



When Is It Legal to Lie in Negotiations?

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IF YOU'RE NEGOTIATING to sell your business and you lie about its debts, that's illegal, right? But what if you begin negotiations with everything squarely on the table. The new quarterly reports come in and they're not as rosy as the previous ones. You don't disclose them to the prospective buyer. Illegal or just unethical? Surprisingly, as this article reports, business negotiations law is increasingly infused with ethical considerations. Shell outlines the basic elements of legal fraud, illustrating the evolving concepts with numerous cases in which negotiators have been penalized for what some consider merely unethical behavior. He argues that when entering into negotiations, your conscience may be your best guide.

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COMMERCIAL NEGOTIATIONS seem to require a talent for deception. In simple, distributive bargaining, when someone asks, "What is your bottom line?" few negotiators tell the truth. They dodge, they change the subject, or they lie.¹ In more complex, multi-issue negotiations, even relatively cooperative bargainers often inject straw issues or exaggerate the importance of minor problems in order to gain concessions on what *really* matters.² In nearly all bargaining encounters, a key skill is the ability to communicate that you are relatively firm on positions when you are, in fact, flexible—in short, to bluff about your intentions.

The apparent necessity for misleading conduct in a process based on cooperation and coordination makes bargaining deception a prime target for ethical theorizing and empirical investigation. Given the high degree of academic interest, one would think that the investigation of deception would have included by now a detailed look at what one of our most powerful social institutions—the law—has to say on the subject. Curiously, academic students of negotiation have essentially ignored the law. Ethical discussions of deception either overlook it completely or assume that it proscribes only

the most clear-cut types of fraud, leaving moralists to distinguish, and in some instances justify, the finer points of deceptive conduct.³ Behavioral studies of bargaining deception, meanwhile, usually take place in academic laboratories where the problems are not subject, as are actual transactions, to legal limits or consequences.⁴

This article fills the existing gap in the bargaining literature. As the recent legal cases discussed here will demonstrate, what moralists would often consider merely "unethical" behavior in negotiations turns out to be precisely what the courts consider *illegal* behavior.⁵ In light of the rather broad legal standards that are beginning to govern bargaining, behavioral investigators should consider research on how legal incentives affect negotiator conduct. Business negotiators and teachers of negotiation skills in business schools and executive training programs need to be aware of the legal consequences of deceptive bargaining tactics.

Legal Fraud: The Basics

American law disclaims any general duty of "good faith" in the negotiation of commercial agreements.⁶ As the United States Court of Appeals for the Seventh Circuit recently stated:

In a business transaction both sides presumably try to get the best deal. That is the essence of

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bargaining and the free market. . . . [N]o legal rule bounds the run of business interest. So one cannot characterize self-interest as bad faith. No particular demand in negotiations could be termed dishonest, even if it seemed outrageous to the other party. The proper recourse is to walk away from the bargaining table, not sue for "bad faith" in negotiations.⁷

This general rule assumes, however, that no one has committed fraud. As we shall see, fraud law reaches deep into the complexities of negotiation behavior.

The elements of common law fraud are deceptively simple. A statement is fraudulent when the speaker makes a knowing misrepresentation of a material fact on which the victim reasonably relies and which causes damages.⁸ A car dealer commits fraud when he resets an odometer and sells one of his "company" cars as brand new. The dealer knows the car is not new; he misrepresents its condition to the buyer; the condition of the car is a fact that is important, or "material," to the transaction; the buyer is acting reasonably in relying on the dealer's assertions that the car is new; and damages result. Similarly, a person selling her business commits fraud when she lies about the number and kind of debts owed by the business.

Lies about important facts are not unknown in business negotiations, but most negotiators know to avoid them. The interesting questions about lying come up on the margins of fraud law. What if the dealer says you had better buy the car today because he has another buyer ready to snatch it away tomorrow? That is a statement of fact. Is it fraudulent if it is a lie? What if the person selling her business says that a large account debt might be renegotiated if you buy the business? That is not really a statement of fact; it is an opinion. Could it nevertheless be deemed so misleading as to be fraudulent when she knows that the creditor would not consider renegotiation? Below, I address these and other questions by exploring in depth each element in the legal definition of fraud with reference to recent cases that have extended the boundaries of the law.

Knowing

The common law definition of fraud requires that the speaker have a particular state of mind with respect to the fact he misrepresents: the statement must be made "knowingly." This generally means

that the speaker knows what he says is false. One way of getting around fraud, therefore, might be for the speaker to avoid contact with information that would lead to a "knowing" state of mind. For example, a company president might suspect that his company is in poor financial health, but he does not yet "know" it because he has not seen the latest quarterly reports. When his advisers ask to set up a meeting to discuss these reports, he tells them to hold off. He is about to go into negotiations with an important supplier and would like to be able to say, honestly, that so far as he knows the company is paying its bills. Does this get the president off the hook? No. The courts have stretched the definition of "knowing" to include statements that are "reckless," that is, those made with a conscious disregard for their truth. Thus, when the information that will give the speaker the truth is close at hand and he deliberately turns away in order to maintain a convenient state of ignorance, the law will treat him as if he spoke with full knowledge that his statements were false. A recent case applied this concept, complete with a punitive damage award, against a company that negotiated a sale of computer and other equipment based on reckless assertions of performance capability.⁹

Nor is reckless disregard for truth the limit of the law. Victims of misstatements that were made *negligently* or even innocently may obtain relief in the proper circumstances. These kinds of misstatements are not deemed fraudulent, however. Rather, they are a way of recognizing that a deal was based on a mistake. If someone sells land relying, either carelessly or without any fault whatsoever, on a deed that contains incorrect notations of the land's proper boundaries, the buyer may be able to have the sale rescinded or the boundaries reformed. But if the seller knows that the deed is incorrect and does not tell the buyer, she has committed fraud.

Misrepresentation

In general, the law requires the speaker to make a positive misstatement before it will attach liability for fraud. Thus, a basic rule for commercial negotiators is to "be silent and be safe." As a practical matter, of course, silence is difficult to maintain if one's bargaining opponent is an astute questioner. In the face of inconvenient questions, negotiators are often forced to resort to verbal feints and dodges such as, "I don't know about that," or, when pressed, "That is not a subject I am at lib-

erty to discuss.”

There are circumstances when such dodges will not do, and it may be fraudulent to keep your peace about an issue. When does a negotiator have a duty to frankly disclose matters that may hurt his bargaining position? Under recent cases, the law imposes affirmative disclosure duties in the following four circumstances:

1. *When the nondisclosing party makes a partial disclosure that is or becomes misleading in light of all the facts.* If you say your company is profitable, you may have a duty to disclose whether you used questionable accounting techniques to arrive at that statement. If you show a loss in the next quarter and negotiations are still ongoing, you may be required to disclose the loss. One way to avoid this is to make no statements on delicate subjects in the first place. Then you have no duty to correct or update yourself.

2. *When the parties stand in a fiduciary relationship to one another.* In negotiations involving trustees and beneficiaries, parties must be completely frank and cannot rely on the “be silent and be safe” rubric. Note, however, that courts have recently broadened the notion of a “fiduciary” to include banks, franchisors, and other commercial players who deal with business partners on a somewhat-less-than-arm’s-length basis. In short, it is becoming increasingly risky to withhold important information in negotiations with parties who depend on you for their commercial well-being.

3. *When the nondisclosing party has “superior information” vital to the transaction that is not accessible to the other side.* This is a slippery exception, but the best test is one of conscience. Indeed, courts often state that the legal test of disclosure is whether “equity or good conscience” requires that the fact be revealed.¹⁰ Would you feel cheated if the other side didn’t tell you about the hidden fact? Or would you secretly kick yourself for not having found it out yourself? If the former, you should consult an attorney. A recent case applying this exception held that an employer owed a duty to a prospective employee to disclose contingency plans for shutting down the project for which the employee was hired.¹¹ In general, sellers have a greater duty than buyers to disclose things they know about their own property. Thus, a home seller must disclose termite infestation in her home.¹² But an oil company need not disclose the existence of oil on a farmer’s land when negotiating a purchase.¹³

4. *When special transactions are at issue, such as in-*

surance contracts. Insurers must fully disclose the scope of coverage, and insureds must fully disclose their insurance risk. If you apply for a life insurance policy and do not disclose your heart condition, you have committed fraud.

If none of these four exceptions applies, you are not likely to be found liable for common law fraud based on a nondisclosure. Beware of special statutory modifications of the common law rules, however. For example, if the sale of your company involves a purchase or sale of securities, state and federal antifraud rules may impose a stiffer duty of disclosure than may apply under the common law. Companies repurchasing stock from employee-shareholders in anticipation of a lucrative merger, for example, have been held liable for failing to disclose the existence of the merger negotiations to their employees.¹⁴ And companies selling their securities are required to disclose important adverse facts about their business to prospective buyers.

Material

Most people lie about something during negotiations. Often they seek to deceive others by making initial demands that far exceed their true needs or desires. Sometimes they mislead others about their reservation price or “bottom line.” Of course, demands and reservation prices may not be “facts.” One may have only a vague idea of what one really wants or is willing to pay for something. Hence, a statement that an asking price is too high may not be a true misrepresentation as much as a statement of preference. Suppose, however, that a negotiator has been given authority by a seller to peddle an item for any price greater than \$10,000. Is it fraud for the negotiator to reject an offer of \$12,000 and state that the deal cannot be closed at that price? In fact, the deal could be closed for that price so there has been a knowing misrepresentation of fact. The question is whether this fact is material in a legal sense. It is not.

Lies about reservation price are so prevalent in bargaining that many professional negotiators do not consider such misstatements to be lies.¹⁵ Indeed, some social science researchers, noticing that exaggerated demands and misstatements about reservation price seem to be the norm across cultures, have hypothesized that they serve a ritual function in negotiation. Lies about initial demands enable the parties to assert the legitimacy of their preferences and set the boundaries of the bargain-

ing range without risk of loss.¹⁶ Misleading statements about reservation prices enable parties to test the other side's commitment to their expressed preferences.

The U.S. legal profession has gone so far as to enshrine this practice in its Model Rules of Professional Conduct. These rules provide that "estimates of price or value placed on the subject of a transaction and a party's intention as to an acceptable settlement of a claim" are not material facts for purposes of the rule prohibiting lawyers from making false statements to a third person.¹⁷

There are thus no legal problems with lying about how much you might be willing to pay or which of several issues in a negotiation you value more highly. Demands and reservation prices are not, as a matter of law, material to a deal.

Some experienced negotiators may be surprised to learn, however, that there are legal problems when negotiators try to embellish their refusals to accept a particular price with supporting lies. Lies about "other offers" are classic problem cases of this sort. For example, take the following relatively older but still leading case from Massachusetts.¹⁸ A commercial landlord bought a building and proceeded to negotiate a new lease with a toy shop tenant when the tenant's lease expired. The proprietor of the toy shop bargained hard and refused to pay the landlord's demand for a \$10,000 increase in rent. The landlord then told the shop owner that he had another tenant willing to pay the amount and threatened the current tenant with immediate eviction if he did not promptly agree to the new rate. The tenant paid, but learned several years later that the threat had been a bluff; there was no other tenant. The tenant sued successfully for fraud.

In a more recent case, this time from Oklahoma, a real estate agent was held liable for fraud, including *punitive* damages, when she pressured a buyer into closing on a home with a story that a rival buyer (the contractor who built the house) was willing to pay the asking price and would do so later that same day.¹⁹ In these cases, the made-up offer was a lie; it concerned an objective fact (either someone had made an offer or they had not), and the courts ruled that the lie could be material given all the circumstances. Note that such lies are not *always* illegal. Rather, the law is content to leave the ultimate question of liability to a jury, with all the expense and risk of a full trial. Of course, victims of such conduct may decide that litigation

is not worth the trouble.

Fact

On the surface of the legal doctrine, it appears that only misstatements of objective fact are illegal. Negotiators seeking to walk close to the legal line are therefore careful to couch their "sales talk" in negotiation as opinions, predictions, and statements of intention, not statements of fact. Moreover, the law views a good deal of exaggeration or "puffing" about product attributes and likely performance as "part of the game." Buyers and sellers cannot take everything said to them at face value.

The surface of the law can be misleading, however. Courts have found occasions to punish statements of intention and opinion as fraudulent when faced with particularly egregious cases. The touchstone of fraud law is not whether the statement at issue was one of pure fact, but whether the statement was designed to conceal a set of facts detrimental to the negotiator's position.

Is it fraud if you misstate an intention—state that you are going to spend a loan on new equipment if you are really going to pay off an old debt? Yes. In the memorable words of a famous English judge, "The state of a man's mind is as much a fact as the state of his digestion."²⁰ Lies regarding intention even have a special name in the law: promissory fraud. All but a handful of states judicially recognize the tort of promissory fraud.²¹ The key element in such a case is proof that the speaker knew he would not live up to his promise *at the time the promise was made*, that is, that he made the promise with his fingers crossed behind his back. Strict proof requirements would make this claim a legal rarity, because subjective intent can rarely, if ever, be conclusively proven. But the courts have not been uniformly strict in the proof required to show an intent not to keep a promise. Fraudulent intent cannot be inferred solely from nonperformance of the promise,²² but circumstantial evidence such as "sharp" dealing throughout the transaction²³ or a refusal to acknowledge that a contract was made²⁴ is enough to get to the jury.

A particularly vivid example of this sort of conduct was litigated in *Markov v. ABC Transfer & Storage Co.*²⁵ A commercial tenant entered into negotiations to renew its lease on a warehouse and railroad yard. The warehouse was vital to the tenant's continued business relationship with its main client, the Scott Paper Company, because

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Scott used the warehouse as a regional product distribution facility. At a meeting during contract renewal negotiations, the landlord assured all parties, including Scott, that the tenant's lease would be renewed for a three-year term.

Unbeknownst to the tenant, the landlord was secretly negotiating to sell the property to the Boeing Company at the same time it was negotiating the lease renewal. The sale went through, and the landlord notified the tenant that it would have to vacate within twenty days. As a result, the tenant lost the Scott Paper contract and incurred extraordinary relocation expenses. The court found that the landlord's promise regarding the lease renewal was fraudulent, essentially made to string the tenant along in case the sale did not go through. It awarded damages for the tenant's lost profits from the Scott Paper contract and required the defendant to pay the tenant's extra moving expenses.

What about statements of opinion? Self-serving statements about the value of your goods or the qualifications of your product or company are standard fare at the negotiating table. However, when negotiators offer opinions that are flatly contradicted by facts known to them about the subject of the transaction, they may be liable for fraud. In one recent New York case, for example, the seller of a machine shop business opined to a prospective buyer that the buyer would have no trouble securing work from his largest customer.²⁶ In fact, the seller was in debt to his customer, intended to pay off the debt from the sale's proceeds, and had virtually no work there due to his reputation for poor workmanship. The buyer was able to prove that the sale was induced by the seller's fraudulent statement of opinion.

In summary, the seemingly strict requirement that fraud be based on statements of fact is, in reality, a flexible concept informed by a notion that parties must take responsibility for the impression they create by the words they use. What is important is not whether some verifiable object exists that corresponds to the speaker's statement. What matters is whether a statement so conceals the true nature of the negotiation proposal that a bargain-

ing opponent cannot accurately assess an appropriate range of values or risks to price the transaction.

Reliance and Causation

Negotiators who lie sometimes defend themselves by saying, in effect, "Only a fool could have believed what I said. He had no business relying on me to tell him the truth!" The standard elements of fraud give some support to such defenses. The burden of proof is on the fraud victim and, among other things, the victim is supposed to prove she relied on the misstatement that caused damages. Surprisingly, however, most courts do not inquire too deeply into the reasonableness of the victim's reliance when the defendant is shown to have made a positive misrepresentation of fact. Courts have trouble swallowing the idea that overt fraud should go unpunished just because victims are lazy or fools. Where statements of opinion or mere non-disclosures are concerned, however, courts are more sympathetic to defendants. When the facts were obvious or the truth was accessible to the complaining party, courts will reject their claims of fraud.

Finally, in cases of promissory fraud, victims of false promises have particular trouble proving reasonable reliance when the speaker can show that the final written contract language flatly contradicts his earlier statements. So long as the contract document accurately corrects the representation alleged to be fraudulent, negotiators may escape liability.²⁷ If the misstatements are quite specific, however, and the contract terms negating them are only general, vague disclaimers, the negotiator may be in trouble. Two examples will help illustrate the legal limits on fraud in these circumstances. A seller named Turner negotiated the sale of his company's principle asset, an electronic thermometer, to Johnson & Johnson. The detailed contract included, as part of the purchase price, a promise of future royalties from thermometer sales.²⁸ During the negotiations, Johnson & Johnson assured Turner that it would aggressively market the thermometer. The

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contract as signed, however, specifically stated that Johnson & Johnson had the legal right to shelve the product if it wished. Johnson & Johnson elected to stop marketing the product soon after the sale in favor of another thermometer it had acquired, and Turner sued for fraud. The court held that, even if Johnson & Johnson made its promise without intent to keep it, the plaintiffs were not entitled to rely on it after seeing that the final written contract negated the promise. "[I]f a jury is allowed to ignore contract provisions directly at odds with oral representations allegedly made during negotiations," the court said, "the language of a contract simply would not matter anymore. . . . And the give and take of negotiations would become meaningless if, after making concessions in order to obtain other contractual protections, a knowledgeable party is later able to reclaim what it had given away by alleging that it had, in fact, relied not on the writing but on the prior oral statements."²⁹

By contrast, when the contract says only that the subject of the transaction is being sold "as is," such language does not provide ironclad protection to a seller for exaggerated or false negotiation claims about the condition of the property.³⁰ As one federal appeals court explained, "When a contract contains an 'as is' clause or other ambiguous language, the agreement is to some extent left undefined, and the plaintiff's understanding of the agreement logically may be colored by the defendant's prior statements, fraudulent or otherwise. Moreover, there is nothing on the face of the contract to trigger alarm."³¹ Courts have similarly held that fraud victims may sue even if the contract contains language integrating all pre-contract representations into the final written document.³²

The lessons of these cases are twofold. First, *read contracts carefully before you sign* and do not accept assurances that changed contract language is "just a technicality" or is "required by the lawyers." Second, if you have made some bold assurances in negotiations that you cannot live up to, *make sure the final contract document negates them specifically*. A general disclaimer may not protect you from fraud liability.

The Boundaries of Bad Faith: Implied Fraud

Although U.S. law disclaims a general duty of good faith in negotiations, it will nevertheless stretch to

punish clear instances of bad faith. In such cases, even though the strict legal elements of fraud are missing, the courts will "imply" a promise or misrepresentation and will bend the usual rules to achieve a desired result.

For example, buyers usually have no duty to disclose the value of the object a seller is selling. Misrepresentations of value are considered nothing to get excited about because they are neither facts nor material to the seller's estimate of what the transaction is worth. However, if an elderly widow is selling an old painting that is, unknown to her, a museum piece, and a professional art dealer assures her that he is buying the work "primarily for the frame," he may run afoul of fraud law.³³ Misrepresentations of value may conceal an important fact to a relatively helpless seller, and the law is flexible enough to respond to such abuses in extreme cases.

Occasionally, negotiators use the bargaining process itself to get what they want, then walk away from the table. The law has a variety of ways of penalizing such bad faith conduct. In *Skycom Corp. v. Telstar Corp.*, for example, a company negotiating a sale of all its assets agreed, as part of preliminary negotiations, to let the prospective buyer take over ongoing negotiations with a third party for a valuable license.³⁴ The prospective buyer succeeded in getting the license but ultimately refused to go forward with the asset purchase. The disappointed seller sued. The court held that the parties' "letter of intent" left too many issues open to be construed as a completed contract, but it let the seller sue for the value of the lost license. The court said the buyer "may have induced [the seller] to turn over the negotiations and that [the seller] may have relied in a commercially reasonable way on representations made to him."

Courts have similarly ruled in favor of inventors and others who have disclosed trade secrets in the course of negotiations to sell their discoveries.³⁵ The prospective buyers in these cases have, in effect, attempted to use the negotiation process to get something for nothing, and the law is not sympathetic to such breaches of common good faith and trust. In essence, the courts have held that the buyer assumes an implied duty of confidentiality when it undertakes to review ideas or inventions. It can be fraudulent to breach this duty by trying to misappropriate the inventor's property during negotiations.

Unethical bargaining practices are, as often as not, illegal or become so after they are brought to light. The law simply expands to include them.

Conclusion: Business Ethics and the Law

When business theorists ask if lying in business negotiations is "ethical," they assume that deceptive conduct is often legal and argue that ethical sensibilities should govern one's negotiating behavior. As it turns out, this perspective on law and ethics is distorted. As this review of cases has shown, business negotiation law is infused with the norms of ethical business conduct. Indeed, the leading legal treatise writers on fraud candidly admit that "a new standard of business ethics" has resulted in complete shifts of legal doctrine in the past fifty years.³⁶ Unethical bargaining practices are, as often as not, illegal or become so after they are brought to light. The law simply expands to include them, definitions notwithstanding. However, when ethically acceptable conduct such as lying about reservation price appears to run foul of legal definitions, the law adjusts and refuses to penalize it. Thus, an ethical sensibility, far from being a "luxury" in business negotiations, may be a negotiator's best counselor.

In commenting on Michael Milken's recent guilty plea to securities law violations, financier H. Ross Perot gave this advice to young businesspeople: "Don't govern your life by what's legal or illegal, govern it by what's right or wrong." It turns out this is good legal as well as business advice, at least insofar as negotiation is concerned. In negotiation, people who rely on the letter of legal rules as a strategy for plotting unethical conduct are very likely to get into deep trouble. But people who rely on a cultivated sense of right and wrong to guide them in legal matters are likely to do well. ■

References

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Professor Robert H. Frank summed this up best when he wrote, "The art of bargaining, as most of us eventually learn, is in large part the art of sending misleading messages about [reservation prices]." See:

R.H. Frank, *Passions within Reason* (New York: Norton, 1988), p. 165.

2

Bargaining situations are often characterized as either distributive (zero-sum negotiations) or integrative (non-zero-sum negotiations). Distributive negotiations typically involve a single, divisible issue such as money. Integrative bargaining involves many issues that differ in importance to the parties, making possible mutual gains from trade across issues. See: R.E. Walton and R.B. McKersie, *A Behavioral Theory of Labor Negotiations* (New York: McGraw-Hill, 1965).

Both distributive and integrative bargaining situations, however, are "mixed motive" in character and contain within them incentives to lie or at least mislead. See:

D.A. Lax and J.K. Sebenius, *The Manager as Negotiator* (New York: The Free Press, 1986), pp. 30-35.

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The most famous recent treatment of the ethics of lying is Sissela Bok's book *Lying: Moral Choice in Public and Private Life* (New York: Vintage, 1978).

Other influential articles include:

A.Z. Carr, "Is Business Bluffing Ethical?" *Harvard Business Review*, January-February 1968, pp. 143-150; and

R.E. Wokutch and T.L. Carson, "The Ethics and Profitability of Bluffing in Business," in *Ethical Issues in Business*, 3rd ed., eds. T. Donaldson and P.H. Werhane (Englewood Cliffs, New Jersey: Prentice Hall, 1988), pp. 77-83.

None of these works focuses on legality of lying and some, such as Carr's piece, explicitly assume that the law's reach extends only to the most blatant forms of fraud.

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I have conducted an extensive search of the social scientific literature on bargaining deception and have found none that examines the effects of legal rules on bargaining behavior.

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This trend extends to other areas of law as well. See:

G.R. Shell, "Substituting Ethical Standards for Common Law Rules in Commercial Cases: An Emerging Statutory Trend," *Northwestern University Law Review* 82 (1988): 1198-1254.

6

The Uniform Commercial Code states that the UCC's general duty of good faith applies only to the performance and enforcement of agreements, not their negotiation. *Uniform Commercial Code* 1-203. See also:

Restatement (Second) of Contracts 205 (1981) comment c ("Bad faith in negotiation" is not "within the scope of this Section.")

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Id. 205 comment c.

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Feldman v. Allegheny International, Inc., 850 F.2d 1217, 1223 (7th Cir. 1988).

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W.P. Keeton, D.B. Dobbs, R.E. Keeton, and D.G. Owen, *Prosser and Keeton on the Law of Torts* (St. Paul, Minnesota: West, 1984), p. 728.

9

Computer Systems Engineering, Inc. v. Qantel Corp., 740 F.2d 59 (1st Cir. 1984).

10

Eckley v. Colorado Real Estate Commission, 752 P.2d 68 (Colo. 1988).

11

See Berger v. Security Pacific Information Systems, Inc., No. 88CA0822 (Colo. App. April 5, 1990); and "Companies Must Disclose Shaky Finances to Some Applicants, a Colorado Court Rules," *Wall Street Journal*, 20 April 1990, p. B12. Award of \$250,000 in actual and punitive damages against employer.

12

Miles v. McSwegin, 388 N.E.2d 1367 (Ohio 1979).

13

Zaschak v. Traverse Corp., 333 N.W.2d 191 (Mich. App. 1983).

14

Jordon v. Duff & Phelps, Inc., 815 F.2d 429 (7th Cir. 1987).

15

Rather, they refer to them as "puffery" or "feints." See: P. Freund, *The Acquisition Mating Dance* (Clifton, New Jersey: Prentice Hall, 1987), p. 164; and G. Nierenberg, *Fundamentals of Negotiating* (New York: Hawthorn/Dutton, 1973), p. 159.

16

See J.G. Cross, *The Economics of Bargaining* (New York: Basic Books, 1969), pp. 166-179; and P.H. Gulliver, *Disputes and Negotiation: A Cross-Cultural Perspective* (New York: Academic Press, 1979), pp. 135-141.

17

American Bar Association, *Model Rules of Professional Conduct* Rule 4.1(a) official comment (1983).

18

Kabatchnick v. Hanover-Elm Building Corp., 103 N.E.2d 692 (Mass. 1952).

19

Beavers v. Lamplighters Realty, Inc., 556 P.2d 1328 (Okla. App. 1976).

20

Edgington v. Fitzmaurice, L.R. 29 Ch. Div. 359 (1885).

21

Indiana courts have rejected the doctrine. Illinois courts require that the plaintiff prove a "scheme" to defraud in addition to other promissory fraud elements. Tennessee courts have explicitly reserved judgment on the existence of the tort. States such as New York, California, and Texas approve the doctrine.

22

Britt v. Britt, 359 S.E.2d 467, 471 (N.C. 1987); and Hodges v. Pittman, 530 So.2d 817, 818 (Ala. 1988).

23

Hanover Modular Homes v. Scottish Inns, 443 F. Supp. 888, 891-92 (W.D. La. 1978); and Brier v. Koncen Meat Co., 762 S.W.2d 499, 500 (Mo. App. 1988).

24

New Process Steel Corp. v. Steel Corp., 703 S.W.2d 209, 214 (Tex. App. 1985).

25

457 P.2d 535 (Wash. 1969). See also: Gibraltar Savings v. LDBrinkman Corp., 860 F.2d 1275 (5th Cir. 1988). Debtor promised creditor to keep holding company solvent when plans were under way to dissolve holding company. This was deemed fraudulent, resulting in a \$6 million verdict.

26

Alio v. Saponaro, 520 N.Y.S.2d 245 (A.D. 1987).

27

The statement in the text does not extend to "consumer" cases. See, for example: Boykin v. Hermitage Realty, 360 S.E.2d 177 (Va. 1987). Condominium owners claimed fraud based on assurances by a realtor that the lot behind their units would remain undeveloped even though readily available public records showed that it was the site of a future playground.

28

Turner v. Johnson & Johnson, 809 F.2d 90 (1st Cir. 1986).

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Turner v. Johnson & Johnson, 809 F.2d at 96.

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See V.H.S. Realty, Inc. v. Texaco, Inc., 757 F.2d 411, 418 (1st Cir. 1985).

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Turner v. Johnson & Johnson, 809 F.2d at 96.

32

Turner v. Johnson & Johnson, 809 F.2d at 95 (citing cases). But see: Grumman Allied Industries, Inc. v. Rohr Industries, Inc., 748 F.2d 729 (2d Cir. 1984). Contractual language stipulating that a buyer of company assets has not relied on any warranties or representations regarding design of new bus precludes claim based on failure to disclose poor "stress test" results on bus prototype.

33

Zimpel v. Trawick, 679 F. Supp. 1502 (W.D. Ark. 1988). An elderly, sick widow was defrauded when a professional land speculator bought her land without telling her that oil and gas had been discovered on it.

34

813 F.2d 810 (7th Cir. 1987).

35

See Smith v. Snap-On Tools Corp., 833 F.2d 578 (5th Cir. 1988). No liability was found when the inventor made a gift of invention to the company. See also:

Smith v. Dravo Corp., 203 F.2d 369 (7th Cir. 1953). Liability was found when the inventor intended negotiations to lead to sale of a trade secret.

36

Keeton et al. (1984), pp. 739, 751–52. In the past half-century, nondisclosure law has evolved to a “standard requiring con-

formity to what the ordinary ethical person would have disclosed,” and the “new standard of business ethics” has “led to an almost complete shift” in law regarding reasonable reliance.

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