



# Transactional Torts

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## Transactional Torts

- Intentional Economic Interference
  - Intentional Interference with Prospective Economic Advantage
  - Intentional Interference with Contract
- Fraud
- Negligent Misrepresentation
- Innocent Misrepresentation
- plus more we won't be covering, e.g.,
  - Breach of Fiduciary Duty
  - Breach of the Covenant of Good Faith and Fair Dealing

## Intentional Economic Interference

The Elements:

1. Valid contract or economic expectancy between plaintiff and third party (not defendant!)
2. Defendant's knowledge of contract or expectancy
3. Intent to interfere
4. Actually caused interference
5. Damages (to plaintiff, not third party)

**NOTE: Wide ranging, nebulously defined "justifications" are the key defense.**

## Intentional Economic Interference - Defenses

*Here are some "privilege" or "justification" defenses, which may go by various names or may lack names:*

- Honest advice
  - Helps if the advice is asked for
  - Helps if the advice is in the context of some relationship, such as attorney/client, consultant/client
- Competition
  - Bona fide competition is the foundation of our economy, so it's generally privileged
  - Or at least as long as it's "fair." But what does that mean? There's plenty of room to argue in litigation.
- Privilege in situations where there is a coinciding interest
  - Such as a parent corporation telling a subsidiary to breach a contract

## *Speakers of Sport v. ProServ*

- Have a vivid example of the intentional interference tort.
- Understand its two faces - IIwK & IIwPEA
- Appreciate the tension of the intentional interference tort with competition
- Appreciate the vagueness of the prima facie intentional interference tort and its defenses
- Appreciate some of the doctrinal variety of fraud
- See puffing as an example of non-fraud
- Appreciate how fraud doctrine can have a role in a claim for something other than fraud

## **Fraud**

The Elements:

1. Material misrepresentation by defendant
2. Scierter
  - (at least recklessness; it's a lie)
3. Intent to induce reliance
4. Reliance
  - a. Actual reliance (causation)  
(victim must be actually deceived)
  - b. Justifiable reliance  
(must be reasonable in falling for it)
5. Damages (detriment)

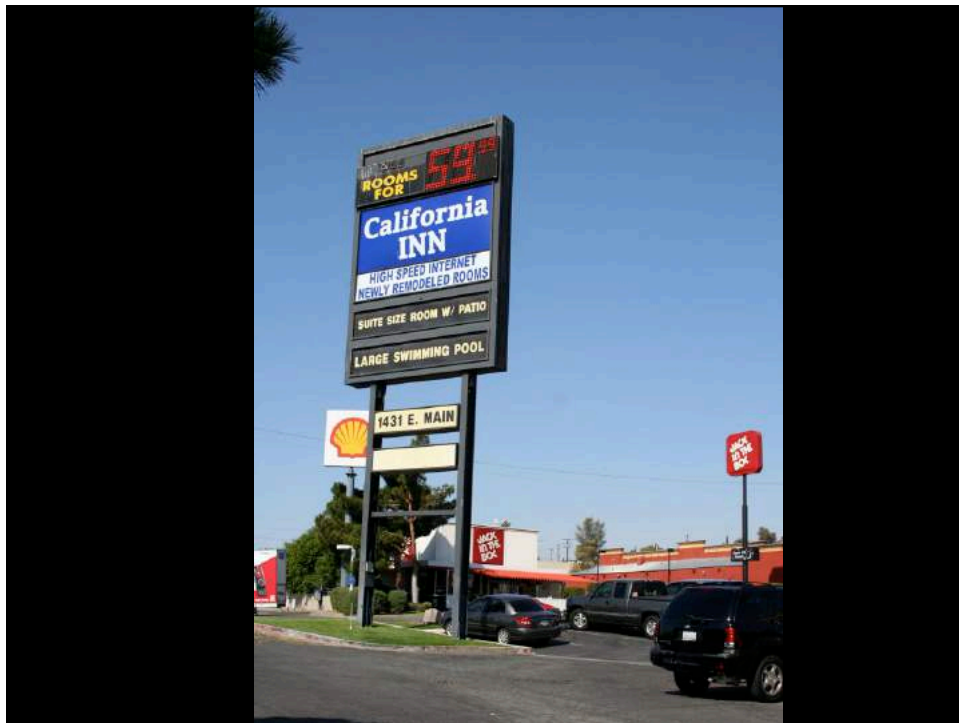
## Fraud - North Dakota Nomenclature

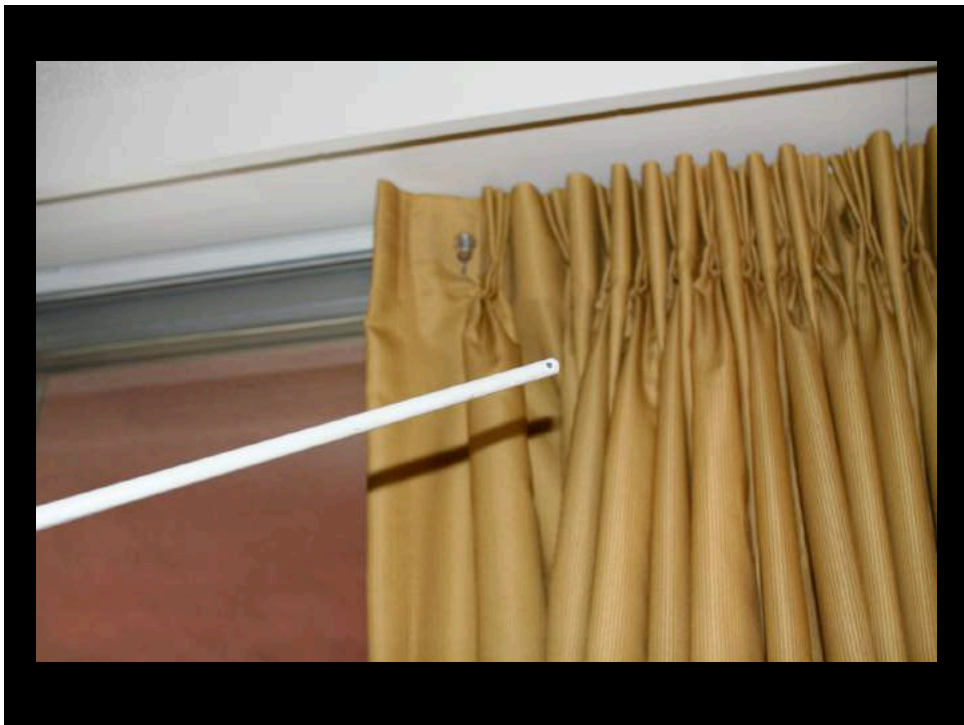
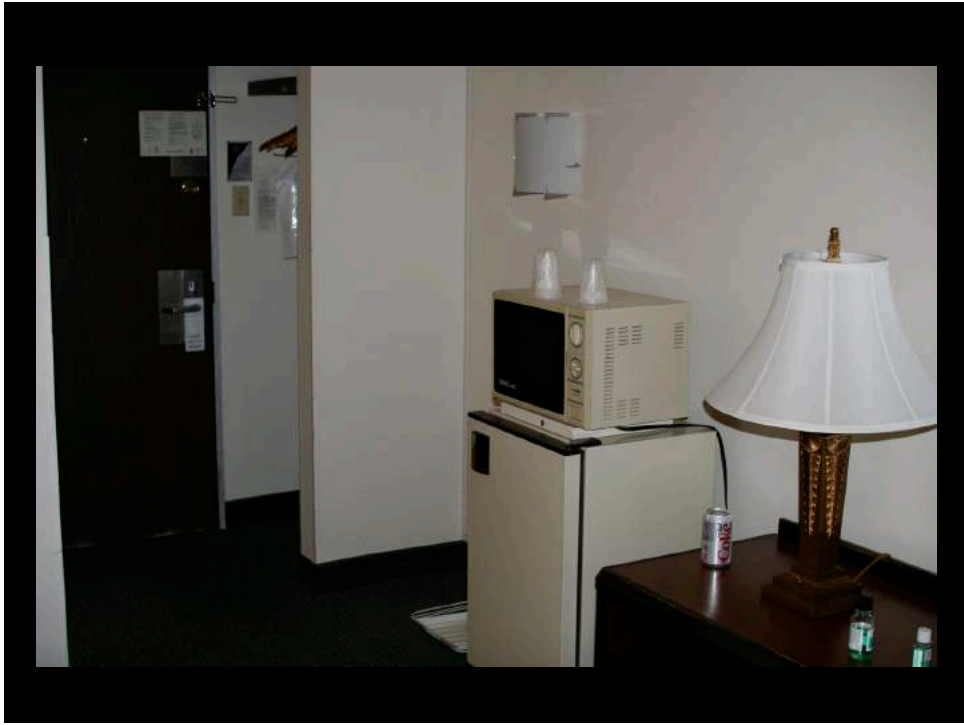
- In North Dakota, the tort claim of fraud is called “deceit.”
- In N.D., “fraud” is the name used for the defense to breach of contract based on fraud.
  - “[F]raud and deceit are very different legal theories with very different results in litigation. I therefore write separately to invite an appeal by a party who has not acquiesced in treating fraud and deceit as the same, so that this Court can have a vehicle for restoring some clarity and certainty to this area of the law. ... Fraud is a claim arising in contract and relates to the lack of consent.”  
Erickson v. Brown, 747 N.W.2d 34, 53 (N.D. 2008)  
(Crothers, J., concurring in part and dissenting in part)

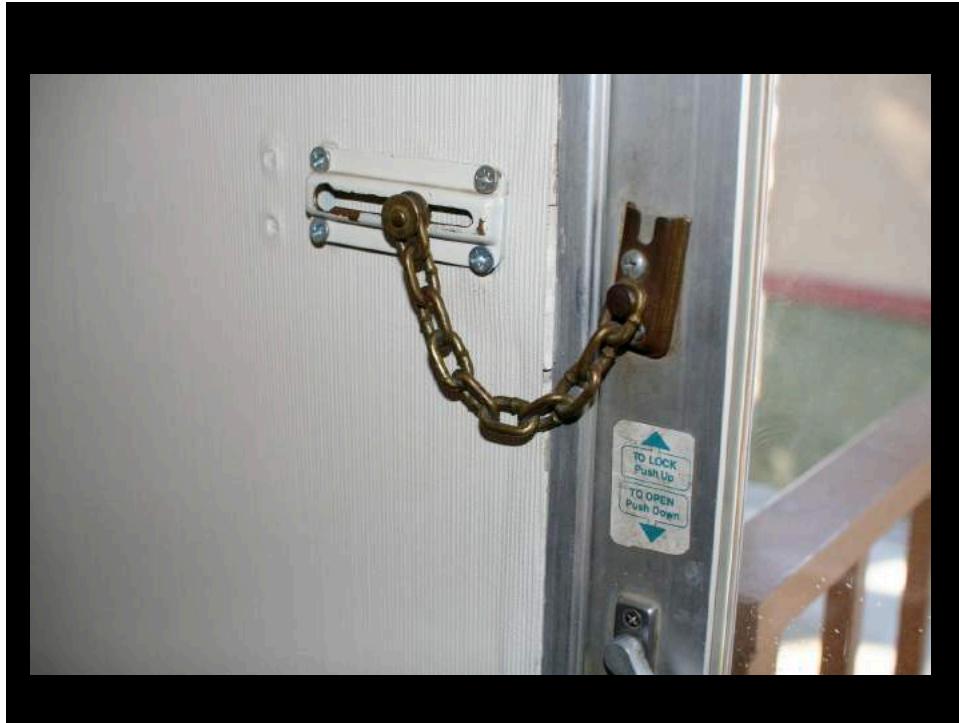
## Fraud - Pleading Requirement

- Fraud must be pled with particularity.
- This is a matter of substantive tort doctrine, and it is independent of Twiqbal requirements.
- This points up a problem for fraud plaintiffs: You need information about how you were suckered to bring a fraud claim. But the very nature of fraud is an intentional concealment of information from the plaintiff.
- This is part of the reason why fraud is a difficult claim to bring and win.

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## Fraud

The Elements:

Review ...

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## **Negligent Misrepresentation**

- Broader than fraud in that it does not require intent.
- But narrower than fraud in that it is only available in a limited range of situations.
- Investment-gone-wrong is a common scenario.

## **Negligent Misrepresentation**

- Be sure to distinguish negligent misrepresentation for negligence claims based on erroneous statements of fact.
  - Negligence claims work for tangible injury person/property (dent or bruise).
  - Casebook ladder example.
  - Negligent misrepresentation works where the injury is purely economic.
  - Negligence generally does not work where the injury is purely economic because of the “economic loss rule”



## Negligent Misrepresentation

In what situations can you bring a negligent misrepresentation claim?

- A negligently made representation made by an accountant or lawyer to a client that is relied upon to the client's economic detriment.
  - This is probably actionable everywhere.
- Possible, but less universal across jurisdictions, is bringing the action as a third-party (not a client).
- Possible, but less universal across jurisdictions, is bringing the action against someone other than an attorney or accountant. Possibilities are:
  - Surveyors, public weighers, real estate agents, persons who stand in a special relationship of trust to the plaintiff

## Innocent Misrepresentation

- Recognized by some courts in very limited situations.
- One such situation might be termites in a house where the seller innocently represented that there were no termites.
- A note for some context:
  - These cases may lack doctrinal clarity. Why invent a new tort when this could be considered a warranty claim? It's not clear.