Causes of Action

Plaintiff's Right to Sue

Introduction

Think of a lawsuit like a recipe for baking a pineapple upside-down cake.

There are certain ingredients you must put in.

One is pineapple.

If you don't include any pineapple in your recipe, you're not going to get a pineapple upside-down cake ... whether you turn it right-side-up or upside-down.

You might get something else, and it might taste yummy, but it won't be a pineapple upside-down cake unless you add the essential ingredient ... pineapple!

NOTICE:
Most teachings in this course apply in both civil and criminal court and both state and federal court.
Some do not.
Refer to *official* rules in your jurisdiction. For example, Google "Florida Rules of Evidence" or "California Rules of Civil Procedure" or "Indiana Rules of Criminal Procedure", etc.
Civil Procedure is not the same as Criminal, but the Rules of Evidence are the same in both.

Note: Rely on *official* rules to know which teachings apply in your jurisdiction. Many apply to both civil and criminal cases. Some do not. Always refer to *official* rules to decide which apply to your particular case in your jurisdiction.

Lawsuits are a bit like pineapple upside-down cake.

Lawsuits also have essential ingredients.

The essential ingredients of a lawsuit are called "elements".

Every lawsuit stands or falls by its elements.

If it's a breach of contract case, it has certain *essential* elements.

If it's a negligence case, it has other *essential* elements.

If it's a slander or libel case, it has still other *essential* elements.

Each different kind of case has different *essential* elements.

The *essential* elements combine to create a "cause of action".

That's what this class will teach you ... causes of action and their elements ... *and you cannot hope to win in court if you don't study this entire class and pass the quiz at the end with at least a "B" or better!*

For a quick introduction, watch this 7 minute video ... *then finish this class.*

Every lawsuit must state at least one cause of action (e.g., breach of contract, negligence, fraud, etc.) that's recognized by the jurisdiction where it's filed ... and every cause of action has certain "elements" the plaintiff (the party bringing the lawsuit) must do two things with:

1. Allege
2. Prove

Each distinct cause of action (The most commonly encountered are listed in this class.) requires its own required ingredients to be (1) alleged and (2) proven - in order for the plaintiff to win.

- If the plaintiff does not *allege* all the elements of a cause of action, the defendant can successfully move the court for an order dismissing the plaintiff's complaint as to that cause of action. If that's the only cause of action alleged in his case, the plaintiff loses, and the defendant wins.
- If the plaintiff does not ultimately *prove* all the elements of at least one cause of action by presenting the greater weight of the "admissible evidence", the plaintiff loses and defendant wins.

That's what lawsuits are all about ... and yet, for some peculiar reason, this truth is rarely taught or is merely glossed over by law school professors (many of whom never went to court as practicing lawyers where they might have learned this truth and stressed the importance of it to their students)!

Many lawyers *never learn this truth!*

Every lawsuit is a battle for evidence to support or refute the elements, depending on which side you're on.

The plaintiff battles for evidence tending to prove the elements he alleged in support of his one or more causes of action.

The defendant battles for evidence tending to prove the plaintiff doesn't have the evidence he needs to prove those elements.

The side with the most evidence wins!

It's all about the "elements".

Each cause of action, like each kind of cake, has different elements.

For example, if you sue (or are sued) for breach of contract, the complaint must allege at least three (3) essential ingredients, the elements of "breach of contract".

1. Existence of an enforceable contract (agreement by the parties).
2. Action by defendant (or failure to act) that constitutes his breach of the contract.
3. Damages to the plaintiff directly resulting from defendant's breach, i.e., the breach was the cause of plaintiff's damages ... and in some jurisdictions that the breach goes to the heart of the contract, i.e., that the breach was "material".

The plaintiff's failure to allege all 3 essential ingredients of his breach of contract case gives the defendant an opportunity to move the court for an order dismissing the case for "failure to state a cause of action".

What do we call such a motion? How about *Motion to Dismiss for Failure to State a Cause of Action?*

See? Like I told you earlier, this isn't rocket science or differential calculus. You *can* learn this stuff and win in court *without a lawyer!*

Of course, simply alleging the essential elements set out in the three-point list above isn't quite enough to effectively state a cause of action for breach of contract. You must allege all "facts" of the case that explain each elements. Only then have you stated a cause of action for breach of contract.

For example, in stating a cause of action for breach of contract you might state all the facts as in the following example:

COUNT ONE: BREACH OF CONTRACT

23. This is an action for breach of contract.

24. On the 1st of April 2011 defendant offered to sell his prize bull to plaintiff for $2,000.

25. Plaintiff and defendant signed a written contract agreeing to the terms of the bargain.

26. A copy of the written contract is attached as Exhibit 1.

27. Plaintiff gave defendant $2,000 in cash.

28. The next day, while visiting a local tavern where defendant goes to drink himself silly every day, plaintiff learned that defendant was bragging how the bull died the week before.

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

30. Defendant failed and refused to deliver the bull alive or return the plaintiff's money.

31. Plaintiff suffered $2,000 in money damages as a direct result of defendant's breach, and the breach was material in that it went to the heart of the bargain in that Plaintiff did not get the bull he paid for.

WHEREFORE plaintiff moves this Honorable Court to enter an Order of Final Judgement awarding plaintiff money damages and such other and further relief as the Court may deem reasonable and just under the circumstances.

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 satisfy all essential elements of the cause of action for breach of contract. Some additional facts may be alleged to put the court on notice what the case is about and what the plaintiff intends to prove ... i.e., what he *must* prove to win. Additionally, some further facts may be alleged simply because when the defendant files his "Answer" to the Complaint, he must admit or deny each allegation, so the Complaint is also used to begin the "Discovery Process" (explained in a later class in this course).

Note: There is more to winning lawsuits than knowing the elements of causes of action, however this is perhaps *the most important thing to know* ... whether you are being sued or suing someone else.

The following pages list many of the most common causes of action you will encounter.

The list is in alphabetical order.

Note: Some causes of action not listed here arise from state or federal statutory law. The essential elements for such statutory causes of action will be stated in the statutes *and explained by controlling appellate court opinions (i.e., "case law") that interprets the statutes*. Your interpretation of what a statute says or what the elements are may not count for much in the heat of battle. It's always best, when tracking essential elements of statutory causes of action, to find appellate court opinions that interpret those statutes and how they control the courts. (Legal Research is covered in another class in this course.)

ALSO NOTE: The elements of some Causes of Action may differ between jurisdictions. Check local rules and case law for specific details before proceeding. The causes of action listed here are for your general information to get you started. Our tutorials on legal research will show you how to find the elements that will determine the outcome of *your* case.

Abuse of Process

A cause of action for the intentional tort "abuse of process" arises when one intentionally uses the legal system to attain a wrongful, unjustified result, thus causing another injury. [A tort is an act that causes injury to another, whether intentional or negligent.]

The term "process" applies to a 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.

The abuse of the court's "process" and injury caused by that abuse gives rise to this cause of action.

The person injured by such abuse has this cause of action (i.e., a right to sue).

As stated above, however, the injured person must properly state his cause of action and support it with all facts necessary to establish the elements listed below.

Suppose Smith sues Jones for fraud just to keep Jones from closing a deal with Miller. Smith believes when Miller sees Jones has been sued, Miller will doubt Jones' honesty and refuse to go forward with the deal. Smith wants to stop the deal, so he abuses legal process to attain a wrongful result.

In order for Jones to sue Smith for abuse of process, however, Jones must show that

1. Smith intentionally used the legal system to attain a wrongful result,
2. That Jones was not guilty of fraud, and
3. Smith knew (i.e., Smith acted intentionally) that Jones was not guilty of fraud.

If Jones was, in fact, guilty of fraud that caused Smith money damages, then Jones cannot sue Smith for suing Jones, 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. The act of using the courts for an improper purpose (i.e., a purpose the law never intended) is a wrong for which injured persons need an opportunity seek redress of their grievance in the courts.

If Smith had a legitimate purpose for suing Jones for fraud, there's no perversion, and Jones has no cause of action for abuse of process.

If Smith did not have a legitimate purpose for suing Jones for fraud, then Jones has a cause of action (i.e., right to sue) for abuse of process against Smith.

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 abuse of process that Smith *intentionally* proceeded against him and did so for an *improper purpose*.

Maliciousness is irrelevant. It is the improper purpose that gives rise to the cause of action, 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 facts sufficient to establish the following essential 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 damages as a proximate result.

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

Defenses

Absolute Immunity

So long as the acts of the court or a judge have 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). Process must be used for an improper purpose. No act occurring prior to issuance of the court's process can give rise to this 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 which the law intended. If process is used to accomplish a proper result (e.g., bringing a civil defendant before the court to answer a complaint that's predicated on a legitimate cause 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.

Frequently, abuse of process arises from a form of extortion, i.e., used to compel another to do something he would not otherwise be lawfully compelled to do. If the one using 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 bringing 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 mere retaliatory tactic without merit in its own right), the party filing the counterclaim may be sued for 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.

Accounting

A cause of action for an accounting arises where there is a fiduciary relationship [a relationship based on trust that the law recognizes] such as where one party has a dispute with a guardian, trustee, receiver, or other fiduciary who has control over assets of the complaining party.

An accounting may also be ordered where issues in a contract case, for example, are so complicated it's not clear if the facts can be ascertained any other way and where terms of the underlying contract provide for an accounting to be ordered in the event of a dispute.

When the complaining party has no separate access to the records, such as where a fiduciary (e.g., a trustee or guardian) has control of the books, an accounting will almost never be denied, since the complaining party has no other way to know if the fiduciary has performed his duties faithfully and not squandered or otherwise used assets wrongfully.

Elements

To successfully plead for an accounting, one should allege sufficient facts to establish the following essential elements of the cause of action:

1. Existence of a fiduciary relationship or contract terms so extensive or complicated it is not clear that money damages alone are adequate.
2. Circumstances indicate necessity for an accounting to be made and reported to the court.

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 ordered.

Defenses

If the matter for which the other party seeks an accounting is simple on its face, e.g., an oral agreement for performance of a clear-cut duty that involves no fiduciary entrustment of assets, this defense should be raised with a motion to strike or motion to dismiss.

Comments

The remedy of an accounting is almost always granted by a judge or by a special master appointed by a judge. Accountings are never submitted to a jury, unless the court deems that justice demands that a jury try the facts and reach a determination on the facts. The application of law is the judge's province.

Winding up of partnerships, for example, frequently requires an accounting to determine the respective parties' interests in the assets of the terminated partnership.

An accounting may also be necessitated when a closely held corporation's business comes to a standstill because of decision deadlock between directors.

Account Stated

This cause of action arises where parties engaged in a prior extended course of dealing (i.e., long-standing history of commercial transactions) and debtor refuses to deny amount claimed by creditor's demands.

If creditor makes demands (e.g., periodic invoices) and debtor does nothing to acknowledge amount demanded and refuses to pay, creditor can bring this cause of action to collect the debt based on the defendant's prior dealings with plaintiff.

The longer the course of prior dealing, the easier it is for the plaintiff to win.

This cause of action is often abused by people unfamiliar with its elements. Many mistakenly believe they can "invoice" someone for a debt, stating 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 naïve 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 allege sufficient facts to establish the following essential elements:

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 defendant is clearly obligated to pay) does not give rise to an action for account stated.
2. When 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 time. (The term "reasonable" is a concept essential to our American system of justice.)
4. Plaintiff suffered damages as a proximate result.

Defenses

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

If there was a prior course of dealing and a long history of periodic billing defendant timely and routinely paid over an extended course of time before receiving the invoice(s) in question, defendant is put to the difficult task of proving (1) he did not assent to the amount of debt stated in the invoice or demand, (2) he had no obligation to do so, (3) 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 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

Assault is merely a threat to do physical harm coupled with the present ability to cause the threatened harm.

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 when the plaintiff 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 the resultant actual injury is called "battery", covered later in this class.)

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

On the other hand, if I walk up to you in a tavern, beer bottle clenched in my uplifted fist, and shout angrily just inches from 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 allege sufficient facts to establish the following essential elements:

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.
5. Plaintiff suffered damages as a proximate result.

As you now 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 to 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 essential elements of this cause of action.

It is up to the plaintiff to allege all facts particular to the circumstances that are necessary to establish each element in his complaint. If he omits any ultimate fact necessary to establish any one of the elements, the defendant can move the court for an order dismissing the plaintiff's complaint for failure to state this cause of action.

Comments

Keep in mind this cause of action arises not from actual physical violence but from defendant's threat to do violence. And, moreover, there must be a reasonable 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. 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. You started it.

Any communication or act done in defense of property is a defense. Thus, if you're 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 one person tells 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.

Threats to cause mortal injury by lethal force, however, are *only* justified in response to 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 question of fact for a jury.

One cannot be excused for threatening to kill potato thieves.

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

Respond with force or threats of force only when absolutely necessary and only in degree as the threat demands.

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 possible severe criminal charges.

Assumption of Duty

An action taken for the benefit of another, whether for payment or not, imposes a duty and imputes knowledge of that duty on the person taking action to do so with reasonable care.

Failure to exercise reasonable care when assuming a duty to assist another gives rise to a cause of action for assumption of duty.

In law school they told us of a young man enjoying sunshine on a crowded beach when a frightened cry for help is heard beyond the breakers. Dashing to the water's edge our would-be hero plunges into the surf ahead of several other strong swimmers *who might otherwise have attempted the rescue but for seeing our hero already several yards ahead of them powerfully pulling toward the thrashing victim.*

Just a few short yards short of reaching the frantic, grasping victim our would-be-man-of-the-hour suddenly realizes the mortal danger into which he is putting himself and turns back, leaving the hapless victim to fend for herself without his aid.

Seeing the young man shirk his assumed duty, the strong swimmers strike out valiantly on their own in hopes of reaching the drowning victim in time.

A moment later, however, the struggling soul disappears beneath the waves, forever lost.

Some say the first fellow who started to the rescue had no duty to complete the task. They say he should not be held liable for the drowning since, after all, he had no duty to begin the attempt.

Our courts uniformly hold otherwise.

One who undertakes to act for the benefit of another is deemed by our system of justice to have assumed a duty to do so with reasonable care.

If our swimmer had not begun his rescue attempt in the first place, he'd not be deemed to have assumed a duty. The bereaved family of the drowning victim would have no cause of action against him. However, since his aborted attempt dissuaded others from making the attempt, he *is* responsible.

He assumed a duty. He breached the duty. Damages resulted.

A cause of action for assumption of duty arises accordingly.

Elements

It's 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 assistance to someone in distress or difficulty. Read carefully:

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 foreseeably increased plaintiff's risk of harm.
4. Plaintiff's harm proximately resulted from reasonable and justifiable reliance on defendant's undertaking to render services.

Our courts have settled this 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 will be deemed by our courts to have assumed a duty to do so with reasonable care, and you can be held liable for injury to that person resulting from your failure to act with reasonable care.

Defenses

Good Samaritan Act

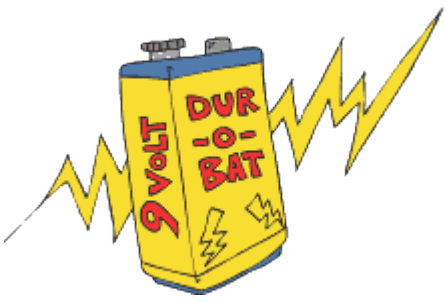
Some jurisdictions have enacted statutory clarifications that limit liability of persons who gratuitously [i.e., without charge or anticipation of financial gain] render assistance, medical or otherwise, in "emergency" situations. These statutes do not remove liability for those who act without reasonable care but clarify the standard of care that must be observed. Be aware of these statutory clarifications in your jurisdiction and controlling 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, our 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

Battery is a cause of action that arises when plaintiff suffers harm or humiliation as a proximate result of being touched - whether violently or gently - without an invitation or legal justification.



It's not necessary for the touch to cause physical injury.

Herein be warned.

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 an index finger to punctuate what he was saying. She'd demanded he use left-over remnants from the living room to carpet her hallway (a demand outside their written contract). She raised her voice demanding compliance when he refused. He merely touched her on the shoulder. That was the excuse she needed. She sued him for battery. He did intend to touch her. She did not invite him to touch her. She deemed the touch offensive, mild though it was. As his lawyer, I was able to prevent her from getting a judgment, however the damage to his business and consequent emotional strain on his family resulted in great suffering.

All because he touched someone with the tip of his index finger without being invited to do so!

That's battery.

Beware!

Elements

To successfully state a cause of action for battery, one must allege sufficient facts to establish the following essential elements:

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

The degree of force is immaterial, except as it may be considered 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 offensive and unauthorized!

Comments

Negligently touching another (i.e., without intent) 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 element that must be alleged as part of the pleadings and proven before the plaintiff can win.

Defenses

Insanity

Since intent is a requisite element for the tort of battery, insanity (or extreme intoxication) may be a defense. The question is one of degree, i.e., whether 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.

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 a physical response is typically a jury question.

If possible to withdraw from threatening situations, wisdom counsels you to do so, rather than 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. 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 Contract

Essentially, breach of contract arises where the defendant acts as if no contract ever existed!

Here are the essential elements:

1. Existence of an enforceable contract,
2. An act or failure to act that breaches the duty imposed by the contract.
3. Damages to the plaintiff proximately resulting from the breach.

What could be simpler?

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

Enforceability

First, a contract must be enforceable to provide the basis for a suit.

Many contracts aren't enforceable.

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 sale of goods valued at more than $500 cannot be enforced in most jurisdictions unless committed to a writing signed by the defendant.

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.

Justification

Second, the breach must be committed without justification.

For example, Tom promises to deliver 75 bushels of apples to Bill on Tuesday for $25. Tom shows up a day late with the apples. Bill has no obligation to pay. Tom has no cause of action for breach of contract. Tom breached first.

Nexus

Finally, there must be a direct "nexus" (i.e., connection) between the damages suffered and the breach. In other words, the damages must be a *proximate* result of the breach.

Consequential or incidental damages are ordinarily not recoverable in a breach of contract action.

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 mill wheel crankshaft repairman.

The learned appellate judges wrote in their opinion, "We think 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 mill wheel shaft was being repaired. He only undertook to repair it as quickly as was reasonably within his power to do, so 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 ... damages that proximately result from breach of the duties promised by the contract itself *and nothing more*.

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

As stated at the beginning of this class, merely listing the elements (as opposed to all of the facts necessary to establish the elements) exposes the complaint to the defendant's successful motion to dismiss.

Sufficient facts must be alleged to establish each essential element as a matter of law.

Comments

When does a contract arise?

What constitutes a contract?

These questions should be understood by all parties involved in a breach of contract case.

A contract arises when 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 class, there was no meeting of the minds about the bull being dead or alive. The buyer reasonably believed the bull was living. The seller

knew the bull was dead. There was, therefore, no meeting of their minds. No enforceable contract can arise where there is no meeting of the minds. If the seller delivered a dead bull and demanded his $2,000, the buyer could refuse to pay without being liable for breach of contract.

There can be no enforceable contract without an exchange of promises *and* a 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, 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 are beyond the scope of this class. Later in this course you will find a class dedicated to the law of contracts. In the meantime, let's continue learning about causes of action.

All foreclosure cases are contract cases. What you learn in this class will help you with foreclosure cases as well as all other contract cases. The promissory note is a contract, and the mortgage securing payment of the note is a contract. Apply the same principles to foreclosure cases that you would apply to any other case arising from breach of contract.

Defenses

Abandonment

If the plaintiff abandons his contract 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. Another class in this course covers affirmative defenses in detail.

Act of God

If hurricane, lightning, flood, or other unforeseeable and *unpreventable* natural circumstance makes performance of a contract impossible, there arises a defense to breach, as defendant is unable to perform due to causes beyond his control.

Breach by Other Party

If plaintiff breaches first (e.g., refusal to pay sums when due) there arises a defense to his complaint that should result in dismissal. Where there is only a partial breach, however, 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 its obligations. Such a contract is voidable if the defendant can prove he entered it under duress.

Failure of Consideration

A plaintiff who does not pay the purchase price, for example, is not entitled to sue for delivery (unless the contract contemplated delivery would be tendered before full payment). 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 in the class on defenses. Like causes of action, such defenses have essential elements that must be alleged 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 complain about the breach. It's that simple!

Illegality

No contract that's 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 they enjoyed 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 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 Implied Covenant of Good Faith

Many jurisdictions tighten the obligations of contract by adding what they call an "Implied Covenant of Good Faith and Fair Dealing".

In those jurisdictions a court may award money damages to plaintiff if defendant takes any action to "interfere" with plaintiff's ability to enjoy plaintiff's reasonable expectations in the bargain

... even when that "interference" does not expressly *breach* the contract. This cause of action often arises when there is some ambiguity as to the terms of a contract, and the defendant takes advantage of the ambiguity causing plaintiff loss, benefiting defendant unfairly.

If plaintiff can prove defendant acted unfairly, the court may award plaintiff money damages.

Suppose for example plaintiff, while visiting defendant's farm, saw a handsome strong-backed work horse grazing in a field. Plaintiff, being in need of a work horse offers defendant $450 dollars for the horse, defendant accepts, plaintiff tenders the cash to defendant, and defendant grabs a halter from a nearby fence post and enters the field whistling for the horse to approach.

The horse does not move, so defendant walks up to the horse, applies the halter, leads the horse through the gate, and hands the halter to the plaintiff saying, "Congratulations! She's all yours!"

As it turns out the handsome horse is blind and deaf.

Now the contract *per se* had no conditions other than payment of $450 and delivery of that particular horse, so defendant has not truly *breached* the contract.

However, plaintiff (in some jurisdictions) has this cause of action for breach of the implied covenant of good faith and fair dealing.

Here are the essential elements:

1. The parties enter into an *otherwise* enforceable contract,
2. Plaintiff performed his part of the bargain.
3. Defendant's conduct was not consistent with plaintiff's *reasonable* expectations under the *specific* terms of the contract.
4. Plaintiff suffered money damages as a proximate result.

Breach of Fiduciary Duty

No person should gain advantage by abusing another's trust.

When one person entrusts another with assets (or even his well-being, as in the case of a guardian), then by accepting that trust the second person is deemed to have a duty to carry out that trust in good faith.

Good faith does not admit of self-dealing.

Thus, if defendant acquires and then abuses his influence of trust over plaintiff or plaintiff's property, then if plaintiff suffers damages as a proximate result, the plaintiff has a cause of action for breach of fiduciary duty.

The term fiduciary comes from the Latin for "faith". *Semper Fidelis*, the motto of the United States Marine Corp, comes from the same root. A fiduciary can be a trustee, a guardian, or simply someone who is put in charge of something or someone with an obligation to carry out his charge faithfully.

A fiduciary is one in whom others entrust their faith.

If that faith is abused to the plaintiff's injury, this 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 proximately caused by the breach of fiduciary duty (i.e., 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. Nor does it require either to disclose facts the other could have discovered by reasonable diligence.

A fiduciary duty arises *only* where one party places trust in another, and the second person, explicitly or implicitly, assumes the obligation of trust.

For example, suppose I say to you, "Would you hold my bicycle while I go in this shoe store for a few minutes?"

Suppose you say, "Sure!", and agree to "hold" the bicycle during my absence.

If you get tired of waiting for me and decide to go home, leaving my bicycle to fend for itself in front of the shoe store, then if someone steals my bicycle "as a proximate result" of your breaching the fiduciary duty *you agreed to*, then I will have a cause of action for breach of fiduciary duty. The measure of damages will be the fair market value of my bicycle as of the moment you assumed the fiduciary duty to "hold" it during my temporary absence.

To establish that a fiduciary duty existed, plaintiff must allege he placed trust in the defendant and defendant accepted that trust.

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

Conspiracy

To prevail in an action for civil conspiracy, one must allege and prove two or more persons acted in concert to cause a wrong for their own advantage.

- two or more conspirators

- acting in concert
- to cause a wrong
- for their own advantage

They don't even have to communicate with each other!

At least one of them must commit at least one wrongful overt act with a shared goal to disadvantage the plaintiff!

Each must seek advantage for himself to be liable for plaintiff's damages.

The overt act(s) must be unlawful, willful, or malicious (a broad range of behavior).

When pleading conspiracy, one must also plead at least one additional count seeking damages for the wrongful act(s). That is to say there must be some "underlying wrongful act", such as tortious interference with an advantageous business relationship. An action for conspiracy alone is without basis and will be dismissed.

Plaintiff may sue for one or more other causes of action, adding a final count for conspiracy in which he alleges the wrongs were committed in concert by multiple defendants seeking their own advantage.

Elements

1. Intentional commission of an unlawful act or a lawful act by unlawful means by the combined effort of more than one actor. The acts need not be criminal, so long as they are forbidden by civil or criminal law. An intentional tort like fraud, for example, is sufficiently unlawful.
2. The acts complained of must be in furtherance of the conspiracy. Any act that does not advance the goal of the conspiracy is not conspiratorial.
3. Overt acts by each conspirator. Mere agreement or consent to the act of another isn't enough.
4. Damage to plaintiff resulting proximately from the conspiratorial act(s).

The gist of conspiracy is not the conspiracy itself, for the conspiracy alone causes no damage. It is the damage, accomplished by the conspired acts of multiple persons acting in concert to further the conspiracy, that gives rise to this cause of action.

One person cannot conspire.

Comments

Civil conspiracy arises from an agreement, confederation, or other combination of two or more persons. Each must intend some benefit to himself resulting from the intended wrongful act. The meeting of two or more independent minds must be intent on one purpose, and those two (or more) must perform overt acts in furtherance of the conspiracy.

The benefit need not be money or property. The benefit could be advantage over or destruction of a circumstance previously enjoyed by the plaintiff, such as a business advantage or opportunity.

The benefit proves intent ... *an essential element of this cause of action*.

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 both Bob and Harry liable for Sam's damages. It is as if Bob and Harry each acted alone. The law deems that each conspirator is jointly and severally liable for all damages caused by acts of the coconspirators.

The act of one is the act of all!

A mafia boss who orders a hit commits murder, though he is nowhere near when the killing occurs. If he furthers the act of the hit man by promising to pay for the kill (by money, property, or any advantage) the law treats him as if he pulled the trigger in person.

The same applies in a civil conspiracy.

A businessman who promises to pay officers of a competitor firm to walk out and take the competitor's business records, thereby destroying the competitor's business, is liable for civil conspiracy. His overt act is the promise to pay for wrongful acts of coconspirators. The damaged plaintiff would sue for the damages he suffered by the underlying act of the walkout and theft of his records and would add a count for civil conspiracy that could result in punitive damages in addition to his actual money damages.

Constructive Fraud

If a person of weakened mental ability signs a deed transferring his or her home to another for no money or substantially less than the home is worth, a presumption of constructive fraud arises, and this cause of action lies for suit to be brought in court.

This cause of action arises where the defendant enjoys a position of trust with the plaintiff (e.g., a lawyer or guardian) or the plaintiff suffers mental weakness or similar infirmity that prevents her from understanding the nature of what she's doing.

This action arises in equity seeking an injunction to prevent plaintiff from suffering damages or, if the damage is already done, seeking an order for money damages or otherwise restoring the plaintiff to the condition enjoyed before the act complained of.

Constructive fraud may lie even when the defendant had no 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) is displaced in modern times by society's need to protect innocent people from suffering loss as a result of unjustly enriching others. The weakness of the person needing protection may be ignorance, inability to understand, or misplaced trust - whether or not the one benefitting is aware of the wrong.

This duty each of us owes to all others arises from moral, social, domestic, and personal obligations imposed by equity in our courts. It is from this common law duty of fairness and the need to protect

innocent people from the consequence of their own weakness that the cause of action for constructive fraud was created by our courts.

Some courts refer to this cause of action as unjust enrichment (covered later in more detail).

Elements

1. Plaintiff, through no fault of her own, reposed trust in the defendant.
2. Defendant abused the trust, obtaining unjust enrichment from plaintiff's loss.
3. Plaintiff suffered damages as a proximate result.

It's not necessary for defendant to occupy a relationship of trust with plaintiff, however such a relationship does strengthen plaintiff's case, for the cause of action arises from defendant's abuse of plaintiff's trust ... imputed, implied, or actual.

This cause of action may arise from misrepresentation or concealment, however such is not necessary, so long as defendant gains an improper advantage that equity abhors as wrong.

Facts that can give rise to an action for constructive fraud are widely varied, but in every case defendant must be proven to have taken unjust advantage of plaintiff.

(See also Fraud)

Conversion

Conversion arises when defendant, without permission or lawful authority, takes possession of "tangible personal property" rightfully belonging to plaintiff.

Conversion takes place at the moment of unlawful possession.

It doesn't matter whether defendant retains possession of the property or promptly or belatedly returns it. It matters not if possession is temporary. If defendant takes possession of any tangible personal property of plaintiff, even for only a few seconds without permission or lawful authority, the thing possessed has been "converted".

Once conversion is made, this cause of action will lie. Defendant cannot un-ring the bell by returning the property.

Tangible personal property includes (but is not limited to) such things as a bicycle, boat, airplane, and or prize bull ... dead or alive.

Money is personal property but is not *tangible* personal property.

A dollar bill is a negotiable instrument, not unlike any other dollar bill. It is not normally considered to be "unique". And, like other instruments (e.g., deeds, mortgages, and such like documents that merely "represent" assets but in and of themselves have no intrinsic value) money is considered *intangible* property.

The wrongful taking of money, therefore, does not give rise to an action for conversion, because money is not "tangible personal property".

An exception is a collection of rare coins or some other identifiable currency having value inherent in the particular *tangible* thing that it is. A dollar bill might be useful to play a game of fool's poker with, or it could be used to stuff into crack in the wall to keep out drafts, but it is not unlike any other dollar bill and has no inherent value other than some strange use to which any other dollar bill could be put.

The wrongful taking of ordinary money, therefore, may give rise to an action for civil theft, but an action for conversion will not lie unless the "money" is rare coins or such like having a uniquely inherent value so it can be treated as "tangible personal property", like a bicycle, boat, airplane, or prize bull.

The gist of conversion is the exercise of dominion or control over the tangible personal property of another that is inconsistent with the owner's right of possession, i.e., *depriving the rightful owner of possession without the owner's consent or other lawful authority.*

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

Houses, barns, buildings, things attached to them and the land they sit on are "real property", not personal property, and therefore cannot be converted.

Elements

1. Deprivation of 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 demand would be futile, i.e., without effect.)
3. Proximate damages to plaintiff.

Demand and refusal is an essential element in some, but not all, jurisdictions. To overcome the necessity of this element (in jurisdictions that permit) plaintiff must show evidence that demonstrates the futility or impossibility of demand. Mere alleging the effort is not enough. Facts must be alleged and proved.

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

The measure of damages 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 plaintiff gave defendant permission to possess plaintiff's tangible personal 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 may be a defense *in some jurisdictions* if defendant can show he lacked intent to convert and would have returned the property promptly if plaintiff had demanded its return.

The defense may lie where defendant mistakenly believed he had a right to possess. Check local case law to see if this defense applies in *your* jurisdiction.

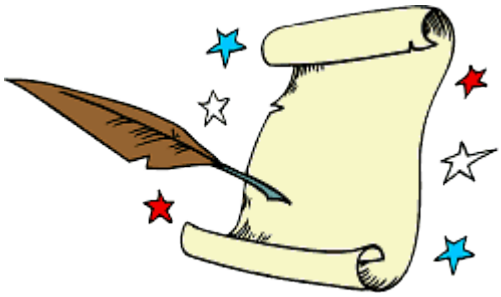
Money

Money being a fungible item (like grains of wheat in a Kansas silo) conversion will not lie unless the particular instruments of money can be uniquely 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 defendant can show that plaintiff had no ownership interest in the property at time of conversion, this defense arises. Only plaintiffs with ownership interests in the tangible personal property can prevail with this cause of action. Arguably, one who purchases property from another who converted it from its rightful owner does not have this cause, because the one from whom he purchased the property had no lawful ownership interest to sell.

Declaratory Judgment



A cause of action for declaratory judgment does not seek money damages.

Instead, it seeks to have the court declare something.

Not too complicated so far?

You might file an action for declaratory judgment to settle a dispute over what is or what 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). Jones is covered by a business liability policy he believes should pay for his defense in the lawsuit. Jones believes the insurance company should be liable to pay Smith, if Jones loses the case.

The insurance company, on the other hand (as insurance companies do), wishes to avoid payment by finding every possible loophole to evade that responsibility. The insurance company may believe Smith's lawsuit involves an intentional tort (tortious interference is an intentional tort, not one arising from mere negligence) and that its policy does not protect policy-holders from damages resulting from intentional acts.

In such cases it is common for insurance companies to file an action seeking a declaration that its policy does not cover the losses Smith claims.

The action is to determine rights of parties in dispute, not to award money damages.

Declaratory actions can only be brought in narrow circumstances.

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 or equitable relationships.

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

Elements

A party seeking declaratory relief must allege and ultimately prove that:

1. There is a *bona fide*, actual, present, practical need for the declaration sought.
2. The declaration deals with present, ascertainable facts or a present controversy as to such 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 law applicable to the facts.
4. Some person has or may have an actual, present, adverse, and antagonistic interest in the subject matter 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 legal advice from the court or an answer to questions founded merely in curiosity.

The first issue to be decided by the court (and first issue defendant should raise in his allegations to avoid immediate dismissal of the action) is whether plaintiff is entitled to a declaration. Each of the foregoing elements must be alleged, or defendant will succeed with a motion to strike or dismiss the complaint. The fact that the court may refuse to declare what the plaintiff seeks, or to declare otherwise than what the plaintiff wishes, does not divest the plaintiff of his day in court *if each of the elements is alleged and reasonably provable.*

Unless 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 but also lacks jurisdiction to entertain the action. In such cases the court may dismiss the action *sua sponte* (i.e., on the court's own initiative).

Defenses

If what plaintiff seeks amounts to an advisory opinion based on hypothetical facts which have not arisen and are only contingent, uncertain, and rest entirely in the future, the court lacks jurisdiction to entertain the complaint.

Defamation

A cause of action for defamation arises when plaintiff is damaged by shame, contempt, hatred, or loss of reputation as a result of defendant's false, unprivileged communication.

Plaintiff's money damages are computed from injury in his occupation, business, or employment. If there are no calculable money damages, the action may still lie for "nominal damages" when plaintiff believes it is worthwhile to pursue the action for nothing more than to clear his name. More on this below.

Merely bringing shame to an individual by publishing facts that are *true* does not give rise to this cause of action.

Defamation only arises where defendant publishes *false* information about plaintiff.

If the proximate consequence of the published falsehood causes injury to the plaintiff in his personal, social, official, or business relationships, wrong and injury are presumed or implied. Such publication is said to be actionable *per se* (i.e., in itself, taken alone, without more).

If publication is in print, as in a letter or newspaper article, the defamation constitutes libel (see below for more).

If communicated verbally, as by a TV newscaster or politician making a speech or even one gossip on the phone with her gossipy friend, the defamation constitutes slander (see below for more).

Both libel and slander constitute 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 a lack of reasonable care as to the truth or falsity of the communication).
4. Publication is actionable *per se* or publication proximately caused plaintiff provable or presumable damages.

The most important thing to consider before filing suit on this cause of action is determining the amount of 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 defamatory statement was false (for whatever value that may have by itself). Plaintiffs suing for defamation frequently spend thousands on costs and legal fees only to recover a nominal amount ... because they cannot prove actual damages (e.g., loss of a job or business opportunity).

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, "Thief", as you ride away on your bicycle after delivering his paper, it's not likely this cause of action will win you enough money to make it worth your while.

Courts sometimes award one-dollar ($1) as "nominal damages" in defamation cases to establish on the public record that a defamatory publication was, in fact, false. But, such a judgment will not likely provide anything in the way of financial compensation for the trouble and embarrassment one must go to bringing one's dirty laundry into the public arena.

If in doubt about the ability to prove the amount of money damages proximately resulting from a false publication, unless it's extremely important to prove the falsity 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 injure you! Unless you can prove the false statement was communicated with actual malice, you are unlikely to prevail.

This is why we so often hear comedians making fun of public figures, saying things certainly unlikely to be true, yet doing so "in jest", knowing they cannot be sued.

Unless actual malice (intent to cause injury) can be proven, a public figure cannot bring an action for defamation. [I personally disagree with this legal doctrine, however it's been the law of the land since the U.S. Supreme Court decision, New York Times v. Sullivan, 376 U.S. 254 (1964).]

Defenses

Truth

If the allegedly defamatory statement is true, there can be no action. Plaintiff has the burden of proving falsity. Defendant does not have the burden to prove truth. This raises an important fact about arguments in general. It is far harder to prove a falsehood than to prove a truth. This is yet another reason why one should consider carefully before bringing an action for defamation except in the most extreme cases where it is absolutely 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 First Amendment proscription against government being entangled with religion. If an allegedly defamatory statement is so entangled with religion that the court would be unable to sort out the truth without crossing the line, the case may be dismissed *ab initio* (i.e., from the beginning).

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 of action.

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

Public Official

If the would-be plaintiff is a public official, he must prove defendant acted with actual malice, i.e., intent to injure by making false statements. Actual malice is proven by showing the false 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. As stated above, wisdom counsels against suing except where absolutely necessary.

Pure Opinion

Everyone is entitled to an opinion, and opinions are not actionable *if expressed as opinion and not fact*.

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*** a 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 both a cause of action and a defense. [Duress as a defense is explained in the Defenses class.]

Duress arises where defendant "forces" plaintiff to take some action damaging to the plaintiff *under circumstances that allow no other reasonable course*. This cause is also sometimes called coercion.

Coercion is not a proper way to get others to do things ... not if you wish to hold them legally to the consequence of what they do.

If defendant coerces plaintiff to do something injurious to the plaintiff, the plaintiff has a cause of action for duress to recover his damages.

If, on the other hand, Smith is coerced by Jones into signing a contract, and Smith refuses to perform the terms of the contract, and Jones sues Smith for breach of contract, then Smith has the affirmative defense of duress (i.e., an opportunity to argue Smith should not be bound, since the contract was obtained by duress). [More on this in the Affirmative Defenses class.]

Now, suppose Smith was coerced into signing a deed to his home over to Jones. Suppose Jones held a loaded shotgun to Smith's head. A few days later, Smith has an opportunity to sell his home, but the deed recorded at the courthouse shows Jones is the owner. Under these circumstances, Smith has a cause of action for duress to set aside the deed transfer and, possibly, for money damages as well.

The issue of fact before the court in such cases is always whether and to what extent the power of duress was in fact irresistible. This is another way of asking if the party claiming coercion had alternative choices by which he might have avoided the consequence. If there were reasonable alternatives to submitting to duress, the cause of action will not lie.

For example, if Jones says to Smith, "I won't go to the prom with you unless you sign this contract," that's not sufficient grounds for coercion. Attendance at the prom is not an unavoidable imperative.

On the other hand, if Jones says to Smith, while pointing a loaded .38 revolver to the Smith's head, shouting insanely, "Sign zee paper, old man!" a cause of action for duress will lie. The coerced party will prevail *if and only if h*e can prove he had no reasonable alternative by which he could avoid being shot!

The dividing line between these extremes is somewhere in the middle.

What must the court decide?

Too far toward the threat of missing the prom, and plaintiff's case will fall apart from the start.

Too far toward the threat of having a pistol bullet smash through the skull, and the plaintiff will most surely win *if and only if* he can prove the threat was real and no reasonable alternative was available.

Elements

The elements are simple to explain but difficult of proof.

1. One side involuntarily accepted the demands of another.
2. Circumstances permitted no reasonable alternative.
3. Plaintiff suffered damages as a proximate result.

Note how the word "reasonable" is used.

The old man coerced at gunpoint could disarm the threat by unscrewing a table leg and beating the crazed madman senseless, 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

smelly and noisy animal, that he's being forced to raise tomatoes under duress. If the pig farmer has a legal right to raise pigs, however, the tomato farmer has no cause of action whatever.

Reasonable Alternative

If a plaintiff claims he was coerced into signing a contract by defendant's threat to punch plaintiff in the nose during a long-distance phone call from another city 500 miles away, the court will conclude the threatened party had reasonable alternatives. The cause of action will fail.

Free Choice

If a defendant allegedly threatening the plaintiff can show the plaintiff acted out of his own will, i.e., that the act did not result from any threat, then the plaintiff alleging to have acted under duress loses.

Comments

Duress is similar to undue influence, another cause of action arising where free will of an individual is overcome by the 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) plaintiff must do more than merely state a falsehood. (See Fraud)

It's true that making a false statement is fraud, however it is not "actionable fraud" without more than mere falsehood.

Merely lying doesn't by itself give rise to this right to sue.

In order for a plaintiff to have a live cause of action for fraud, it is necessary the lie be coupled with other elements. Only then can a court award plaintiff money damages proximately resulting from the fraud.

Moreover, the underlying facts pled in a complaint for fraud must be very specific. Failure to set out the facts of the fraud with *specificity* will result in losing the case. General allegations of fraud routinely result in the court's granting the defendant's motion to dismiss for failure to state the cause of action. Plaintiff must precisely specify the facts that establish each of the essential elements of this cause of action.

Elements

1. Defendant made 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 statement.
4. Defendant intended plaintiff to act in reliance on the false statement or showed a reckless disregard for the consequences to plaintiff.

5. Plaintiff reasonably relied on the statement in acting upon it. (Some authorities say the plaintiff's reliance on the false statement must be "justified". Reasonable or justified, it is the same. Plaintiff must act reasonably in relying on the false statement.
6. Plaintiff suffered damages as a proximate result.

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 prickly pineapples and buggy 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, and should plead both in separate counts, as explained elsewhere in the course.)

This cause is sometimes called misrepresentation.

See also "fraud in the inducement" below.

Defenses

The following may be defenses to a cause of action for fraud. See the class on defenses to learn more.

Bad Faith

In some jurisdictions, the courts require a showing that the false statement was made in "bad faith" or with reckless disregard for the reasonably foreseeable consequence of relying on the statement.

This is not necessary in all courts. Check controlling case law in your jurisdiction.

Class Actions

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

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 plaintiff should never receive a benefit from his 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 breach of contract. 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 someone intended never to perform is a steep hill to climb. See "fraud in the inducement" below.

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", though these statements are not technically *true*, they are treated as statements, they are considered statements of the salesman's opinion.

This is called "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 a car salesman, on the other hand, claims "actual mileage" is only 9,827 miles when he knew the mileage is actually 109,827, a cause of action certainly does arise. If buyer can prove the fraud, 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 the omission of a material fact was intentional and for the purpose of misleading another, the cause will lie.

For example, if the seller of a home omits to advise buyer that the roof leaks profusely when it rains, that omission will be considered material to the value of the house and give rise to a cause of action for fraud.

The question for the court is whether and to what extent the omission was material and, of course, knowing and intentional.

If seller doesn't know his roof leaks, there's no cause of action for fraud.

If seller knew (or, in some courts, if he *should* have known) the materiality of the reduction in value of the house by a leaking roof is such the court will impose a duty on seller to report the hidden defect or be liable to the buyer for fraud.

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

1. Defendant actually knew the statement was false. To prove this, of course, plaintiff must show defendant had actual knowledge the statement was false, i.e., that defendant knew at the time that the statements were not true.
2. Defendant had no knowledge the statement was false. To prevail in this circumstance, 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. For example, fraud arises if an office supply salesman claims, "This printer holds 250 sheets of blank paper and prints in 256 colors," and it is later discovered the printer holds only 50 sheets and only prints black-and-white. Such specificity overrides opinion. The salesman and the company he works for will be held liable for such specific false statements.
3. Defendant should have known the statement was false. To prevail here, plaintiff must show defendant possessed special knowledge about the subject matter or occupied a special position that imputes to him the knowledge of such fact, whether he knew or not. Fraud arises, for example, 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 of the bank president imputes to him the duty to know what he says about such particulars material to the bank's assets and operations.

Fraud in the Inducement

Fraud in the inducement is a sub-category of fraud that includes all the elements of common fraud but applies where 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 "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 goods sold arises when plaintiff has sold *and delivered* goods to defendant, and defendant who refuses to pay for the goods.

In certain jurisdictions plaintiff may be entitled to interest on the unpaid price from 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 refused to pay.
4. Plaintiff suffered damages as a proximate result.

That's all there is to it.

If the goods are not as described, defendant may have a defense, however the goods cannot be retained unless paid for at the stated price or negotiated price.

If defendant can show the goods were never delivered, defendant has a defense. For this reason, it is *always* a good idea to get a receipt for delivery of goods yet to be paid for.

Infliction of Emotional Distress

The gist of this cause of action is to compensate victims of conduct that inflames the sense of human decency.

This cause of action may lie to award money damages to plaintiff, whether defendant actually intended the injury or simply acted with a reckless disregard for the consequence to others. So, although the cause includes the word "intentional", keep in mind the intention is imputed to the wrongdoer when it was reasonably foreseeable that the acts of the wrongdoer would cause the injury.

Elements

1. Defendant acted intentionally or with reckless disregard.
2. Defendant knew or should have known it was reasonably foreseeable that the acts would cause severe emotional distress.
3. Defendant's conduct was outrageous, indecent, atrocious, odious, uncivilized, or intolerable.
4. Plaintiff suffered severe emotional distress as a proximate result.

Defenses

Legal Rights

The thin line in these cases is whether 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 as Sister Sue requested, the funeral home may have a defense claiming it acted within the legal limits of the law. Note use of the word "may" in that sentence.

On the other hand, if the funeral home dumps Aunt Betsy along some lonely country road in southern Alabama, the act is one our courts will deem outrageous, indecent, atrocious, odious, uncivilized, and intolerable, so family members and loved ones will likely prevail in court with this cause of action and receive a sizeable judgment.

Between these limits is a broad, uncertain factual gray area.

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).

Injunction, Preliminary

Injunctions are classified as (1) temporary and (2) permanent.

They are most often obtained to stop someone from doing something but may also be brought to compel someone to do something or continue doing something.

Temporary injunctions (often called preliminary injunctions) are fairly easy to obtain upon a proper showing of the immediate necessity based on alleged facts sufficient to establish the essential elements. Such injunctions are self-terminating, i.e., they expire after a set time determined by the court according to the apparent necessity. Actions for temporary injunctions are typically heard at the start of a lawsuit in which the plaintiff seeks some immediate remedy for threatened damages he has yet to prove.

Suppose a contractor begins excavating in the lot next to your home, using a giant, noisy earth-moving machine to scrape out a deep pit right up next to your property line. It's obvious the first heavy rain will cause a substantial part of your yard to wash into that pit! The court would issue a temporary injunction to stop further excavation (empowering law enforcement to use handcuffs and steel bars to stop it, if necessary) until you have time to prove the threat of damages is real. I myself obtained such orders during my career *without notice to the other side*, in a case where it was necessary to stop some people in their tracks by throwing them out of their business and putting locks on the doors so they could not re-enter without the court's permission!

Permanent injunctions are much harder to obtain. Permanent injunctions are issued to continue the initial orders of preliminary injunctions beyond their expiration. There must, of course, be a sufficient evidence to show a permanent injunction is necessary to insure justice and protect the "good guy" going forward.

* In actions for injunction, the complaint is called a "petition", plaintiff is called the "petitioner", the answer is called a "response", and defendant is called the "respondent". Otherwise it's just another lawsuit. It's only different by its unique essential elements that must be (1) alleged and (2) proven, *just like every other lawsuit*.

All injunctions derive from the inherent equitable power of our courts to issue writs and warrants to empower and command sheriffs (or other law enforcement) to use force, if necessary, to carry out the court's orders.

Injunctions can stop action or compel action.

Injunctions are issued to protect petitioners who are threatened with harm at the hands of the respondents.*

Injunctions may also be used to carry out a court's prior judgments or orders.

Anywhere that a respondent needs to be compelled to do something he or she does not wish to do or restrained from doing what he or she wishes or threatens to do, an injunction is the correct remedy.

A count for injunction can be combined with other counts alleging any other causes of action that may arise from related fact circumstances.

Elements for Temporary Injunction

1. Existence of an imminent likelihood of irreparable harm if the injunction is not issued,
2. Unavailability of an adequate remedy at law (i.e., an award of money damages after the threatened harm cannot restore petitioner's to his *status quo ante* (i.e., the condition he enjoyed before),
3. The threatened harm to petitioner outweighs any reasonably possible harm to respondent,
4. Granting an injunction will not contravene any substantial public interest (i.e., will not adversely affect the legitimate interests of disinterested persons), and
5. Petitioner has a substantial likelihood of success based on the underlying allegations (i.e., the facts alleged are not merely speculative on their face).

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.

Elements for Permanent Injunction

1. Existence of an imminent likelihood of irreparable harm if the injunction is not made permanent or extended for a longer term,
2. Unavailability of an adequate remedy at law (i.e., an award of money damages after the threatened harm cannot restore petitioner's to his *status quo ante* (i.e., the condition he enjoyed before),
3. The threatened harm to petitioner outweighs any reasonably possible harm to respondent,
4. Granting an injunction will not contravene any substantial public interest (i.e., will not adversely affect the legitimate interests of disinterested persons), and
5. Petitioner has demonstrated the facts alleged in his petition by a preponderance of the admissible evidence and is entitled to the order sought as a matter of law.

Since injunctions invoke the court's equitable powers, petitioners seeking an injunction must come to court with "clean hands". To obtain the relief sought they cannot be found to have in any material way contributed to the condition that threatens them with harm.

One does *not* attempt to "prove" the grounds for his petition in the petition. This is the worst mistake you can make, and yet experienced lawyers (who should know better) do it all the time. Do not think you must tell the whole story in the petition. You must not. The petition is not a story, nor is it an argument. It is a petition that must accomplish three (3) things:

1. Allege all facts necessary to trigger the court's jurisdiction power to issue the injunction,

2. Allege all facts necessary to satisfy the five (5) elements listed above, and

3. Demand judgment.

Wise petitioners will also use the petition to do the following fourth (4^{th}) important thing *in moderation*, as explained here:

Allege such additional facts as petitioner is *certain* the respondent must admit (facts that will tend to prove the essential facts) without becoming unnecessarily burdensome. (This 4th set of allegations is solely for the purpose of getting early discovery of facts the respondent cannot deny. It is not essential and should not be abused. Allege only those facts the respondent *cannot* deny! Then the admitted facts become part of the record, requiring no further effort on your part to prove them!)

The most common flaw in *pro se* pleadings (and those of inexperienced lawyers) is the overbearing tendency to demonstrate one's brilliant mastery of the English language, to impress the world with one's vast legal knowledge, or to beat a dead horse with superfluous allegations that go beyond what is essential ... *thus weakening the case by alleging non-essentials!*

The purpose for the petition is to allege what *must* be alleged to get one's foot in the courthouse door ... not to *prove* the case in a single document. Alleging more than absolutely necessary serves only to give the other side an advantage in that (1) judges don't want to read it and (2) the opponent has more facts to try to disprove.

#1 – Jurisdiction – Allege *only* those facts necessary to obtain the court's jurisdiction.

#2 – Essential Elements – Allege *only* those facts necessary to establish the five elements.

#3 – Demand Judgment – Using the "polite" terminology given in the included example.

#4 – Discovery – Allege *only* those facts the respondent *must* admit (or lie about) and keep these to *only* those that will help you prove the "essential facts". Anything else will only serve to weaken the effectiveness of your petition and make it harder to win in the long run.

Filing pleadings more than 10-12 pages in any kind of case is usually a mistake. In most cases where there is only one claim (one cause of action) pleadings of 4-5 pages should suffice. Short pleadings are powerful.

The purpose of pleadings is *not* to prove the case. That's what discovery is for!

Keep it simple!

Short and concise!

Jurisdiction

The court you apply to must have jurisdiction (power to enter orders) to grant the relief sought. In the case of injunctions, pretty much any federal district court and any trial level court in the state court system of your State has that power. One may merely need to allege facts that establish that (1) the petitioner resides in the court's jurisdiction, (2) the respondent resides in the court's jurisdiction or is

otherwise (give specifics) subject to the court's jurisdiction, (3) the petition seeks the equitable remedy of a temporary injunction [The first step is always at "temporary injunction". Once the initial temporary injunction is obtained, one can further petition the court to make the injunction permanent. Temporary first. Easier to obtain.] and (4) the court *has* jurisdiction. Those facts meet the first of the three requirements of a petition: to allege jurisdiction.

The Facts (Elements of the Cause of Action)

There should be a *brief* section where the petitioner alleges sufficient facts to establish each of the five elements required for the court to have jurisdiction to issue the order sought. It is not enough to merely recite the elements one-by-one. You must allege the *ultimate* facts (and only so many of those facts as are absolutely essential) to establish all five elements for an injunction to issue. That is all.

Add nothing more, except those facts alleged for the sole purpose of discovery, as already discussed, where it is *certain* the respondent must admit the facts or lie to the court. And, the facts alleged for discovery should be *only* those facts that will help you *prove* the essential facts!

Use single sentences. Let each sentence have its own paragraph number. Do not put more than one sentence in any single numbered paragraph. Do not use compound sentences (i.e., with "and", "but", etc.) Each numbered paragraph should make one statement of fact and one only!

Demand for Judgment

Demand issuance of the injunction. This is often done in the form of a "prayer, but the language should *not* be precatory. Do not "wish". Do not "pray". Do not "hope". Do not "beg". *Move the court to enter an Order* enjoining the respondent (or granting such other relief as the petitioner may seek). The example below demonstrates sample language for this.

Discovery Allegations

One may *optionally* allege such additional facts as one is absolutely, quintessentially *certain* the respondent must admit or lie about it. This is solely for the purpose of getting the obvious facts into the record without wasting valuable discovery. [Many discovery tools are limited. One should, therefore, use them sparingly and only as necessary. Since the initial petition is an opportunity to allege facts that the respondent must either admit or deny, this is an excellent chance to allege such facts as one is certain the respondent must admit, if truthful. All facts that are thus admitted are admitted for all purposes.]

There is no point whatever in alleging additional facts you anticipate the respondent will deny. Allege only those additional *helpful* facts you are certain the respondent will admit.

This must *not* be over-used or abused. There is no need to force the respondent to admit that Tuesdays follow Mondays or that such-and-such a law is in existence. One can get those facts into the record later using motions for judicial notice. Allege only those facts that will help win the action *and keep the number of such allegations to no more than the total of all the other allegations.*

Powerful pleadings are "short and plain statements".

They are not a "letter to the judge" nor a story that must persuade someone to believe.

Do not fall into the amateur lawyer's trap of stating more than is necessary.

Let the pleading do what it is intended to do ... and no more.

There'll be time enough for provin' when the pleadin's done!

IN THE FOURTH JUDICIAL CIRCUIT COURT

IN AND FOR HAPPINESS COUNTY, FLORIDA [1]

Case No. _____ [2]

PETER PIPER,

Please note the footnotes and comments provided below.

Petitioner,

v.

BORIS BADGUY,

Respondent.

_____/

VERIFIED PETITION FOR TEMPORARY INJUNCTION [3]

PETER PIPER petitions this Honorable Court to issue a temporary injunction and in support therefor states:

JURISDICTIONAL ALLEGATIONS

1. This is an action for the equitable remedy of a temporary injunction.

2. Petitioner resides in Happiness County, Texas.

3. The threatened harm to be enjoined is threatened to be imposed in Happiness County.

4. Respondent resides in Happiness County [or has some other legal nexus to Happiness County that invokes the jurisdiction of this Honorable Court [4]].

5. This Honorable Court has jurisdiction.

FACTUAL ALLEGATIONS

6. Petitioner has personal knowledge that respondent Boris Badguy has a well-formed plan to act in a manner that will surely cause petitioner serious bodily harm.

7. The threatened act complained of is ..... [5]

8. The threatened bodily harm is ..... [6]

9. The threat is imminent because ..... [7]

10. An action for money damages alone is insufficient to restore petitioner to his *status quo ante* after the threatened harm because ..... [8]

11. The threatened harm to petition outweighs any substantial harm to the respondent, because ..... [9]

12. There is no substantial public interest that will be contravened by this Honorable Court's issuing an injunction favoring this particular petitioner.

13. There is a substantial likelihood that petitioner will prevail in this action, because the facts obtained on the record by discovery will reveal that ..... [10]

14. Boris Badguy is a registered pharmacist. [11]

15. A temporary injunction is necessary to protect petitioner from the threatened harm.

WHEREFORE petitioner Peter Piper moves this Honorable Court to enter an Order enjoining respondent Boris Badguy from [*briefly* describe the threatened harm once again] and granting such other and further relief as the circumstances and demands of justice may warrant.

UNDER PENALTIES OF PERJURY I affirm that the facts alleged in the foregoing are true and correct according to my own personal knowledge.

_____

Peter Piper, Petitioner

STATE OF FLORIDA

COUNTY OF HAPPINESS

BEFORE ME personally appeared Peter Piper who, being by me first duly sworn, executed the foregoing in my presence and stated to me that the facts alleged therein are true and correct according to his own personal knowledge.

_____

Notary Public
My commission expires:

Footnotes to the foregoing pleading:

1. The title of the court, of course. Local research is required to know how to state the title of the court.

2. Leave this blank. The clerk will assign a case number when the case is filed.

3. Verify the petition by swearing to it under penalties of perjury. This gives it more force. Judges consider sworn facts more favorably, since petitioner risks a jail term by stating them under oath.

4. For example, Coca Cola can be sued anywhere in the world. My next door neighbor, on the other hand, can only be sued in the Florida county where we live, unless he runs over someone's dog in South Dakota.

5. Describe in reasonable detail the planned act, not the effect it will have. That comes next. Be brief without omitting any essential fact. If known, state the time and place where the act will happen. If known, state the manner in which it will happen. If known, state the person(s) who will carry out the act.

6. When detailing the harm, state only the essential facts necessary to prove the harm and that the harm is such that it will impact the petitioner in a substantial and serious manner.

7. See preceding footnote.

8. See preceding footnote.

9. Remember that here we are talking about "outweighing", not that there will be "no harm" to respondent. In nearly every action for an injunction, the respondent will be adversely affected. What must be alleged here *in brief* are the facts that demonstrate that petitioner's harm outweighs that of respondent.

10. As before, you will explain *in brief* some *provable* facts to sustain this allegation. You will not try to prove those facts in this pleading. You will simply allege sufficient facts (and only such as are sufficient) to establish that *if proven* the petitioner's injury is all that has already been said and that an injunction is necessary to carry out the essential requirements of justice.

11. Example of a fact being alleged for discovery purposes only, i.e., a fact we are certain must be admitted, one that will be helpful to have admitted up front, so we don't have to use valuable discovery tools later on to prove. Use these with discretion. If such facts will not serve to assist in proving the essential element facts alleged to establish your right to the injunction, don't try to prove them. You'll be busy enough proving those things that are necessary to win. No need to build a straw house here!

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, i.e., an act that can have no possible consequence. If requiring or prohibiting an action will have no reasonably foreseeable benefit, the court is without jurisdiction to lawfully enter an order compelling such an act.

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 all essential elements.

Defenses

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

Invasion of Privacy

Like defamation, this cause of action can bring more problems to plaintiff than merely letting the matter go by.

Litigation for invasion of privacy tends to re-publicize facts that might be better left alone.

Still, the cause of action exists, and essential elements follow.

Elements

To win a cause for invasion of privacy, plaintiff must allege and prove:

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.

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.

Malicious Prosecution

Malicious prosecution is available to award damages to those who are sued (or criminally prosecuted) without legal grounds.

If the underlying action was brought without sufficient legal justification AND the injured party prevails in the underlying action, this cause of action may lie.

It does not arise, however, until the successful conclusion of the underlying case.

Additionally, the injured party must show the person who brought the underlying action had NO probable cause and *knew he had no cause or should have known he had no cause through the exercise of reasonable diligence!* If he knew or should have known the case was merely malicious without any genuine legal basis in fact, this cause favors the plaintiff.

Elements

The essential elements are:

1. A prior legal action against the present plaintiff was commenced (criminal or civil).
2. Defendant in present case was the direct cause of prior proceeding. Defendant in 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 ultimately found to be without meritorious foundation.
3. Prior proceeding terminated favorably to defendant there (plaintiff here).
4. There was no *bona fide* probable cause or legal justification for the prior case.
5. Defendant in present case caused prior case with actual or legal malice.
6. Plaintiff in malicious prosecution case suffered damages proximately resulting from the underlying case.

Defenses

Absolute Immunity

Government prosecutors are entitled to absolute immunity from prosecution for malicious prosecution (unless the prosecutor can be shown to have acted with personal motive or outside the scope of his or her authority).

Individual private actors are not immune.

Dismissal on Technical Grounds

If prior case terminated for any reason other than innocence or lack of legal 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 defendant in the prior case, i.e., it was not determined that defendant was without guilt, culpability, or civil liability.

In order for defendant in 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 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 *first* be proven that defendant in prior case was without fault. That requires complete *bona fide* termination of the prior case.

Malice

Malice may be either "actual", i.e., state of mind of prior plaintiff to harm prior defendant or "legal", i.e., inferred from circumstances, such as absolute lack of probable cause that a reasonable person would recognize.

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 ... like driving a car with one's eyes closed!

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. On our first day of classes, not knowing his handicap, I caught up with him at the elevator after our first contracts class to congratulate him for the masterful way he responded to our crotchety old professor.

Good naturedly, with only friendly intent, I said, "Good going in class!" and slapped him on the shoulder. I was horrified as he crumpled helplessly to the floor!

He asked me to help him to the wall where he managed to work himself into an erect stance once more, waving off my anxious apologies. We became good friends and remained so for years afterward, however I never forgot that negligence lesson. I had no idea my good-natured congratulatory slap (that would have no effect on healthy persons) would cause my friend to collapse. Nonetheless, I was negligent and legally responsible for the consequence of my action.

It doesn't matter if a defendant intends to harm the plaintiff. If his act causes harm, the defendant is liable for injury that proximately results from his act.

The common law adage, "A defendant takes his plaintiff as he finds him," applies. We all have a common law duty to exercise reasonable caution to protect others from the consequence of our acts ... intentional and otherwise.

You are responsible for damages caused by what you do, even when the person damaged is unusually susceptible to injury. This is known as the "eggshell skull" doctrine in law. The doctrine developed from an old case where a fellow with an unusually thin skull was seriously injured by an accidental blow to the head so slight it could not have caused a healthy man so much as a headache. Nonetheless, the act resulted in substantial harm to the thin-skulled plaintiff, and the courts found the defendant was liable.

Failure to exercise reasonable care gives rise to a cause of action for negligence.

Elements

In order to effectively plead a cause of action in negligence, the plaintiff must allege sufficient 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 proximate result of the defendant's breach of that duty of care.

It's no more complicated than that.

Defenses

Comparative Negligence

In many cases, plaintiff is at least partially responsible for his own damages.

Where this is true, plaintiff cannot recover that portion of damages caused by himself. He is said to be comparatively negligent.

If plaintiff runs a stop sign and is 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 apportion money damages accordingly.

Economic Loss Rule

The economic loss rule is a doctrine developed to prevents plaintiffs from double-dipping.

Plaintiffs may file an action for breach of contract and also for negligence in performance of a 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 his strawberry plants. The farmer's case included a count for breach of contract and another 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. 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 an improperly designed part on the tractor caused the tractor to fail. As a result the farmer claimed he was unable to get his crops in on time. The faulty tractor resulted from negligence, no doubt of that. The court said, however, the bargained-for consideration was a tractor, not crops safely gathered into the barn. When the tractor failed it was only the tractor that was damaged by 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. But, the tractor did not directly damage the farmer's crops, so the farmer was not permitted to recover for negligence and the value of his 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.

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 gist of this rule is that when one is prevented from enjoying the benefit of his contract by negligence that only affects the thing bargained for, recovery must be by a breach of contract action alone. A 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 contract (he paid for fertilizer) and for negligently labeled herbicide that destroyed his crop.

Assumption of Risk

Some activities (e.g., karate and sky-diving) are so inherently dangerous that courts allow a defense against plaintiffs who voluntarily engage in such activities.

If plaintiff expressly assumes the risk of a bodily contact sport, like soccer or football, the courts treat him as waiving his right to recover damages for reasonably foreseeable injuries.

Plaintiff need not sign a paper acknowledging the risk (though, of course, this would create a stronger position for defendant) if the court can infer from facts presented that plaintiff understood (or should have understood) the severity of reasonably foreseeable injuries and that he voluntarily proceeded to participate without regard for the risk.

This defense does not exist where defendant is wantonly or recklessly negligent. If defendant exposes plaintiff to risk that was not foreseeable (e.g., owner of parachute club that packs old rags and dirty laundry in a parachute bag by mistake) there is no defense.

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 reasonably by the other for doing so.

The Latin phrase means literally, "for so much as the thing is worth."

Suppose a fence painter came to your house while you were on vacation and painted your scratched and faded fence a lovely blue color.

You arrive home to find your fence looking much better ... but not the color you'd choose.

The fence painter asks for $7,000 for less than a day's work. You refuse, of course.

There is no contract, and you'd not have asked for blue if there were a contract.

If the sign painter sues for breach of contract, he loses, because there is no contract.

If he sues for *quantum meruit*, however, he may win ... *but not for $7,000!*

If he can convince the court it was "reasonable" for him to expect payment (a slippery slope indeed under the facts of our little hypothetical) he might recover "*what the job was worth*".

The court would award him no more than fair market value for the job ... and only then if he can convince the court by a preponderance of the admissible evidence it was "reasonable" under the circumstances for him to expect payment.

Now, suppose you were not on vacation when the fence painter began painting. You sat at the front window of your home enjoying a cup of coffee and reading your morning paper as the man labored in plain view. You watched him paint the gate, the posts, each panel. You watched him carefully lay a drop cloth below his work so the paint wouldn't kill your grass. Occasionally, he looked up to see you sitting in your window, smiled, and waved in a friendly manner as if he'd known you all your life. It was all very amusing. You thought to yourself, "How kind of that nice young man to paint my fence." Meanwhile you did nothing to interrupt his work, hoping he'd paint it all before realizing he was at the wrong house!

The fence painter comes for payment, and you refuse, thinking you got a windfall bargain.

So, the fence painter sues for *quantum meruit* and breach of contract, seeking his $7,000.

Again, he loses on breach of contract, because there's been no meeting of the minds, no promise for a promise. [See the Reference class on Contracts.].

However! He wins easily on *quantum meruit*, because you *knew* he was conferring a benefit to you while you sat by and accepted that benefit without opposing in any way. If he can convince the court you watched him paint all morning and half the afternoon, he will surely win something. And, under these conditions the judge will exercise human nature and lean toward the high end of fair market value for the sign painter's work, because you were so obviously willing to take advantage of the young man.

That's what lawsuit for *quantum meruit* can do.

This only works when there's no underlying contract to give rise to a cause of action for breach of contract. A separate count for *quantum meruit* should always be made part of the pleadings when there's any likelihood a contract action might fail upon the court's finding there was no contract or that an alleged contract was unenforceable at law (thus removing contract from the equation and opening the door for fair market value recovery for *quantum meruit*).

Under the *quantum meruit* doctrine plaintiff is entitled to nothing more than reasonable fair market value of the benefit conferred on defendant, a benefit defendant knowingly accepted in the absence of any contract, written or verbal.

See also "Unjust Enrichment" below.

Promissory Note

This is probably the easiest of all causes of action 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.

If the note also provides that the holder is entitled to recover reasonable attorneys fees and costs (as most do) plaintiff recovers judgment for the full amount he is owed plus the cost of bringing suit.

Elements

The essential 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. If not, the original note will be required at trial (unless the court allows plaintiff to establish its existence another way).
3. Defendant failed to pay some part or all of the obligation when payment was due.
4. Plaintiff suffered damages as a proximate result.

Where many plaintiffs get into trouble is with acceleration of the note. They may attempt to bring suit when only one payment is late. In such cases, they can only recover judgment for the amount that is then due.

If a 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 will plaintiff have a cause of action to collect the full amount until the complete term of the note has run.

Always be sure you put an acceleration clause and clause for attorney's fees and costs in any promissory note you accept from others in lieu of cash.

Defenses

Payment of a promissory note is, of course, an absolute defense.

To prevail, defendant need only produce admissible evidence to demonstrate all funds payable under the terms of the note, including interest, have been fully paid.

Another absolute defense arises where holder of the note negotiated some consideration for the note other than payment, in which case the obligation created by the note disappears and, along with it, the cause of action.

Finally, failure of the plaintiff to produce the original note is an absolute defense in all but a few jurisdictions.

Quiet Title

An action to "quiet title" arises when an individual holding "legal title" is threatened by a genuine or perceived outside interest in the title.

Such threats may include:

- meritless mortgage
- easement
- *lis pendens*
- mechanic's lien
- occupation by force
- or any other claim of right to possession, occupation, or other use

Legal title is typically limited to evidence by duly executed deed or other absolute instrument of ownership, whether or not such evidence is encumbered by a mortgage or other security interest.

One who does not hold such a deed or instrument has no standing to bring an action to quiet title, for he has no title to quiet.

On the other hand, one who holds "legal title" to property *must* bring this action to obtain an Order from the Court declaring what interests are held to the property and who holds those interests.

The action is, of course, most frequently brought to *remove* what we lawyers call a "cloud on the title", some issue that either challenges ownership outright or imposes an issue that would tend to diminish the property's sale value (wise buyers do not pay top-dollar for properties in which ownership or right of use is unclear or challenged).

Elements

The essential elements are:

1. Party bringing the action holds "legal title" according to local law.
2. The "cloud" is real, presently in place, and not speculative or imagined.
3. The "cloud" can be proven to exist.
4. The "cloud" threatens a genuine valuable interest in the property.

A common example is an action to "quiet title" where an alleged mortgage holder (or other party claiming a security interest in the property) asserts rights that are illegal or otherwise barred by equitable principles. Where a mortgage has been obtained by fraud, for example, the title owner may be able to prove the fraud and cancel the mortgage holder's claim.

Another common example arises where a contractor made improper repairs to a roof resulting in substantial water damages. If the property owner refuses to pay for the faulty work, the contractor may file a lien against the property. Obviously, if the owner can prove the faulty repair work was not worth the contractor's demands, the owner would include an action to quiet title along with an action for negligence and, possibly, breach of contract to recover the cost of his damages and lift the lien.

Defenses

Valid defenses to this action include:

1. The mortgage, lien, *lis pendens*, or other "cloud" is legally valid.
2. The alleged "cloud" is imaginary or speculative.
3. The alleged "cloud" does not affect the value of the property or its use.
4. There is no "cloud" as alleged by the owner.

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.

For example, if the angry woman agreed to pay for the pie but later refused, the young fellow pictured here as a right to get his pie back un-eaten.

In practice, replevin is carried out by the sheriff (or other authorized law enforcement officer) empowered by a writ called, not surprisingly, a writ of replevin. The court will issue the writ, the plaintiff (or the clerk) will serve the sheriff with the writ, the sheriff may require the plaintiff to post a bond, and then the sheriff will direct one or more of his deputies to visit the place where the subject property is located and there to take it by force, if necessary, and return it to the plaintiff.

Elements

The complaint must allege sufficient facts to establish the following:

1. Description of claimed property sufficient to identify it and its location (if known).
2. Property's value (supported by bills of sale or similar evidence, if available).
3. That plaintiff lawfully owns subject property and is entitled to immediate possession.
4. 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. That property has not been taken for a tax, assessment, or fine pursuant to law.
6. Damages suffered by plaintiff as a proximate result of defendant's wrongful retention of plaintiff's property.

Money cannot be replevied, unless it is specific money, e.g., a coin collection, particular locked bag of cash, some specifically identifiable negotiable instruments, or otherwise identifiable money (as explained in the cause of action for conversion, which see above).

Real property (i.e., land, buildings, and fixtures affixed to the land or buildings) also cannot be replevied.

Rescission

While normally a disgruntled party cannot get out of a contract or other legal commitment simply by tearing up a piece of paper, like this angry fellow here, it is possible to obtain an order of rescission from the court declaring the obligation null and void.

Rescission is an equitable remedy whereby a party obligated by some legal commitment resulting from fraud, false representation, mutual mistake, impossibility of performance, or similar cause resulting from other than his own wrongdoing may obtain an order relieving him of that commitment.

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

Elements

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

1. The making of a contract or other legal commitment with evidence attached, if available.
2. Existence of fraud, mutual mistake, false representation, impossibility of performance, or other ground for rescission or cancellation.
3. Plaintiff rescinded and notified the other party that he rescinded.
4. If plaintiff received any benefit, he must offer to restore defendant to the extent of the 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 quo ante* (i.e., status before the fact).

If rescission is granted, the court will attempt to restore both parties, as nearly as possible.

This is always the goal of rescission.

A common cause for rescission results when, for example, an elderly person of limited mental ability unwittingly executes a deed conveying his home to a person who knew or should have known that the incapacity of the seller prevented seller from appreciating the consequence of his acts. In such cases, the deed will be rescinded. If defendant paid anything for the conveyance, he will be given back what he has paid. Both parties will be restored as nearly as possible.

If buyer in such a case was aware of the sharp deal he was making at the other's expense, the court may not go to the trouble of restoring the purchase price!

Equity may punish as well as protect.

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

Defenses

Adequate Remedy at Law

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

Modification of Contract

If a contract has been modified after 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 opposite of rescission.

Where rescission is an action to avoid a legal obligation, specific performance is an action to force an unwilling party to perform his obligations.

Specific performance cases seek an order compelling someone to satisfy some legal obligation they refuse to act upon.

Cases arise frequently in land deals, where a seller enters contract to sell, buyer performs all conditions precedent, and seller refuses to close and deliver a deed.

The elements are quite simple.

Elements

1. Existence of a contract or other legal obligation.
2. Plaintiff performed all conditions precedent to defendant's obligation to perform.
3. Defendant refused to perform.
4. Plaintiff has no adequate alternative remedy at law (i.e., money damages alone are insufficient to restore him to his *status quo ante*, i.e., prior condition).
5. Plaintiff suffered damages as a proximate result.

Specific performance sounds in equity, so the party bringing the action must not have contributed to the problem. The adage is, "He who comes to equity must come with clean hands!"

Spoliation of Evidence

Until recently, this cause of action was not available.

A party was entitled to argue prejudice in prosecuting other claims against parties who destroyed evidence, negligently or with invidious intent, but there was no separate cause of action against defendant who destroyed the evidence plaintiff needed to prevail.

Now, in many jurisdictions, there is!

A plaintiff who lacks sufficient evidence to bring a case for negligence or breach of contract, for example, because the defendant destroyed 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?

Where this cause of action is available, you sue for the damages you might have recovered by stating a cause of action for the spoliation of the evidence that no longer exists!

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.

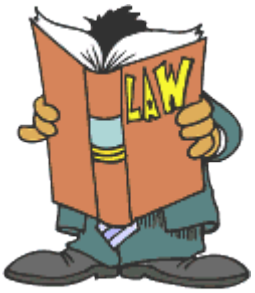
4. Significant impairment of the plaintiff's case as a direct result.

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.

Statutory Causes of Action



This class lists the most commonly encountered common law causes of action and some of the defenses that may be raised against them.

Many other causes of action are created by statute, i.e., laws created by state and federal legislative bodies and subsidiary agencies.

Statutes, codes, ordinances, and such like codified laws often provide civil remedies for those injured by violations.

An example is a cause of action available against insurance companies (in some states) to compensate insured parties for damages resulting from an insurance company's refusal to pay a claim when the insurance company knows (or ought to know) it is liable for the claim. In some jurisdictions this cause of action gives the insured party the right to recover *treble damages* in addition to the amount he would otherwise be entitled to under the terms of his policy. This is not a common law cause of action but one that arises out of statutory law.

Another is the lemon law statute that exists in many states. The requirements to prevail with a lemon law cause of action vary from state-to-state, but it is not a common law cause of action. The elements will be found by examining the statute that creates the cause.

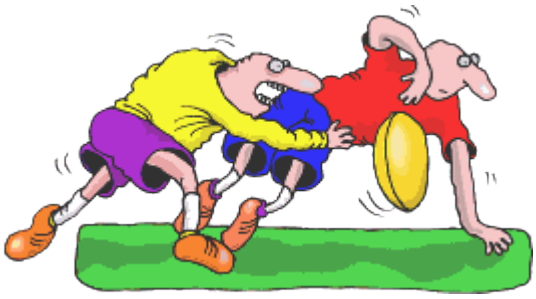
Statutory laws of this kind are constantly being created and changing, so it is beyond the scope of this course to set out all the causes of action that arise from statute.

It is up to you to carefully study the statutes that may provide remedies and identify the elements set forth in those statutes to determine (1) what must be alleged by the plaintiff and (2) what the plaintiff must prove by the greater weight of admissible evidence to prevail.

The list is too long to include here, but the cause of action principles are the same as those set out under other headings in this class.

If you are dealing with causes of action that arise from statutory law, don't stop at studying the statutes. Study the case law that interprets those statutes also, so you are absolutely certain what the elements are and how to plead and prove (or disprove) them. Your private interpretation of statutory language and the elements of a statutory cause of action may not agree with controlling appellate courts. Always study the case law along with the black-letter law (i.e., the law created by legislatures and other law-making bodies).

Tortious Interference



When a defendant interferes with an advantage of some sort enjoyed by plaintiff, the plaintiff has this cause of action to recover his damages.

Tortious interference takes two forms. They differ 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 an advantageous 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 breach of plaintiff's contract with another and proximate damages to plaintiff.

The elements are similar for both.

Elements

For tortious interference with an advantageous business relationship:

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

For tortious interference with a contractual relationship:

1. Existence of a binding contract favorable to plaintiff.
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 proximate result.

Discussion

In order for either cause based on interference to lie, the interference must be intentional.

Negligent interference does not give rise to 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. A temporary injunction may also be obtained to prevent interference from continuing.

Interference with a contractual relationship is more severe. If plaintiff's contract is binding (i.e., it is enforceable) and defendant's intentional acts interfere with that contract so that a breach or other diminution of the 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 for damages sounding in tortious interference with a contractual relationship.

Undue Influence

Undue influence is a cause of action brought 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 a greedy sibling who importunes an elder family member to "change the will", cutting his brothers and sisters out of their rightful inheritance.

Other cases involve lawyers, care-givers, and even next-door neighbors who prey upon the weakened mental capacity of others to wrongfully obtain gain for themselves.

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.
4. Grantor or grantor's estate suffered damages as a proximate result.

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 could be unduly influenced to dispose of property in a manner contrary to his free will.

Of course, if an otherwise capable individual suffers this injury as a result of coercion or duress (which see above), then this action could be joined.

In a case I handled for a Miami client, an extremely elderly gentleman having unknown distant relatives and an avaricious stockbroker died leaving $12 million to his stockbroker and nothing to his blood relatives. The old gentleman enjoyed a long-term confidential relationship with the stockbroker. The stockbroker was also the old man's attorney and drafted the will by which the old gentleman signed away his millions. Finally, evidence was adduced to show the stockbroker used a girlfriend to visit the elderly gentleman at his home to obtain the needed signature.

These facts gave rise to a cause of action for undue influence and, as soon as the judge saw what I presented, the lawyer was turned out of his "inheritance" and true relatives rewarded.

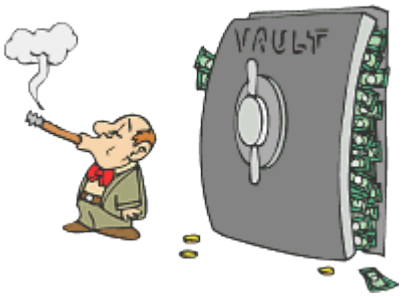
In another case, a disgruntled sibling complained his sister received the bulk of their father's estate. He brought an action for undue influence. The sister, however, had nothing to do with procuring the will, nor did the sister live in the same state with the decedent or have any confidential relationship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

Comments

If a beneficiary enjoyed the requisite confidential relationship and also procured the will or other beneficial instrument (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 this legal presumption arises, the burden of proof shifts to the procuring beneficiary to prove absence of some or all elements of undue influence.

A judgment favorable to this cause of action nullifies provisions of the document procured by undue influence and restores 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* (explained above).

Unjust enrichment arises whenever plaintiff confers a benefit on defendant under circumstances that would cause a reasonable person to believe plaintiff would be compensated for the fair market value of the benefit.

Our courts reason that one person should not be unjustly enriched at the expense of another. Even when there's no contract to detail the parties' expectations, this cause of action prevents the defendant from being unjustly enriched at the expense of the plaintiff.

Elements

The essential elements are:

1. Plaintiff conferred a benefit on defendant.
2. Defendant either requested the benefit or knowingly and voluntarily accepted it.
3. It would be unjust for defendant to retain the benefit without compensating plaintiff reasonably.
4. Plaintiff suffered damages as a proximate result.

For example, an itinerant house-painter asks a homeowner if he can paint the homeowner's house. The homeowner answers, "Of course!", thinking he will get a free coat of paint. After all, he hasn't agreed on a price, so he figures he's not bound to pay.

In fact, our course will imply a contract in such circumstances. The house painter who brings this cause of action under this set of facts will be awarded the fair market value of his services and the cost of his paint.

It would be unjust to do otherwise.

Such cases are said to arise out of *quasi contract*, i.e., a contract not created by the parties but by the court enforcing principles of equity to prevent a wrong.

Defenses

Express Contract

This cause of action fails if defendant can show an express contract exists, verbal or in writing. The terms of an express contract confirm the mutual understanding of the parties. In such cases, the parties will be held to the terms of their express contract.

Burden

The plaintiff seeking to enforce an implied contract must meet a greater burden than one who uses better business sense and requires an express contract before undertaking to render services or deliver goods to another. This is especially true when it comes time to prove the value of the services and goods rendered where there is no express prior agreement.

Payment Accepted

Once plaintiff accepts payment, he cannot sue for unjust enrichment. A motion to dismiss will prevail upon evidence that payment was tendered and accepted.

Conclusion

So we come to the end of this class on complaints.

The meat-and-potatoes of every lawsuit are:

- laws,
- facts, and
- rules.

The right to bring a complaint stands on laws, facts, and rules.

There must also be

- duty
- liability
- damages

Plaintiff must allege in his complaint at least one valid cause of action the courts recognize or his case will be summarily dismissed upon the filing of his opponent's Motion to Dismiss for Failure to State a Cause of Action.

Although there may be a few rare common law causes of action not listed in this class (and many statutory causes of action too numerous to list) we've covered the causes you'll most often encounter.

To find the essential fact elements of any cause of action not included in my course, try searching Google® using a phrase like "cause of action elements for trespass", for example. This should give you all you need, now that you understand what causes of action and essential fact elements are.

Complaints can be avoided by valid defenses. I've listed common defenses to the most frequently encountered complaints. To learn more about defenses, study the "Defenses" class in my course.

Whether you're a plaintiff or defendant, you need to know and understand the essential elements of both complaints *and* defenses!

Knowing the elements of complaints and defenses is half the battle of winning.

The rest of the battle is simply a matter of learning the rest of what's explained for you in my course.

Justice is now in *your* hands.

Please tell others about my course.

Quiz on Causes.

Take this quiz to see how much you still need to learn.

Some items may seem like "trick questions", but there is only *one* correct answer to each.

Remember: Reading *carefully* is essential to success in court.

Take this and all quizzes as many times as you wish.

However, to be properly prepared for your battles in court, go back over the classes until you get at least a "B" on every quiz.