep hill to climb. Another type of fraud related to contracts is fraud in the inducement, covered elsewhere.

Puffing

When a salesperson claims the used car you're about to drive is "a sweet-running" automobile with a suspension system that's like "riding on clouds", even though these may not be technically *true* statements, they are considered statements of the salesman's opinion or "puffing". Such statements of opinion do not give rise to an action for fraud. A buyer is obligated to test the product and form his or her own opinion. If one buys a car, vacuum cleaner, or miracle toothbrush solely on representations of a salesman's opinion, the buyer has no cause of action for fraud if in the buyer's own opinion these things are not true. If the car salesman, on the other hand, claims the "actual mileage" is only 9,827 miles when he knew, in fact, the mileage is 109,827, a cause of action certainly does arise and, if the buyer can prove his claim, he may win a judgment for punitive damages over and above what he paid for the car. In some states statutes provide criminal penalties for such motor vehicle odometer fraud. Generally, for a false statement to give rise to a cause of action for fraud, the statement must be one of fact (past or present) and not opinion.

Comments

Omitting a material fact may also give rise to fraud, if it can be shown omission was intentional and for the purpose of misleading another. For example, in some courts, if the seller of a home omits to advise the buyer that the roof leaks profusely whenever it rains, such an omission is considered material and may give rise to a cause of action for fraud. The question for the court becomes whether and to what extent the omission was material and, of course, intentional. If the seller didn't know his roof leaks, there is no cause of action for fraud. If he knew (or, in some courts, even if he should have known), the materiality of the diminution in value of the house by its leaking roof is such that the court will impose a duty on the seller to report to his buyer the hidden defect or be liable to the buyer for fraud.

The degree of knowledge on the part of the person making the false statement (or omitting a material statement) may be measured in one of three ways, each requiring a different degree of proof.

1. The maker actually knew of its falsity. To prove this, of course, the plaintiff must show the maker had actual knowledge the statement was false, i.e., that the maker knew at the time the statements were made that they were not true.
2. The maker had no knowledge of its falsity. To prevail in this circumstance, the plaintiff must show the representation was made in such absolute, unqualified, positive terms that a reasonable person would infer the maker had knowledge of its truth. Fraud arises if an office supply salesman claims, "This printer holds 250 sheets of blank paper and prints in 256 colors," if the printer only holds 50 sheets and prints only in black-and-white. The specificity goes beyond opinion, and the salesman is held liable for the falsity of such specific statements.
3. The maker should have known of its falsity. To prevail here, the plaintiff must show the maker possessed special knowledge or occupied a special position to impute a knowledge of the fact, whether he knew or not. Fraud arises if a bank president claims his bank holds $892 million in deposited assets when, in fact, the bank has only $12 million. The special knowledge or position gives rise to a duty to know what is said about such particulars material to the bank's operation.

Fraud in the inducement is a particular sub-category of fraud that includes all the elements of common fraud but applies where the plaintiff suffers damages from entering into a contract (e.g., contract to rent, purchase, or perform services) after being persuaded to do so by the lies of another. As in common fraud or misrepresentation, the plaintiff's reliance on false statements must be reasonable and, as some courts put it, "justifiable". Therefore, if one justifiably and reasonably relies on false statements of another to enter a contract that causes injury (money damages or other loss) he has a cause for fraud in the inducement.

Goods Sold

A cause of action for good sold arises when plaintiff has sold *and delivered* goods to the purchaser defendant who fails or refuses to pay for the good received. In certain jurisdictions the plaintiff may be entitled to interest on the unpaid price from the date when payment was due.

Elements

1. Plaintiff sold and defendant agreed to pay for described goods.
2. Plaintiff delivered and defendant accepted delivery of described goods.
3. Defendant failed and refused to pay for the goods.
4. Plaintiff suffered damages as a direct result.

It's no more difficult than that!

Injunction, Preliminary

Injunctions are classified as (1) temporary or preliminary and (2) permanent. This section deals with preliminary (or temporary) injunctions. The next section deals with permanent injunctions, typically granted to continue preliminary injunction after plaintiff shows the necessity of making the preliminary or temporary injunction permanent.

All injunctions derive from the inherent equitable power of courts to issue writs and warrants to sheriffs (or other law enforcement officers) who then have legal authority to use force, if necessary, to carry out the court's order. Injunctions enjoin action, i.e., they either order that action be taken or that it not be taken. Injunctions are used in many and varied circumstances to effectuate a court's judgments.

Temporary injunctions are typically entered (or denied) at the start of a lawsuit in which the plaintiff seeks some remedy for damages he has not yet proven.

Elements

1. Imminent likelihood of irreparable harm if a temporary injunction is not issued.
2. Unavailability of adequate remedy at law, i.e., an award of money damages alone will not restore the plaintiff's threatened loss.
3. Threatened harm to plaintiff (petitioner) outweighs any possible harm to defendant (respondent).
4. Granting of injunction will not contravene the public interest.
5. Plaintiff (petitioner) has a substantial likelihood of success on the merits of underlying case, i.e., the cause for which plaintiff seeks an injunction is likely to be proven.

The granting of a preliminary injunction is an extraordinary remedy that should be granted only sparingly upon presentation of adequate proof of the essential elements.

Defenses

Unclean Hands

An injunction, being an equitable remedy, should not be granted when the party seeking it has not acted in good faith. The maxim in equity is, "He who comes to equity must come with clean hands." Thus, if a plaintiff (petitioner) has wrongfully defrauded the defendant (respondent) when he seeks an injunction, the court should deny him, if the respondent pleads unclean hands as an affirmative defense and explains in his pleading why the plaintiff (petitioner) has unclean hands.

Totality of the Circumstances

The court should not merely consider the allegations of the pleadings when asked to grant an injunction. Other factors should be considered:

- Nature of the interest to be protected.
- Relative adequacy of other available, less-restrictive remedies.
- Unreasonable delay of plaintiff (petitioner) to seek the remedy.
- Relative hardship likely to be caused to defendant (respondent).
- Possible prejudice to defendant (respondent) of defending in underlying lawsuit.
- Related misconduct of plaintiff (petitioner).
- Interests of third persons and of the public.
- Practicality of framing and enforcing the injunction.

Comments

Bond

Some jurisdictions require the posting of a bond to protect the foreseeable injury to defendant (respondent). The amount of bond is calculated in relation to the amount of money damages a wrongfully-issued injunction might cause the defendant (respondent). In some jurisdictions, if the court does not require a bond and no bond is posted, the injunction cannot be lawfully enforced. (Check local statutes and case law.)

Breach of Contract

Injunctions typically do not issue to enforce contracts. The proper action is for specific performance, covered elsewhere, in which case (if sufficient proof is shown) the court may issue an injunction to require the defendant (respondent) to perform provisions of a legally-binding contract.

Covenant Not-to-Compete

Non-compete provisions in written agreements (e.g., contracts for employment) are typically enforced by injunctions (if sufficient proof is shown). Restrictions apply if services of the party to be enjoined are of particular value to the community (e.g., doctor or other medical services provider). Further, if the conditions of the covenant (e.g., length of time or size of geographic area) are unreasonable, courts will not enforce the covenant. Injunctions to prevent unauthorized use of trade secrets, or solicitation from proprietary customer lists are typically granted.

Domestic Violence

These are generally related to statutory enactments that define the procedures and pre-conditions necessary to obtain an injunction to prevent violence. (See local statutes and case law.)

Evidence

As stated elsewhere in these and other Jurisdictionary® materials, mere argument of counsel does not constitute evidence and is insufficient grounds for issuance of an injunction, temporary or otherwise.

Futile Act

No court process can lawfully enforce the performance of a futile act. If requiring or prohibiting an action will have no reasonably foreseeable benefit, the court is without jurisdiction to lawfully enter an order.

Irreparable Harm

If the wrong sought to be prevented by an injunction could be compensated by an order awarding money damages to the injured person, an injunction should not issue. The decision is not based on whether the defendant (respondent) possesses sufficient means to satisfy a money judgment but whether money alone would (if available) restore plaintiff (petitioner) to his original status. If a money amount cannot be calculated to restore the injured party, an injunction is proper.

Injunction, Permanent

To obtain a permanent injunction, one is generally required to offer a much higher degree of proof and clearly demonstrate necessity. Further, where a temporary injunction may issue without notice or hearing, a permanent injunction can only issue after notice and pleadings have been served on the defendant (respondent) who must then be given a reasonable opportunity to respond and present evidence in defense.

The elements are the same but for one additional essential: success on the merits of the underlying case (see previous section).

Elements

1. Imminent likelihood of continuing irreparable harm if permanent injunction not issued.
2. Unavailability of adequate remedy at law, i.e., an award of money damages alone will not restore the plaintiff's threatened loss.
3. Threatened harm to plaintiff (petitioner) outweighs any possible harm to defendant (respondent).
4. Granting of injunction will not contravene the public interest.
5. Plaintiff (petitioner) has prevailed in the underlying case, i.e., plaintiff has proven the facts on which he seeks the permanent injunction.

The granting of a permanent injunction is an extraordinary remedy that should be granted only sparingly upon presentation of adequate proof of <u>all</u> essential elements.

Defenses

The defenses for a permanent injunction are the same as those for a preliminary or temporary injunction.

Intentional Infliction of Emotional Distress

The gist of this cause of action is to compensate victims of conduct that inflames the sense of human decency, whether inflicted intentionally or with a reckless disregard for the consequence to others.

Elements

1. The defendant's acts were performed intentionally or with reckless disregard.
2. The defendant knew or should have known the acts would foreseeably cause plaintiff severe emotional distress.
3. The conduct was outrageous, indecent, atrocious, odious, uncivilized, or intolerable.
4. Plaintiff suffered severe emotional distress as a direct result.

Defenses

Legal Rights

The thin line in these cases is whether the defendant was within his legal rights to act in the manner that caused injury. This is always a judgment call for the court. Clearly, if a funeral home incinerates Aunt Betsy's mortal remains, and Sister Sue is outraged that such a procedure was used instead of cemetery interment, the funeral home has a defense in that it acted within the legal limits of the law. On the other hand, if the funeral home dumps Aunt Betsy along some lonely country road in southern Alabama, the acts is one our courts will deem outrageous, indecent, atrocious, odious, uncivilized, and intolerable, so that family members and loved ones will have a cause of action. Between these limits is a broad and uncertain gray area only courts can decide. (See local case law for help.)

Defamation

If the only cause of injury is defamation, and the defamation falls within one of the privileges (See Defamation.) plaintiff cannot prevail. For example, if a prominent

politician is accused of being a ne'er-do-well slithering skunk with ties to the underworld, even though the scurrilous attack offends or even causes emotional distress, the politician cannot prevail, because of the privilege (unless he can prove actual malice).

Invasion of Privacy

Like defamation, this cause of action can bring more problems to the plaintiff than merely letting the matter go by, for litigation only tends to re-publicize facts that may be better left alone. Still, the cause of action exists, and the essential elements follow.

Elements

To properly state a cause for invasion of privacy, the plaintiff must allege:

1. Defendant publicized a matter concerning the private life of plaintiff.
2. The matter would be highly offensive to reasonable persons.
3. The matter is not one of legitimate concern to the public.
4. Plaintiff suffered damages as a direct result.

Everyone has a right to enjoy his or her privacy. This right of privacy has been interpreted from the U.S. Constitution by the Supreme Court and is specifically protected by the state constitutions of many of the 50 states. Where a person's private life begins and his public life leaves off, of course, are decisions for the court in each individual case. When the unwarranted publication of private affairs, with which the public has no legitimate concern, causes mental suffering, shame, or humiliation to a person of average sensibilities, the cause of action arises, and the plaintiff is entitled to recover money damages.

Some jurisdictions have carved out four situations that give rise to this cause.

- Intrusion, e.g., photographing plaintiff sun-bathing in her own backyard behind a privacy fence.
- Public disclosure of private facts, e.g., publishing the existence of great wealth that exposes plaintiff to foreseeable injury at the hands of thieves and con-men.
- False light in the public eye, e.g., publishing false facts about plaintiff, a variant form of defamation.
- Commercial exploitation of the property value of plaintiff's name.

Defenses

Public Right to Know

If the public has a right to know some matter that would otherwise be protected by plaintiff's claimed privacy right, the cause of action does not arise. If, for example, a local physician suffers from severe cocaine addiction, the public has a right to know, and the physician would have no right to sue those who publish such a "private" fact. If the publication is untrue, of course, the physician has a cause of action for defamation.

Hypersensitivity

The measure of sensitivity that gives rise to the cause of action is that of a man of reasonable sensitivity. A person of unusual sensitivity is not protected.

Laches

- A Defense -

Laches is a defense that rests on the concept that one who delays unreasonably in pursuing his remedy in court, especially where his voluntary delay prejudices the other party, should not be permitted to sue. The decision is based on elements, just as causes of action are.

Elements

In order for defense of laches to lie, defendant must prove each of the following elements:

1. Some genuine basis for the plaintiff's lawsuit, i.e., conduct on the part of the defendant giving rise to the complaint (otherwise the defense is not necessary).
2. Plaintiff had knowledge of defendant's conduct giving rise to the complaint for an unreasonable time before filing suit.
3. Plaintiff had a reasonable opportunity to file suit sooner.
4. Plaintiff unreasonably delayed filing suit.
5. Defendant lacked knowledge plaintiff would assert the right on which suit is filed.
6. Injury or prejudice to defendant if relief is granted on the complaint.

The fundamental doctrine underlying the defense of laches is whether and to what extent the plaintiff's delay has lessened the defendant's ability to defend. For example, if a key witness has died during the interval, defendant may have a harder time proving he is not liable for the damages plaintiff seeks. In some cases, delay may actually preclude the court from arriving at a just result because the span of time has made it too difficult to determine the truth of matters asserted by the respective parties.

Depending on the jurisdiction, in most states the defense of laches will not be heard until the statute of limitations has run. Problems arise when the statute is tolled for one reason or another, i.e., when the clock is stopped. Consult local statutes and case law.

Defenses

Defenses to this equitable defense include the following:

Excuse

Once a defendant has succeeded in showing the elements of this defense exist, the burden then shifts to the plaintiff to show his delay in filing suit was through no fault of his own. Perhaps he was unable to sooner obtain necessary evidence. Perhaps he knew of the wrong but did not know the identity of the wrongdoer. Under such circumstances as these, the plaintiff may be excused from filing sooner, and the defense of laches fails.

Infants

An infant (which term in law generally means anyone younger than the statutory minimum age required to bring suit) is excused from filing suit during the period of his incapacity, however as soon as he is of age the law imputes to him a duty to timely file an action against those who he claims caused him injury during his minority. For details, see local statutory authority and case law.

Comments

Laches is an affirmative defense that must be raised by the responsive pleading (i.e., the answer) or (if permitted in the jurisdiction) reasonably soon thereafter. If it is not affirmatively pled at the beginning of the case, it is deemed to have been waived.

The burden of proving each and every element of this defense is, of course, on the defendant, and in most jurisdictions it must be proved by clear and convincing evidence (as opposed to the greater weight or predominance of evidence).

Unlike statutes of limitations that apply to actions in law, laches is a defense in equity that looks behind the scenes, so-to-speak, to examine the prejudicial effect of the delay and applies the defense to prevent injustice. Statutes of limitations simply tick off the time and more or less mechanically bar suits at law thereafter. Laches only bars suits in equity when not to do so would cause an injustice because of plaintiff's unreasonable, unexcused delay.

Application of the doctrine depends on the facts of each individual case.

The mere passage of time does not give rise to this defense. Each of the elements must be alleged and proven.

Malicious Prosecution

Malicious prosecution is available to award damages to those who successfully defended a previous lawsuit that was brought without sufficient legal justification. It does not arise until the successful conclusion of the previous case, i.e., until the defendant in the previous case has prevailed and, additionally, can show that plaintiff in the previous case had no probable cause to sue in the first place.

Elements

The essential elements that must be alleged (and ultimately proven) are:

1. A prior proceeding against the present plaintiff was commenced (criminal or civil).
2. Defendant in the present case was the direct cause of prior proceeding. Defendant in the present case need not have been plaintiff or prosecuting party in prior case, if he was person substantially responsible for commencement or continuation of the prior case that was ultimately found to be without meritorious foundation.
3. The prior proceeding terminated favorably to the defendant there (plaintiff here).
4. There was no *bona fide* probable cause or legal justification for the prior case.
5. Defendant in the present case caused the prior case with actual or legal malice.
6. Plaintiff in the malicious prosecution case suffered damages from the prior case.

Defenses

Absolute Immunity

Government prosecutors are entitled to absolute immunity from prosecution for malicious prosecution, however individual private actors are not, and that includes actors who for malicious purposes and without probable cause instigate criminal actions against others, who then have the remedy of this cause of action in civil court.

Dismissal on Technical Grounds

If prior case terminated for any reason other than innocence or lack of liability of defendant therein (plaintiff in malicious prosecution case) the cause of action will not lie,

because the result does not constitute termination favorable to the defendant in the prior case, i.e., it was not determined that the defendant was without guilt, culpability, or civil liability. In order for defendant in the prior case to have a cause of action for malicious prosecution, the prior case must have adjudicated him without fault. Dismissal or other termination on technical grounds (or even a stipulated settlement, unless the stipulation states the defendant was without fault) does not give rise to this cause of action.

Bona Fide Termination

Another point to hold in mind when considering this cause of action is whether in the prior case the plaintiff there (defendant here) was afforded a reasonable opportunity to prosecute his claim. If prior plaintiff was unable to complete discovery, for example, it may be found that his failure to prove the plaintiff here (defendant there) at fault was not the result of justice but circumstances beyond his control. As stated above, in order for this cause of action to lie, the prior case must be terminated in favor of defendant there, and termination must be *bona fide*, i.e., in good faith, with the plaintiff there (defendant here) having been allowed his "day in court".

Counterclaim

Malicious prosecution may not be pled as part of a counterclaim, since it must be first proven that defendant in the prior case was without fault, and that requires complete *bona fide* termination of the prior case.

Malice

Malice may be either "actual", i.e., the state of mind of the prior plaintiff to harm the prior defendant or "legal", i.e., inferred from circumstances, such as absolute lack of probable cause that a reasonable person would recognize, even though no evil intent can be proven.

Nolle Prosequi

If the government prosecutor in good faith enters a nolle prosequi or declination to prosecute in the prior proceedings, the essential element of a *bona fide* termination in the prior defendant's favor is satisfied.

Negligence

Negligence is simply failure to exercise reasonable care under the circumstances.

When I was still in law school, a classmate suffered a debilitating disease making it extremely difficult for him to maintain his balance when walking. During the first day of our first year I came up behind him in the hall after our first contracts class, slapped him on the back to congratulate him for the masterful way he responded to our crotchety old professor, and was mortified to watch as he crumpled to the floor! He asked me only to help him get nearer the wall, where he managed to pull himself erect again by working against the vertical surface until he was standing on his own like the rest of us. He waved off my anxious apologies, and we became good friends afterward, however I never forgot the lesson. I had no idea my good-natured congratulatory slap (that would have no effect on an otherwise healthy person) would cause my friend to collapse. Nonetheless, I was negligent and legally responsible for the consequence of my action.

It doesn't matter if the defendant intends to harm the plaintiff. If his act causes harm (as mine in slapping my classmate on the back), the defendant is liable for injury that directly results from his act.

The common law adage, "A defendant takes his plaintiff as he finds him," applies in all cases and should cause us to exercise a greater degree of caution to protect others from the consequence of our negligent acts. You are responsible for damages caused by what you do, even when the person damaged was unusually susceptible to injury. This is known as the "eggshell skull" doctrine, a principle that arose in a case where a man with an unusually thin skull was seriously injured by an accidental blow to the head so slight

that it could not have caused a healthy man so much as a headache. Nonetheless, the act resulted in harm, and the actor was liable.

Each of us owes all others a duty to act with care. Failure to carry out this duty in a responsible manner is the essence of a cause of action for negligence.

Elements

In order to effectively plead a cause of action in negligence, the plaintiff must allege sufficient ultimate facts to show each of the following essential elements exist:

1. Defendant owed plaintiff a legal duty to exercise at least reasonable care or, in some cases, to conform to a higher standard of care.
2. Defendant breached his duty of care.
3. Plaintiff was damaged as a direct result of the breach.

It's no more complicated than that.

Defenses

Comparative Negligence

In many cases, the plaintiff is at least partially responsible for his own damages. Where this is true, the plaintiff cannot recover that portion of damages caused by himself. He is said to be comparatively negligent. Therefore, if plaintiff ran a stop sign and was hit by defendant's car going 120 mph, both parties are somewhat responsible. Plaintiff for running the stop sign. Defendant for speeding. The jury will determine the degree of their comparative negligence and apply this as a percentage to determine that amount of harm caused by the defendant only.

Economic Loss Rule

The following explanation from Jurisdictionary® website.

The economic loss rule prevents plaintiffs from double-dipping. Many times plaintiffs file an action for breach of contract and also for negligence in performance of the contract. The economic loss rule prevents plaintiffs from collecting for both.

For example, a case involving a contract between a strawberry farmer and a chemical company was filed in Florida when a batch of fertilizer the farmer ordered turned out instead to contain herbicide that killed all his strawberry plants. The farmer's case had a count for breach of contract and another count for negligence. Since the farmer contracted for fertilizer and received herbicide instead, he sued for breach of contract. Since the packaging of herbicide in fertilizer bags could only result from bone-headed negligence, the farmer also sued for negligence damages. The farmer won, and the economic loss rule did not apply.

In another case, however, a farmer sued a tractor manufacturer for breach of contract and negligence when a negligently designed part on the tractor caused the tractor to fail, and the farmer couldn't get his crops in on time. The faulty tractor resulted from negligence. The court said in this case, however, that the bargained-for consideration was a tractor, not crops safely gathered into the barn. When the tractor failed to work it was only the tractor that was damaged by the defendant's negligence. The farmer's contract for a working tractor was breached by delivery of a faulty tractor, and the farmer won on his breach of contract count. The tractor did not directly damage the farmer's crops, however, so the farmer was not permitted to recover for negligence. Since the damages were not to property other than property the farmer contracted for (a working tractor) the courts restricted his recovery to breach of contract and denied the negligence count. The economic loss rule barred his recovering for lost crops.

In the first case, a negligently delivered chemical damaged other property, and the economic loss rule did not prevent recovery for both breach of contract and negligence damages. In the second case a negligently manufactured tractor damaged itself, and the court applied the economic loss rule to bar the farmer from recovery on his negligence count for crops left to rot in the field.

The idea of the economic loss rule is that when one is prevented from enjoying the benefit of his contract bargain by negligence that only affects the thing bargained for, recovery must be by a breach of contract action alone. The negligence count will not be heard unless the defective thing bargained for also damaged other property. You cannot double-dip. Since the negligently manufactured tractor damaged only itself and not the farmer's crops, the farmer was required to seek recovery in court solely on his breach of contract count. When the negligently packaged herbicide destroyed fields of strawberries, however, the farmer was permitted to recover damages both for breach of his contract (he paid for fertilizer) and for the negligent delivery of herbicide that destroyed his crop.

The economic loss rule applies to restrict recovery only to the contract count when negligence damages the thing bargained for. In such cases the injured party is said to have lost only the economic value of his bargain. If the injured party also suffers damages to other property, however, the economic loss rule does not apply. Both contract and negligence law may be used to get a judgment for damages if something other than the bargained-for thing is damaged by the defendant's negligence.

Assumption of Risk

Some activities (e.g., karate and sky-diving) are so inherently dangerous, that the courts will allow a defense against plaintiffs who voluntarily engage in such activities. If the plaintiff expressly assumes the risk of a bodily contact sport, like soccer or football,

the courts deem that he has waived his right to recover damages for injury resulting from contacts inherent in the sport. The plaintiff need not sign a paper acknowledging the risk (though, of course, this creates an even stronger defense) if the court can infer from facts presented that he understood the severity of foreseeable consequences he was risking and proceeded to participate without regard for the risk. This defense does not exist, however, where the defendant was wantonly or recklessly negligent, thus exposing plaintiff to risk that was not foreseeable (e.g., the parachute club that packs old rags in a parachute bag).

Quantum Meruit

A cause of action for *quantum meruit* arises when one person confers a benefit on another under circumstances that would cause a reasonable person to believe he would be compensated by the other. The Latin phrase means literally, "for so much as the thing is worth."

See unjust enrichment.

Promissory Note

This is perhaps the easiest of all lawsuits to win. Plaintiff's possession of a signed but unsatisfied promissory note raises presumption of non-payment and shifts the burden of proof to the defendant to show he paid the note in full, on time, with interest. This can only be shown by receipts, cancelled checks, or other evidence of actual payment. If the defendant cannot prove he paid and satisfied the note, the court will grant judgment for that portion of the note that remains unpaid, together with accrued interest thereon. If the note also provides in its terms for judgment of a reasonable attorney's fee and costs, the plaintiff recovers judgment for the full amount he is owed plus the cost of bringing suit.

Elements

The elements are simple common-sense.

1. Defendant executed and delivered a promissory note on a certain date.
2. Plaintiff owns and holds the note. A copy of the original note is usually required to be filed with the complaint, and the original note will be required to be produced at trial (unless the court allows the plaintiff to establish its existence another way).
3. Defendant failed to pay some part or all of the note when payment was due.
4. Defendant owes plaintiff a certain sum based on terms of the promissory note.

Where many plaintiffs get into trouble is with acceleration of the note, i.e., they may attempt to bring suit when only one payment is late, in which case they can only recover judgment for the amount that is then due. If the note itself does not contain a provision that the full amount will become due at once and payable upon the event of any default (i.e., an acceleration clause), the full amount of the note will not be due nor the plaintiff have a cause of action to collect until the full term of the note has run. Always

make sure you put an acceleration clause and a clause for attorney's fees and costs in any promissory note you accept from others.

Defenses

Payment of a promissory note is, of course, an absolute defense. To prevail, the defendant need only tender to the court admissible evidence to demonstrate that all funds payable under the terms of the note, including interest, have been fully paid. Another absolute defense arises where the holder of the note has negotiated some consideration for the note other than payment. Either way the obligation to pay disappears and, along with it, the cause of action.

Replevin

A cause of action for replevin seeks a court order directing the defendant to return possession of specific goods, furniture, equipment, or other such personal property (not money[5] or real property[6]) to the plaintiff.

Elements

The complaint must contain the following.

1. Description of the claimed property sufficient to identify it and its location (if known).
2. The property's value (supported by bills of sale or similar evidence, if available).
3. A statement the plaintiff lawfully owns the property and is entitled to possession.
4. A statement that defendant is wrongfully in possession of the property, how defendant came into possession (if known), and why defendant is wrongfully detaining the property (if known).
5. A statement that the property has not been taken for a tax, assessment, or fine pursuant to law.
6. A statement of other damages suffered by plaintiff as a result of defendant's wrongful retention of plaintiff's property.

A successful replevin action results in the court's issuance of a write of replevin directing the sheriff to take possession of the property and turn it over to the plaintiff, who may be required to first post a bond and pay the sheriff some reasonable fee for his trouble.

[5] Money can be replevied, however it must be specific money, e.g., a coin collection or a particular locked bag of cash, i.e., some specifically identifiable negotiable instruments and not merely a sum of money generally.

[6] Real property includes land, buildings, and other fixtures affixed to the land and, in this way, differs from personal property.

Rescission

Rescission is an equitable remedy whereby a party who (as a result of fraud, false representation, mutual mistake, impossibility of performance, or other cause resulting not from his own wrongs) has entered into a contract may be relieved of liability to perform the obligations of the contract or from the consequence of having already performed.

Rescission is a purely equitable remedy, and for relief to be granted the plaintiff must show the court that he is clearly entitled to the court's assistance.

Elements

A complaint for rescission must set out the following essential elements.

1. The making of a contract. Evidence of the contract should be attached, if available.
2. Existence of fraud, mutual mistake, false representation, impossibility of performance, or other ground for rescission or cancellation.
3. Plaintiff has rescinded and notified the other party that he has rescinded.
4. If plaintiff has received any consideration for the contract, he should state his offer to restore the defendant to the extent of those benefits, if restoration is possible.
5. Plaintiff has no adequate remedy at law, i.e., an award of money damages alone is not sufficient to restore plaintiff to his status before the fact.

If rescission is granted, the court will attempt to restore both parties, as nearly as possible, to status they enjoyed before entering the contract. This is the goal of rescission.

A common cause for rescission results when an elderly person of limited mental ability unwittingly executes a deed selling his home to a person who knew or should have known the incapacity of the seller prevented him from appreciating the consequence of his acts. In such cases, the deed will be rescinded, and the buyer will be given back what he has paid, so both parties are restored as nearly as possible. If the buyer in such a case

was aware of the sharp deal he was making at the other's expense, the court need not go to the trouble of restoring the purchase price! Equity may punish as well as protect.

Rescission is sometimes a harsh remedy and is not, therefore, favored by courts.

Defenses

Adequate Remedy at Law

If plaintiff's damages can be corrected by a money judgment alone, rescission is not the proper remedy, and the count for rescission should be dismissed.

Modification of Contract

If the contract has been modified after the fraud or mistake was discovered, the court will not rescind, unless the modification is also the result of fraud or mistake.

Specific Performance

Specific performance is, in a way, the converse of rescission. Where rescission is an action to avoid the consequence of contract, specific performance is an action to force an unwilling party to perform his obligations under the contract. Cases arise frequently in land deals, where a seller enters contract to sell, buyer performs all conditions precedent, and seller refuses to close.

The elements are quite simple.

Elements

1. Existence of a contract.
2. Plaintiff performance of all conditions precedent to closing.
3. Defendant's refusal to perform.
4. Absence of an adequate remedy at law, i.e., money damages alone are insufficient.
5. Plaintiff has suffered damages as a direct result.

The property need not be land. It could be an extremely unique item of jewelry or an antique painting that cannot be replaced, regardless of money available to purchase a substitute. This is the gist of specific performance.

On the other hand, if the property is not unique (as might be the case with a single plot in a large subdivision, where one plot is pretty much like any other), the court may refuse to grant specific performance, since an award of money would allow plaintiff to purchase another property substantially identical.

Spoliation of Evidence

Until recently, this was not an available cause of action in itself, though a party was entitled to argue prejudice in prosecuting other claims against parties who destroyed evidence, negligently or with invidious intent.

Today, in many jurisdictions, a plaintiff who lacks sufficient evidence to bring a case for negligence or breach of contract, for example, because the other party destroyed the evidence has a separate cause of action for spoliation. After all, what's the point of bringing a lawsuit for negligence or breach of contract if you know from the outset that evidence you need to prevail has been destroyed. Now, in many jurisdictions, you can go ahead and sue for damages you might have recovered by stating a cause of action for the spoliation of that evidence.

Elements

The essential elements are:

1. Existence of a potential lawsuit.
2. Defendant's legal or contractual duty to preserve evidence material to plaintiff's case.
3. Defendant's intentional or negligent destruction of the material evidence.
4. Significant impairment of the plaintiff's case as a direct result.
5. Plaintiff's damages.

In a recent Florida case, a truck rental company employee suffered injuries when a ladder belonging to the company collapsed. Before the case could be filed against the ladder manufacturer, the truck rental company sent the broken ladder out with the trash, effectively destroying the injured employee's case. So, the employee sued the truck rental company for spoliation and won the full value of his injury, medical bills, loss of future earnings, loss of enjoyment of life, etc. It didn't matter that the truck rental company was

in no way responsible for the ladder failure. The court found it liable to the employee on the theory that it knew or should have known that ladder was critical evidence, and its act of tossing the ladder in the trash was a breach of duty … giving rise to a cause of action.

Tortious Interference

Tortious interference takes two forms, differing only in the elements necessary to plead and prevail.

Tortious interference with an advantageous business relationship does not require the existence of a contractual relationship. Mere expectancy that the relationship would have continued but for the interference is sufficient. Indeed, the cause of action will lie even when the business relationship is based on a contract that is void or unenforceable

Tortious interference with a contractual relationship, like the name implies, results where the plaintiff is injured as a result of the defendant's interference that results in the breach of plaintiff's contract with another.

The elements are similar for both.

Elements

For tortious interference with an advantageous business relationship:

1. Existence of a favorable business relationship, not necessarily evidenced by contract.
2. Defendant's knowledge of the relationship.
3. Defendant's intentional and unjustified interference with the relationship.
4. Damage to plaintiff as a direct result.

For tortious interference with a contractual relationship:

1. Existence of a contract.
2. Defendant's knowledge of the contract.
3. Defendant's intentional and unjustified procurement of the contract's breach.
4. Damage to plaintiff as a direct result.

Discussion

In order for either form of tortious interference to lie, the interference must have been intentional. In most jurisdictions, negligent interference is not a cause of action.

Where interference with a business relationship is lawful competition, the cause of action will fail. Where interference involves theft of trade secrets or misappropriation and use of proprietary confidential customer lists and critical information, the plaintiff is entitled to a money judgment to recover the value of the relationship prior to defendant's interference. Theft of trade secrets or unlawful use of the proprietary client information of another is not lawful competition. A temporary injunction may be obtained in some cases to prevent the interference from continuing.

Interference with a contractual relationship is more severe. If plaintiff's contract is enforceable, and defendant's intentional acts interfere with that contract so that breach or other diminution of value of the contract results, plaintiff's damages are more easily determined and defendant's wrong more clearly identified. It is not lawful competition to encourage one person to breach his contract with another, and those that do so are liable to plaintiff who sue for tortious interference with a contractual relationship.

Unconscionability

- A Defense -

The defense of unconscionability is related to the cause of action for rescission. The gist is that if a party has become the unwitting victim of a contract procured by fraud, overreaching, or otherwise by unjust means, the court should not enforce that contract, even though the plaintiff is a victim of his own foolishness and lack of caution.

To prevail with this defense, the defendant must show the court that the contract, in itself (i.e., aside from related factors) was outrageously unfair and that the proceedings leading up to the parties entering into the contract were also outrageously unfair.

The first requirement is called substantive unconscionability, wherein the terms of the contract itself are deemed to be unreasonably favorable to the plaintiff seeking to sue on the contract.

The second requirement is called procedural unconscionability, wherein there was lack of any meaningful choice on the part of the defendant when he entered the contract. Perhaps he was too feeble, or perhaps he lacked all understanding of technical aspects of the promises made to him. Either way, there was no meeting of the minds essential to the formation of an enforceable contract, and therein lies the gist of this defense.

It has been said at common law that an unconscionable contract is one that "no man in his right mind and not under delusion would make on the one hand, and no fair and honest man would attempt to enforce on the other." Some authorities refer to the respective bargaining powers of the parties and the ability of the one to understand the terms and conditions communicated by the other.

Synonyms for unconscionable include “shocking the conscience”, “monstrously harsh”, “grossly unfair”, etc.

Unconscionability is an affirmative defense that must be pled at the outset of the case or it is waived.

Undue Influence

Undue influence is a cause of action to avoid the legal effect of a document (e.g., a will, deed, trust, or similar conveyance of rights or property) procured from a person of weakened mental ability by a person who occupied a position of trust with the person of diminished ability. The court's favorable judgment prevents the latter from gaining unjust advantage from his unduly influencing the former. The most common cases, of course, involve the greedy sibling who importunes an elder family member to "change the will", cutting the other brothers and sisters out.

Elements

1. Existence of a confidential relationship between beneficiary and grantor.
2. Beneficiary actively procured the instrument (will, trust, deed, etc.).
3. Grantor suffered some condition lessening her ability to resist the influence.

Element #3 may not be required by all courts, however it is an essential element in some jurisdictions, since it should not be argued that a grantor in perfect physical and mental health having average intelligence and understanding of the nature of his estate and the natural objects of his bounty (loved ones, family, etc.) could reasonably be said to be unduly influenced to dispose of property in a manner contrary to his free will unless he was subjected to actual duress, i.e., coercion … a different cause of action, q.v.

In an actual case in Miami an extremely elderly gentleman having only distant relatives and an avaricious stockbroker died leaving $12 million to the stockbroker, with whom he enjoyed a confidential relationship and who, being also an attorney, drafted the will by which the old gentleman signed away his millions. These facts clearly gave rise to a cause of action for undue influence.

In another case, a disgruntled sibling complained that his sister received the bulk of their father's estate and brought an action for undue influence. The sister, however, had nothing to do with procuring the will, nor did the sister live in the same state with the decedent or have any confidential relationship with the decedent greater than the relation her brother also enjoyed. So, the cause of action failed because requisite elements were not present.

Comments

If the beneficiary enjoyed the requisite confidential relationship and also procured the will (or other document), e.g., taking the elderly person to the beneficiary's lawyer to have the will drafted, a presumption of undue influence arises in most jurisdictions. Once the presumption arises, the burden shifts to the procuring beneficiary to prove the absence of some or all elements of undue influence.

Favorable judgment nullifies those provisions of the document procured by undue influence, restoring the situation to what it was before the document was executed.

Unjust Enrichment

The gist of unjust enrichment is similar to the cause of action for *quantum meruit* that arises when one person confers a benefit on another under circumstances that would cause a reasonable person to believe he would be compensated by the other. The courts reason that one person should not be unjustly enriched at the expense of another so, even where there is no contract between them to spell out in detail their relative expectations, this cause of action (or *quantum meruit*) will lie to prevent the one from being unjustly enriched at the expense of the other.

Elements

The essential elements of fact that must be pled and proven are:

1. Plaintiff conferred a benefit on defendant.
2. Defendant either requested the benefit or knowingly and voluntarily accepted it.
3. Circumstances surrounding the transaction were such that it would be unjust for the defendant to retain the benefit without compensating plaintiff reasonably.

An example that might give rise to this cause of action is seen where an itinerant house-painter asks a homeowner if he can paint the homeowner's house. The homeowner answers, "Of course!", seeing an opportunity to get a free coat of paint and thinking that, because he has not agreed on a price that the is not bound to pay for the job. In fact, the court will imply a contract under such circumstances, awarding the housepainter the fair market value of his services, because it would be unjust to do otherwise.

Such cases are sometimes said to arise out of *quasi contract*, i.e., a contract that is not created by the parties themselves but by the court acting in equity to prevent a wrong.

Defenses

Express Contract

This cause of action fails if the defendant can show that an express contract exists, whether verbal or in writing. The idea is that the terms of the express contract are more likely to convey the actual understanding of the parties, and they should be held to the terms of that express contract.

Burden

The plaintiff seeking to enforce an implied contract is required to meet a greater burden than one who uses better business sense by requiring an express contract before undertaking to render services or deliver valuable goods to another.

Payment Accepted

Once plaintiff accepts payment for his services or delivered goods, he cannot then sue for unjust enrichment, and a motion to dismiss will prevail.

Waiver

- A Defense -

Waiver is an affirmative defense that arises when plaintiff has waived the right or privilege upon which he sues. The right or privilege waived must, of course, first exist, or there is nothing to be waived, so this is one of the elements. A second element is that the waiver must be knowing, i.e., the plaintiff cannot have waived a right or privilege without knowing (or having constructive knowledge) of the fact. Finally, the plaintiff must have waived with actual intention to relinquish the right or privilege.

Elements

In order to successfully assert this defense, the defendant must allege (in his initial response to the complaint) that

1. Plaintiff possessed a right or privilege upon which he has brought his lawsuit.
2. Plaintiff waived the right or privilege.
3. Plaintiff knew or should have known he waived the right or privilege.
4. Plaintiff intended by his waiver to relinquish the right or privilege.

For the court to imply the waiver from the plaintiff's conduct, facts relied upon to demonstrate that the waiver occurred must be clear and convincing. Mere inferences are not enough, however probable they might be. In the absence of direct facts demonstrating waiver, the defendant must meet a heavy burden for the court to imply a waiver.

In some jurisdictions, particular waivers cannot be established unless evidenced by some express writing that demonstrates knowledge of the act and its consequence. See local statutes and case law for details in your jurisdiction.

Conclusion

The meat-and-potatoes of every lawsuit are (1) the laws and (2) the facts.

The right to sue on laws and facts, however, depends on the plaintiff's having at least one valid cause of action the courts in his jurisdiction recognize. Although there are a few causes of action not listed in this tutorial, we have covered those that include most of the cases you'll encounter. Others arise from particular statutory enactments and deal with particular fact circumstances that affect only a rare few.

Of course the right to sue can be challenged by valid defenses, and we've listed a few of the more common affirmative defenses and the elements that must be pleaded to defeat the plaintiff's intentions.

Knowing the elements of causes of action and common defenses is half the battle of winning lawsuits. The rest is common-sense, effective discovery, and above all being the person who *should* win!

The trust of keeping American justice alive is in your hands. Teach the processes to your children.

Act justly toward others.

Do good works.

Live long.

- The End -

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