

# Commercial Litigation: Causes of Action Checklist

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## A Checklist setting out the key elements of various causes of action that commonly arise in commercial litigation.

This Checklist sets out the key elements of various causes of action that commonly arise in commercial litigation. This Checklist is intended only as a general summary of US law. The specific elements of each cause of action may vary considerably from state to state. In addition, some states may not recognize certain causes of action, or may refer to them under different names.

### ABUSE OF PROCESS

Abuse of process refers to a litigant's improper use of properly issued legal process, and requires more than the malicious filing of an unmeritorious complaint (see Malicious Prosecution). To state a claim for abuse of process, the plaintiff must prove that the defendant:

- Caused legal process (either civil or criminal) to be issued.
- Intended to harm the plaintiff without excuse or justification.
- Used the process in an improper manner to obtain a collateral objective.

The plaintiff does not need to prove malice to establish abuse of process, and therefore lack of malice is not a defense. Following the advice of counsel is also not a valid defense to an action for abuse of process.

**Example.** A claim for abuse of process may arise where a litigant obtains a temporary restraining order against a party in a lawsuit (severely disrupting the party's business operations) for the sole purpose of coercing that party to pay an unrelated debt.

### ACCOUNT STATED

An account stated is an agreement between parties involved in a prior transaction, recognizing that the account representing the transaction is true and the balance stated is correct, with a promise (either express or implied) by one party for the payment of the balance to the other. To state a claim for an account stated, the plaintiff must show that:

- A debtor-creditor relationship exists between the parties.
- An invoice was presented by the creditor to the debtor.
- The account (that is, the amount due) was accepted by the debtor as correct.
- The debtor promised, expressly or impliedly, to pay the amount stated.
- The debtor failed to pay the creditor.

**Practice tip.** A plaintiff may prove that the debtor accepted the account as correct and promised to pay the amount stated therein by showing that the debtor received the plaintiff's invoices and failed to object to them within a reasonable period of time after receipt.

### BREACH OF CONTRACT

Generally, the elements of a cause of action for breach of contract are:

- The formation of a contract between the plaintiff and the defendant.
- Performance by the plaintiff.
- Failure to perform by the defendant.
- Resulting damages to the plaintiff.

**Practice tip.** Breach of contract claims are subject to many defenses, including mutual mistake, impossibility of performance, failure of consideration, lack of privity, waiver, estoppel, Statute of Frauds, and unconscionability.

### CONVERSION

Conversion is essentially the civil law equivalent to criminal theft. To state a claim for conversion, the plaintiff must show that it:

- Has the right to possess certain property.
- Was deprived of its interest in the property by the defendant's unauthorized act.
- Suffered damages due to the conversion.

**Practice tip.** Some states require the plaintiff to show that it made a demand on the defendant to return its property and that the demand was not met (or alternatively, that a demand would be

futile). Additionally, in the case of conversion of money, the plaintiff must typically show that the defendant converted specific and identifiable funds.

## DEFAMATION

Defamation refers to injury to one's reputation through written (libel) or oral (slander) statements. To state a claim for defamation, the plaintiff must show that:

- The defendant made a false and defamatory statement of fact about the plaintiff.
- The defendant made the statement to a third party.
- The defendant acted with actual malice, gross negligence, or negligence (depending on the plaintiff's status as either a "public" or a "private" figure).
- The defendant's statement was not made in a privileged setting (for example, while testifying at trial).
- The plaintiff suffered damages due to the defamatory statement.

**Practice tip.** False statements that do not harm the plaintiff's reputation, but nevertheless cause economic injury to the plaintiff, may be actionable under other tort theories such as injurious falsehood or product disparagement (see Injurious Falsehood, Product Disparagement and Trade Libel). Also, depending on the jurisdiction, a statute of limitations may apply to an action for defamation.

## FRAUDULENT MISREPRESENTATION

To state a claim for fraudulent misrepresentation, a plaintiff must show that:

- The defendant made a false representation of material fact.
- The defendant knew the statement was false when making it.
- The defendant intended for the plaintiff to rely on the false statement.
- The plaintiff justifiably relied on the false statement.
- The plaintiff suffered damages due to its reliance on the defendant's false statement.

A plaintiff is not justified in relying on the truth of a fraudulent misrepresentation if the plaintiff knows that it is false or the statement is obviously false. To satisfy the reliance element of fraudulent misrepresentation, a representation must have been of such a nature and degree and have been made in such circumstances that the plaintiff had a right to rely on the statement.

**Practice tip.** In some jurisdictions, a plaintiff's fraud claim (or fraudulent concealment claim) may be dismissed under the economic loss rule if it is merely duplicative of its breach of contract claim. However, strict application of the economic loss rule is on the decline, or has been eliminated, in some jurisdictions.

## FRAUDULENT CONCEALMENT

To state a claim for fraudulent concealment, a plaintiff must show that:

- The defendant had a duty to disclose material information to the plaintiff.

- The defendant intentionally concealed material information that was otherwise unknown to the plaintiff.
- The defendant intended to deceive the plaintiff by concealing this information.
- The plaintiff acted in justifiable reliance on the defendant's concealment.
- The plaintiff suffered damages due to its reliance.

**Practice tip.** Fraudulent concealment may occur not only when the defendant actively conceals a known fact, but also when the defendant reveals certain facts while omitting others. Certain jurisdictions may allow the statute of limitations to toll for fraudulent concealment.

## INJURIOUS FALSEHOOD, PRODUCT DISPARAGEMENT, AND TRADE LIBEL

False statements denigrating the quality of a company's goods or services may give rise to a claim for injurious falsehood, product disparagement, or trade libel. These claims require the plaintiff to show that the:

- Defendant intentionally made a false statement about the plaintiff's business or products to a third person.
- Defendant acted with malice (for example, the defendant knew that the falsehood would likely induce others not to deal with the plaintiff).
- Plaintiff suffered special damages (that is, specific and measurable losses) due to the defendant's conduct.

**Practice tip.** The torts of injurious falsehood and product disparagement are broader than defamation in that they are not confined to false statements that damage the company's reputation. For example, statements that a company's products or services are of poor quality (as opposed to statements that impugn the integrity or creditworthiness of a business, for example) may support an injurious falsehood or product disparagement claim, but not rise to the level of defamation.

## MALICIOUS PROSECUTION

The target of unjustified litigation may, under certain circumstances, bring a civil claim for malicious prosecution against the party who initiated the prior suit (the complainant). A plaintiff asserting a malicious prosecution claim must show that:

- The complainant initiated a prior lawsuit against the plaintiff.
- The complainant lacked probable cause to bring the prior lawsuit.
- The complainant acted with malice in bringing the prior suit.
- The prior lawsuit was terminated in the plaintiff's favor.

**Practice tip.** In some jurisdictions, the plaintiff must allege that it suffered a "special" injury before it may recover damages for malicious prosecution. The special injury requirement may be satisfied where the court in the prior lawsuit granted the complainant preliminary relief which, in turn, interfered with the plaintiff's personal or property rights. The litigation privilege cannot bar the filing of this claim if the complainant has satisfied the elements of malicious prosecution. Additionally, in some jurisdictions, a claim for malicious prosecution lies only for maliciously prosecuted **criminal** actions.

## MISAPPROPRIATION OF TRADE SECRETS

The owner of a trade secret may have a cause of action for misappropriation where either:

- The defendant acquired the trade secret by improper means, or with knowledge or reason to know that the trade secret was acquired improperly.
- The defendant disclosed the trade secret without the owner's consent.

Trade secret protections apply broadly to business, financial, and technical information (such as client lists, marketing plans, pricing and discount structures, production processes, chemical formulas, and software source code) that meet the following criteria:

- The information is not generally known or ascertainable outside of the owner's organization or control.
- The owner derives economic value or business advantage by having exclusive use of the information.
- The owner makes reasonable efforts to preserve the secrecy of the information.

**Practice tip.** Counsel should determine whether the applicable jurisdiction has a statute of limitations for misappropriation of trade secrets and, if so, the event that triggers the limitations period if the tort continues over a period of time.

## PRIMA FACIE TORT

Several states recognize a cause of action for prima facie tort. To state a claim for prima facie tort, the plaintiff must show that:

- The defendant maliciously and intentionally injured the plaintiff.
- The defendant's conduct was otherwise lawful.
- The defendant's conduct does not give rise to an action for some other tort.
- The defendant had no legitimate excuse or justification for its conduct.
- The plaintiff suffered special damages (that is, specific and measurable losses) due to the defendant's conduct.

**Practice tip.** A cause of action for prima facie tort should not be used as a catch-all alternative for liability, and cannot be premised on the same conduct underlying other asserted tort claims.

## PROMISSORY ESTOPPEL

The equitable doctrine of promissory estoppel stands as an exception to the general rule that promises are not enforceable without the exchange of **consideration**. A plaintiff seeking to recover on promissory estoppel grounds must show that:

- The defendant made a clear and unambiguous promise.
- The plaintiff acted in reliance on the defendant's promise.
- The plaintiff's reliance was both reasonable and foreseeable.
- The plaintiff suffered an injury (or a prejudicial change in position) due to its reliance on the defendant's promise.

**Practice tip.** Promissory estoppel is sometimes invoked where a breach of contract claim based on the same set of facts would necessarily

be dismissed under the Statute of Frauds. Similarly, an employee may assert a promissory estoppel claim for termination of an at-will employment contract.

## QUANTUM MERUIT

Latin for "as much as he deserves," *quantum meruit* is an equitable doctrine that allows a plaintiff to recover the reasonable value of services performed where the parties have not expressly contracted for those services. To state a claim for *quantum meruit*, the plaintiff must show:

- That the plaintiff performed services for the defendant in good faith.
- That the plaintiff reasonably expected to be compensated for those services.
- That the defendant accepted the benefit of those services.
- The reasonable value of the services performed (compare to unjust enrichment), where the plaintiff's damages are measured by the value of the benefit **conferred**.

**Practice tip.** The existence of an express contract generally precludes recovery under the theory of *quantum meruit*.

## TORTIOUS INTERFERENCE

Tortious interference claims typically fall into one of three categories:

- Tortious interference with an existing contract.
- Tortious interference with prospective contractual relations.
- Tortious interference with business relations.

### TORTIOUS INTERFERENCE WITH AN EXISTING CONTRACT

To state a claim for tortious interference with an existing contract, the plaintiff must show that:

- A valid contract existed between the plaintiff and a third party.
- The defendant knew about the contract.
- The defendant intentionally induced the third party to breach the contract or otherwise acted in a way to render performance impossible.
- The plaintiff was damaged due to the defendant's conduct.

**Practice tip.** A claim for tortious interference with an existing contract may fail if the underlying contract is shown to be void.

### TORTIOUS INTERFERENCE WITH PROSPECTIVE CONTRACTUAL RELATIONS

To state a claim for tortious interference with prospective contractual relations, the plaintiff must show that:

- There was a reasonable probability that the plaintiff and a third party would have entered into a contractual relationship.
- The defendant wrongfully prevented the relationship from developing.
- The defendant intended to prevent the relationship from developing.
- The plaintiff suffered actual harm or damage due to the defendant's interference.

**Practice tip.** To support a claim for tortious interference with prospective contractual relations, the defendant's conduct must be

wrongful apart from its interference with the prospective contract itself. Examples of wrongful conduct include fraud or threats of physical violence.

### TORTIOUS INTERFERENCE WITH BUSINESS RELATIONS

To state a claim for tortious interference with business relations, the plaintiff must show that:

- A business relationship existed between the plaintiff and a third party, with the likelihood of future economic benefit to the plaintiff.
- The defendant knew about the relationship.
- The defendant wrongfully disrupted the business relationship.
- The defendant intended to disrupt the business relationship.
- The defendant's conduct caused the plaintiff to suffer economic injury.

**Practice tip.** To support a claim for tortious interference with business relations, the defendant's conduct must be wrongful apart from its interference with the business relationship itself. Also, if a prospective contract would be unenforceable because it would be void, the unenforceability of that contract is a defense to a tortious interference claim.

### UNJUST ENRICHMENT

The equitable doctrine of unjust enrichment permits a party to recover an amount equal to the benefits that it conferred on another (compare to *quantum meruit*), even though the parties did not enter into an express contract. Simply stated, unjust enrichment is based on a mistaken payment and applies only when a contract does not exist between the parties. To state a claim for unjust enrichment, the plaintiff must show that:

- The defendant benefitted at the plaintiff's expense.
- Equity and good conscience require restitution.

**Practice tip.** The existence of an express contract generally precludes recovery under the theory of unjust enrichment.

### WARRANTY

Warranty claims normally arise in the context of the sale of goods, and are therefore usually based on a state law version of Article 2 of the **Uniform Commercial Code** (UCC). Warranty claims may involve a plaintiff alleging that the product seller breached:

- An implied warranty of title and against infringement (UCC § 2-312).
- An express warranty (UCC § 2-313).
- An implied warranty of merchantability (UCC § 2-314).
- An implied warranty of fitness for a particular purpose (UCC § 2-315).

For additional information on warranties, see Standard Document, General Purchase Order Terms and Conditions (Pro-buyer): Section 15 ([3-504-2036](#)).

### BREACH OF WARRANTY OF TITLE AND AGAINST INFRINGEMENT

A claim for breach of warranty of title may arise where the defendant sells the plaintiff goods that either:

- Belong to another party.
- Are subject to another party's security interest.

A claim for a breach of warranty against infringement may arise where a merchant both:

- Regularly deals in goods of the kind sold.
- Sells goods that are subject to a patent or trademark but does not have a patent or trademark license to sell the goods.

Remedies for breach of warranty of title and against infringement include:

- Rejection of the goods (UCC §§ 2-601 or 2-612).
- Revocation of the acceptance of the goods (UCC § 2-608).

### BREACH OF EXPRESS WARRANTY

To state a claim for breach of an express warranty, the plaintiff must show that:

- The seller made a false statement of material fact about the product.
- The plaintiff reasonably relied on the false statement to its detriment.

**Practice tip.** A seller's representations that can form the basis of a breach of express warranty claim may also underlie common law claims for fraud and negligent or intentional misrepresentation. Also, there is generally no liability for ordinary sales talk or "puffing."

### BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY

A warranty of merchantability arises when goods do not meet the buyer's unstated reasonable expectations of minimum standards of quality. A claim for a breach of warranty of merchantability may arise where a merchant both:

- Regularly deals in goods of the kind sold.
- Sells goods that are not suitable for the ordinary purposes for which similar goods are used.

The plaintiff must also show that the defendant's deviation from the standard of merchantability proximately caused the plaintiff's injuries.

**Practice tip.** In contrast to an express warranty, an implied warranty of merchantability attaches to the sale of a product as a matter of law (unless modified or disclaimed by the parties), even if the seller makes no express representations about the product's quality. A plaintiff may be prevented from recovering if it had knowledge of the defect at the time it obtained the goods or if its own conduct caused the harm instead of any failure of the goods.

### BREACH OF IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE

A claim for breach of an implied warranty of fitness for a particular purpose may arise where the plaintiff purchases a product for a special purpose, but the product is ultimately unable to serve that purpose. To state a claim for breach of an implied warranty of fitness for a particular purpose, the plaintiff must show that:

- There is a particular purpose for which the product is required.
- At the time of the sale, the seller had reason to know that the product was being purchased for a particular purpose.

- The plaintiff was a person who the defendant would reasonably have expected to use the product.
- The plaintiff relied on the product seller's skill or judgment to select a suitable item.

**Example.** An implied warranty of fitness for a particular purpose may arise where a consumer purchases a waterproof diver's watch for an upcoming diving trip, as opposed to purchasing a watch simply to tell time.

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