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The Masquerading Fraud Claim

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Everyone loves a good costume party. But nothing is more frustrating for a business client than being on the receiving end of a run-of-the-mill breach-of-contract lawsuit dressed up as a fraud claim. In our overly litigious world, adversaries often twist a simple breach-of-contract case into an allegation of fraud to gain leverage in the matter.

Allowing meritless fraud claims to survive through discovery and into mediation, arbitration or trial will cause problems throughout the case and especially during settlement negotiations. Your adversary will no doubt use the lingering fraud claim as leverage to obtain a more favorable settlement. The value of a client's affirmative claim in the eyes of a judge, mediator or arbitrator could be dramatically reduced in the face of a fraud counterclaim, no matter how specious it may be. Consequently, aggressively defending against such a claim by seeking dismissal at the outset is of paramount importance. Some common and effective defense strategies are discussed below.

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Promises To Do Something in the Future Are Not Fraud

Many fraud allegations are really just "breach-of-promise" claims masquerading as fraud. To make out a fraud claim, a party must allege (1) material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) intention that the other person will rely on the representation; (4) a reasonable reliance thereon by other person; and (5) resulting damages. Many claims fail the very first requirement — a statement concerning a presently existing or past fact. For example, a claim in a simple, run-of-the-mill contract case that a sales representative promised the customer that he would ship a product quick-

ly at some point in the future is simply not a fraud claim. This is because a promise to do something in the future is not a statement about a presently existing fact or past fact.

The general rule in New Jersey, and elsewhere, is that fraud cannot be predicated upon statements that are promissory in nature at the time they are made and that involve actions to be done in the future. *Anderson v. Modica*, 4 N.J. 383, 391-392 (1950); *Ocean Cape Hotel Corp. v. Masefield Corp*., 63 N.J. Super. 369, 380 (App.Div.1960); *Barry by Ross v. N.J. State Highway Auth*., 245 N.J. Super. 302, 310-311 (Ch. Div. 1990). For this reason, statements about future or contingent events, probabilities, expectations or what will be done in the future, cannot constitute actionable fraud. *Alexander v. CIGNA Corp*., 991 F.Supp. 427 (D.N.J. 1998), *aff'd*, 172 F.3d 859 (3d Cir.1998).

This is true even if the statements turn out to be wrong. As long as the statements were not made with the intent to deceive, such statements about future events, expectations or intended acts, do not constitute misrepresentations despite their falsity. *Notch View Assocs. v. Smith*, 260 N.J. Super. 190 (Law Div. 1992); *Middlesex County Sewer Auth. v. Borough of Middlesex*, 74 N.J. Super. 591 (Law Div.1962), *aff'd* 79 N.J. Super. 24 (App.Div.1963). If the fraud allegation concerns the nonfulfillment of a contract, then the claim fails. *Anderson*, 4 N.J. at 392.

To be sure, a promise to pay in the future may be fraudulent if there is no present intent ever to do so. *Van Dam Egg Co. v. Allendale Farms, Inc*., 199 N.J. Super. 452 (App. Div. 1985). Accordingly, "a false representation of an existing intention, i.e., a false state of mind with respect to a future event has been held to constitute actionable misrepresentation." *Capano v. Borough of Stone Harbor*, 530 F.Supp. 1254, 1264 (D.N.J.1982). But from a practical perspective, it will be very difficult to prove a person did not have the intent at the time the statement was made. In any event, mere nonperformance is insufficient to prove that the promisor had no intention of performing. As such, a simple failure to fulfill contractual obligations cannot support a fraud claim. Rather, it is merely a breach of contract claim, which does not by itself constitute a fraud claim.

Fraud Cannot Be Based on Puffery and Opinions

Claims alleging mere puffery or statements of opinion also do not make out a fraud claim. The famous Allstate slogan, "You're in good hands with Allstate," is the common example of nonactionable puffery. The reasoning is that statements that are mere "puffery" or "vague and ill-defined opinions" are not statements of fact at all, and therefore do not constitute actual misrepresentations. *Alexander*, 991 F.Supp. at 435. While there is certainly a fine line, courts will draw a distinction between an actionable statement of fact and a company's mere puffing or opinion about its products or services. For example, statements assuring customer satisfaction are not an actionable misrepresentation. *Dream Builders v. Estate of Paton*, 2010 WL 1924776 (App. Div. 2010). Accordingly, a salesperson's statements like "we're the best," "you'll love our products" or "you will be satisfied with our services," will typically be considered nonactionable puffery.

Fraud Must Be Pleaded with Particularity; Conclusory Statements Are Not Enough

One of the most common arguments to dismiss a fraud claim is to rely on R.4:5-8 in arguing the claim fails the "heightened" pleading requirement for fraud. Rule 4:5-8(a) requires that "in all allegations of misrepresentation, fraud, mistake, breach of trust, willful default or undue influence, particulars of the wrong, with dates and items if necessary, shall be stated insofar as practicable." A court may dismiss a complaint alleging fraud if "the allegations do not set forth with specificity, nor do they constitute as pleaded, satisfaction of the elements of legal or equitable fraud." *Levinson v. D'Alfonso & Stein*, 320 N.J. Super. 312, 315 (App.Div.1999) (affirming dismissal of fraud claim for failure to plead with specificity); *Kenney v. Scientific, Inc*., 204 N.J. Super. 228, 256 (Law Div. 1985) (dismissing fraud claim for failure to comply with R. 4:5-8(a)).

A fraud claim cannot be based on the mere recitation of conclusions, repeating of the elements of the cause of action or the parroting of statutory language. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (to survive motion to dismiss, allegations in complaint "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."); *Wellness Pub. v. Barefoot*, 2008 WL 108889, at * 15 (D.N.J. Jan. 9, 2008) (dismissing claim in complaint because it merely parroted the language in a statute); *Glass v. Suburban Restoration Co*., 317 N.J. Super. 574, 582 (App. Div.1998) ("It has long been established that pleadings reciting mere conclusions without facts and reliance on subsequent discovery do not justify a lawsuit.").

However, even where a motion under R.4:5-8(a) is successful, that does not end the inquiry. Often courts will permit the party to amend the pleading to satisfy the requirements of the rule. To combat the likelihood of an amended pleading, it is important to point out that any amended pleading itself would be futile and therefore should not be permitted. *Notte v. Merchants Mut. Ins. Co*., 185 N.J. 490, 500-01 (2006). Where the proposed amended pleading would be a "useless endeavor" and not sustainable as a matter of law, courts are free to refuse leave to amend. Winning a R.4:5-8(a) motion would be a truly pyrrhic victory if your adversary were simply given the opportunity to amend and refile the fraud claim with more specific and damning allegations.

Applying these basic principles will go a long way to successfully unmasking the "masquerading" fraud claim. You will streamline the case, and narrow the focus to the true issues at stake. Your client will thank you, you will play the role of the hero, and more importantly, your client's case will benefit from it. ■