

Fraud: District of Columbia

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

Elements Generally

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

To state a claim of common law fraud (or fraud in the inducement) under District of Columbia law, a plaintiff must plead that:

- The defendant made:
 - a false statement of material fact (see Material Misrepresentation);
 - with knowledge of its falsity; and
 - with the intent to deceive (see *Scienter*).
- The plaintiff:
 - relied on the representation (see Reliance); and
 - suffered damages (see Remedies).

(*Chedick v. Nash*, 151 F.3d 1077, 1081 (D.C. Cir. 1998) (applying District of Columbia law); *In re U.S. Off. Prods. Co. Sec. Litig.*, 251 F. Supp. 2d 77, 100 (D.D.C. 2003) (applying District of Columbia law); *Hercules & Co. v. Shama Rest. Corp.*, 613 A.2d 916, 923 (D.C. 1992).)

Material Misrepresentation

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

Under District of Columbia law:

- A false representation may be either:
 - an affirmative misrepresentation; or

- nondisclosure of a material fact when there is a duty to disclose (*Jericho Baptist Church Ministries, Inc. (D.C.) v. Jericho Baptist Church Ministries, Inc. (Md.)*, 223 F. Supp. 3d 1, 10 (D.D.C. 2016) (applying District of Columbia law)).

(*Sundberg v. TTR Realty, LLC*, 109 A.3d 1123, 1131 (D.C. 2015).)

- A material misrepresentation actionable in fraud must be consciously false and intended to mislead another (*Sarete, Inc. v. 1344 U St. Ltd. P'ship*, 871 A.2d 480, 493 (D.C. 2005)). A literally true statement that creates a false impression can be actionable in fraud (*Jacobson v. Hofgard*, 168 F. Supp. 3d 187, 196 (D.D.C. 2016) (applying District of Columbia law); *Remeikis v. Boss & Phelps, Inc.*, 419 A.2d 986, 989 (D.C. 1980); Restatement (Second) of Torts § 529).

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

Under District of Columbia law, a misrepresentation is material if either:

- It is likely to induce a reasonable person to manifest assent.
- The maker knows that it is likely to induce the recipient to manifest assent.

(*Boomer Dev., LLC v. Nat'l Ass'n of Home Builders of U.S.*, 258 F. Supp. 3d 1, 13 (D.D.C. 2017) (applying District of Columbia law); *Sundberg*, 109 A.3d at 1131; *Sarete, Inc.*, 871 A.2d at 493; Restatement (Second) of Contracts § 162 cmt. a.)

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



Under District of Columbia law, a plaintiff cannot prevail on a fraud claim based on:

- Opinions or predictions of future events, unless stating that something will occur while knowing the contrary to be true (*Boomer Dev., LLC*, 258 F. Supp. 3d at 13-14 (applying District of Columbia law); *Howard v. Riggs Nat'l Bank*, 432 A.2d 701, 706 (D.C. 1981)).
- Preposterous or obviously false statements (*In re Estate of McKenney*, 953 A.2d 336, 343 (D.C. 2008)).
- Commercial puffery, such as nonmeasurable generalized positive statements or statements of a product's superiority (see *Secs. and Exch. Comm'n v. E-Smart Techs., Inc.*, 74 F. Supp. 3d 306, 323 (D.D.C. 2014); see, for example, *Jefferson v. Collins*, 905 F. Supp. 2d 269, 283 (D.D.C. 2012) (applying District of Columbia law) (defendants' representation that a property was a "gorgeous renovation" was commercial puffery); see also *Pearson v. Chung*, 961 A.2d 1067, 1076 (D.C. 2008)).

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

Under District of Columbia law, a breach of a contractual promise to perform can give rise to a fraudulent misrepresentation claim if, at the time the promise was made, the promisor had no intention of carrying it out (*Butler v. Enter. Integration Corp.*, 459 F. Supp. 3d 78, 96 (D.D.C. 2020) (applying District of Columbia law); *Va. Acad. of Clinical Psychologists v. Grp. Hospitalization & Med. Servs., Inc.*, 878 A.2d 1226, 1234 (D.C. 2005)).

In the District of Columbia, the courts impose a "very high standard" on sophisticated business entities asserting fraudulent inducement in an arms-length transaction (*Wash. Inv. Partners of Del., LLC v. Sec. House, K.S.C.C.*, 28 A.3d 566, 575-76 (D.C. 2011)).

Scienter

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

A plaintiff asserting fraud in the District of Columbia must allege and prove that the defendant either acted knowing that its statement was false or made the statement

recklessly and positively without knowledge of its truth (*Jacobs v. Dist. Unemployment Comp. Bd.*, 382 A.2d 282, 287 (D.C. 1978); *Howard*, 432 A.2d at 706).

General allegations of motive and opportunity are insufficient to demonstrate scienter (*Burman v. Phx. Worldwide Indus., Inc.*, 384 F. Supp. 2d 316, 336 n.16 (D.D.C. 2005)). Moreover, "[t]he mere breach of a promise, without more, is insufficient to establish fraudulent intent" (*Butler*, 459 F. Supp. 3d at 97 (applying District of Columbia law); *Va. Acad. of Clinical Psychologists*, 878 A.2d at 1234).

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

A plaintiff does not need to allege and prove scienter for a claim of constructive fraud, which requires the plaintiff to show the existence of a confidential relationship between plaintiff and defendant and includes all the same elements of actual fraud *except* the intent to deceive (*Himmelstein v. Comcast of the Dist., L.L.C.*, 908 F. Supp. 2d 49, 59 (D.D.C. 2012) (applying District of Columbia law); *Cordoba Initiative Corp. v. Deak*, 900 F. Supp. 2d 42, 50 (D.D.C. 2012) (applying District of Columbia law); see Constructive Fraud).

Reliance

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

To satisfy the reliance element of fraud in the District of Columbia, a plaintiff must plead with particularity which statements the plaintiff relied upon and which actions it took in response. The plaintiff's reliance must be a substantial factor in the injury suffered. (*Parr v. Ebrahimian*, 70 F. Supp. 3d 123, 129 (D.D.C. 2014) (applying District of Columbia law); *Wu v. Stomber*, 883 F. Supp. 2d 233, 273 (D.D.C. 2012) (applying District of Columbia law); *Stancil v. First Mount Vernon Indus. Loan Ass'n*, 131 A.3d 867, 876 (D.C. 2014).)

For example, the reliance element in a fraud claim is satisfied if a consumer is persuaded by a misrepresentation to buy a product, even if it is the sole product under consideration by the consumer (*Va. Acad. of Clinical Psychologists*, 878 A.2d at 1237-38).

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

In the District of Columbia, reliance must be objectively reasonable (*Burlington Ins. Co. v. Okie Dokie, Inc.*, 329 F. Supp. 2d 45, 49 (D.D.C. 2004) (applying District of Columbia law); *Sibley v. St. Albans Sch.*, 134 A.3d 789, 811 (D.C. 2016)).

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

To establish reliance under District of Columbia law, the plaintiff must indicate that its reliance on the allegedly fraudulent representation was reasonable, which is a fact-intensive inquiry evaluated on a case-by-case basis, considering all the surrounding circumstances (*Burman v. Phx. Worldwide Indus., Inc.*, 384 F. Supp. 2d 316, 329 (D.D.C. 2005); *Sibley*, 134 A.3d at 811). While the reasonableness of the reliance can be an issue of fact that should be left for a jury, dismissal for failure to state a claim is proper when no reasonable person can rely on the representation (*Burman*, 384 F. Supp. 2d at 329).

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

Under District of Columbia law, the maker of a material misrepresentation may be held liable for third-party losses if the third-party:

- Reasonably relied on the representations.
- Falls within the identifiable classes of persons that the defendant intended to influence.

(*Boomer Dev., LLC v. Nat'l Ass'n of Home Builders of U.S.*, 325 F.R.D. 6, 14 (D.D.C. 2018) (applying District of Columbia law).)

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

Under District of Columbia law, a plaintiff may not reasonably rely on a misrepresentation if there was an adequate opportunity to conduct an independent investigation and the defendant did not have exclusive

access to such information. Reliance, however, is justified if a defendant prevents a plaintiff from making a reasonable inquiry. (*Baker v. Gurfein*, 744 F. Supp. 2d 311, 319 (D.D.C. 2010) (applying District of Columbia law); *In re Estate of McKenney*, 953 A.2d at 343.)

Remedies

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

Under District of Columbia law, a plaintiff discovering fraud involving a contract must choose between two mutually exclusive remedies:

- Rescission of the contract.
- Affirm the contract and pursue monetary damages.

If the fraud victim indicates to the other party the intent to affirm the contract or continues performance, that party affirming the contract is precluded from seeking rescission. (*Ellipso, Inc. v. Mann*, 480 F.3d 1153, 1158 (D.C. Cir. 2007) (applying District of Columbia law); *Carter v. Urb. Serv. Sys. Corp.*, 324 F. Supp. 3d 19, 34 (D.D.C. 2018) (applying District of Columbia law).)

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

Liability for fraudulent misrepresentation under District of Columbia law extends only to damages that are:

- The natural and proximate consequences or the direct consequences of the fraud.
- Clearly defined and ascertained.

(*Democracy Partners v. Project Veritas Action Fund*, 453 F. Supp. 3d 261, 284 (D.D.C. 2020) (applying District of Columbia law).)

A fraud plaintiff in the District of Columbia may obtain:

- Out-of-pocket damages as the norm in fraudulent misrepresentation cases (*McQueen v. Woodstream Corp.*, 672 F. Supp. 2d 84, 89 (D.D.C. 2009) (applying District of Columbia law)).
- Special damages that constitute expenditures made in reliance on the misrepresentation when seeking rescission (*Sage v. Broad. Publ'ns, Inc.*, 997 F. Supp. 49, 53 (D.D.C. 1998) (applying District of Columbia law)).

- Punitive damages only if the plaintiff shows by clear and convincing evidence that the tort was aggravated by the defendant's:

- egregious conduct, such as maliciousness, wantonness, gross fraud, recklessness, and willful disregard of another's rights; and
- state of mind that justifies punitive damages.

(*Essroc Cement Corp. v. CTI/D.C., Inc.*, 740 F. Supp. 2d 131, 147-48 (D.D.C. 2010) (applying District of Columbia law); *Chatman v. Lawlor*, 831 A.2d 395, 400 (D.C. 2003)).

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

Under District of Columbia law, a plaintiff fraudulently induced to enter into a contract may pursue rescission as an alternative to damages. However, a party may not rescind a contract and at the same time seek to recover damages. (*Dean v. Garland*, 779 A.2d 911, 915 (D.C. 2001).)

Fraudulent Concealment

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

Under District of Columbia law, a plaintiff may bring a claim for fraudulent concealment. A plaintiff asserting fraudulent concealment must plead and prove that:

- The defendant:
 - has a duty to disclose a material fact to the plaintiff;
 - failed to disclose that fact; and
 - intended to defraud or deceive the plaintiff.
- The plaintiff:
 - acted in justifiable reliance on the concealment; and
 - suffered damages as a result of the defendant's concealment.

(*Lee v. Bos*, 874 F. Supp. 2d 3, 6 (D.D.C. 2012); *Howard Univ. v. Watkins*, 857 F. Supp. 2d 67, 75 (D.D.C. 2012); see *Sundberg*, 109 A.3d at 1131 (where there is a duty to disclose a material fact, nondisclosure of that material fact may constitute fraud).)

Constructive Fraud

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

District of Columbia law recognizes a cause of action for constructive fraud, which includes all the same elements as actual fraud except the intent to deceive. Constructive fraud requires a plaintiff to demonstrate the existence of a confidential relationship between the plaintiff and defendant, by which the defendant is able to exercise extraordinary influence over plaintiff. (*Himmelstein*, 908 F. Supp. 2d at 59; *Cordoba Initiative Corp.*, 900 F. Supp. 2d at 50.)

Doctrines That Preclude Fraud Claims

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

In the District of Columbia, a defendant's mere breach of contract does not give rise to a claim of fraud unless the defendant had a fraudulent intent to not honor the contract at the time of contracting (*Wagshal v. Rigler*, 947 F. Supp. 10, 14 (D.D.C. 1996)). A plaintiff must plead:

- Damages distinct from those of a simple contractual breach.
- That the defendant's fraud breached a duty independent of the defendant's contractual duties.

(*Plesha v. Ferguson*, 725 F. Supp. 2d 106, 113 (D.D.C. 2010) (applying District of Columbia law); *Choharis v. State Farm Fire & Cas. Co.*, 961 A.2d 1080, 1089 (D.C. 2008).)

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

District of Columbia courts have not resolved the question of whether the economic loss doctrine applies to fraud claims. However, District of Columbia courts have applied the economic loss doctrine to bar tort recovery for purely economic losses in the context of negligence claims, except where a special relationship exists (*Aguilar v. RP MRP Wash. Harbour, LLC*, 98 A.3d 979, 985-86 (D.C. 2014)).

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

Under District of Columbia law, an incorporation clause in a contract generally forecloses a fraudulent inducement claim based on representations regarding future conduct that the defendant made before the parties contracted (Jacobson, 168 F. Supp. 3d at 203 (applying District of Columbia law); *Drake v. McNair*, 993 A.2d 607, 624 (D.C. 2010); *Hercules & Co.*, 613 A.2d at 929).

Procedural Issues

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

In the District of Columbia, the complaint must state the circumstances constituting fraud with particularity (D.C. Sup. Ct. Civ. R. 9(b); *Virginia Acad. of Clinical Psychologists*, 878 A.2d at 1233). Mere conclusory statements are insufficient to satisfy the particularity requirement (*Hercules & Co.*, 613 A.2d at 923). One pleading fraud must allege such facts as will reveal the existence of all the requisite elements of fraud (*Atraqchi v. GUMC Unified Billing Servs.*, 788 A.2d 559, 563 (D.C. 2002) (as amended on clarification sub nom. *Atraqchi v. GUMC Billing Servs.*, 801 A.2d 951 (D.C. 2002))).

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

In the District of Columbia, a plaintiff must prove each element of fraud by a heightened evidentiary standard, clear and convincing evidence (*Sibley*, 134 A.3d at 809).

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

Under District of Columbia law, fraud claims are subject to a three-year statute of limitations (D.C. Code § 12-301(8)). The statute starts to run when a plaintiff knows or reasonably should know of:

- The existence of the alleged injury.
- The injury's cause in fact.
- Some evidence of wrongdoing by the defendant.

(*Drake*, 993 A.2d at 617).

The discovery rule focuses on the plaintiff's general knowledge that the defendant's conduct was wrongful (*Drake*, 993 A.2d at 617-18).

The presence of a fraudulent misrepresentation does not excuse the injured party from exercising reasonable diligence under all of the circumstances (*BDO Seidman, LLP v. Morgan, Lewis & Bockius LLP*, 89 A.3d 492, 500 (D.C. 2014); *Diamond v. Davis*, 680 A.2d 364, 381 (D.C. 1996)).

A cause of action accrues when the plaintiff:

- Has actual notice of the cause of action.
- Is deemed to be on inquiry notice because acting reasonably under the circumstances would have led to an investigation that would have resulted in actual notice.

(*Cevenini v. Archbishop of Wash.*, 707 A.2d 768, 771 (D.C. 1998); *Diamond*, 680 A.2d at 372.)

The tolling inquiry focuses on the reasonableness of the plaintiff's behavior, not the alleged wrongdoing of the defendant. What it means to act reasonably under the circumstances is a highly fact-specific analysis, including:

- The conduct and misrepresentations of the defendant.
- The reasonableness of the plaintiff's reliance on the defendant's conduct and misrepresentations, including the nature of the relationship between plaintiff and defendant.

(*BDO Seidman, LLP*, 89 A.3d at 500.)

The reasonable response of the plaintiff, depending on the circumstances, may be not to investigate at all, or to conduct an exhaustive investigation (*Diamond*, 680 A.2d at 372). The defendant bears the burden to show that the plaintiff has not acted with reasonable diligence (*Diamond*, 680 A.2d at 377).

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