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**§ 27.01 Introduction**[[1]](#footnote-2)1

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Landowners have filed numerous lawsuits in recent years alleging fraudulent or negligent misrepresentations by landmen in obtaining ***oil*** and gas leases. This chapter will briefly consider some of the reasons such allegations arise, examine the rules and laws that impose a duty to avoid misrepresentations, discuss examples of recent cases involving allegations of misrepresentations, and recommend ways for landmen and lessees to minimize the likelihood of such allegations.

**§ 27.02 Some Reasons Allegations of Misrepresentation Arise**

Most landmen[[2]](#footnote-3)2 deal honestly with landowners, and most landowners would not allege they have been the victims of a misrepresentation unless they believed they had been.[[3]](#footnote-4)3 But allegations of fraud, misrepresentation, and other misconduct by landmen in the acquisition of mineral leases nevertheless are made. Aside from the occasional landman or landowner who is a "bad apple," several factors contribute to this. The first factor is landowner confusion. Many landowners have little experience in negotiating written contracts and scant knowledge about the ***oil*** and gas industry or its terminology. The potential for landowner confusion is increased if the landman persuades the landowner to sign the lease immediately, without taking a few days to reread and study the proposed lease, and perhaps consult an attorney.

The second factor is the tension between the lessee's desire that the landman reveal as little as possible about such matters as the lessee's exploration plans and the amount the lessee has paid other lessors, versus the landowner's desire to obtain that very information. If the tactic that the landman uses to avoid disclosing confidential information is to reply to a landowner's questions with an evasive response or to make a disclosure of only a portion of the relevant information, as opposed to stating that he is not authorized to discuss the matter, the landowner might conclude later that the evasive answer or partial disclosure was a misrepresentation.

Third, market conditions change. Bonus payments and royalty fractions sometimes go up as a play develops, and landowners who granted leases early, for lower bonuses, may feel cheated. Companies lose interest in areas, and landowners who were negotiating proposed leases when a company ceases leasing may feel cheated. If an area starts to produce large quantities of ***oil*** or gas, a landowner who granted a lease might feel that the lessee knew all along that the area was a sure bet and that the lessee should have given landowners a better deal.

Finally, some landmen are insufficiently trained and educated, which becomes a greater problem when a "lease rush" occurs. Companies quickly hire many individuals to be landmen, including some individuals with little or no prior experience, and sometimes press those individuals into service without sufficient training regarding what they can say, what they should not say, and how they should respond to questions seeking information that the landman is obliged to keep confidential.

Each of these factors, and no doubt others, can lead to a landowner believing that the landman made misrepresentations during negotiation of a mineral lease. Such a belief can adversely affect the lessee by damaging the relationship between the lessee and the landowner. Further, if the landowner tells others about the alleged misrepresentation, the reputation of the lessee may be damaged, which will make future contract negotiations with other landowners more difficult. A damaged reputation also can make dealing with regulators and public officials more challenging.

The personal interests of the landman also can be affected. The landman might be charged with violations of the ethical codes that govern the members of landmen associations. A landman who is an attorney might be charged with violation of the rules of professional conduct that govern lawyers.

Finally, the landowner might file suit against the lessee and the landman, alleging fraud and negligent misrepresentation, and possibly breach of contract. Even if the lessee and landman prevail in such litigation, they may incur significant expense in defending the litigation. If the landowner seeks a judgment that the lease is void, the lessee may feel compelled to delay development of the leased premises while the suit is pending. If the landowner prevails, the lessee could be liable for damages. Indeed, the landman might be personally liable for any damages in tort.[[4]](#footnote-5)4 Further, the landowner may be able to obtain a court judgment that the lease is void.[[5]](#footnote-6)5

**§ 27.03 Basic Rules Against Misrepresentations**

Both the ethics rules that govern specific types of professionals (such as landmen and lawyers) and the laws that govern all persons (such as tort law and contract law) impose duties to avoid misrepresentations.

**[1] Ethics Rules**

**[a] Landmen Associations' Codes of Ethics**

State and provincial laws generally do not impose ethics rules that apply specifically to landmen or land work. But many landmen are members of landmen associations (in which membership is voluntary), several of which have codes of ethics. A notable example is the American Association of Professional Landmen (AAPL), a professional organization that has about 13,000 individual members.[[6]](#footnote-7)6 The AAPL has a Code of Ethics, which is found at article XVI of the organization's bylaws.[[7]](#footnote-8)7 The Code of Ethics strongly emphasizes the importance of fair and honest dealings. Section I of the Code of Ethics states:

It shall be the duty of the Land Professional at all times to promote and, in a fair and honest manner, represent the industry to the public at large with the view of establishing and maintaining goodwill between the industry and the public and among industry parties.

The Land Professional, in his dealings with landowners, industry parties, and others outside the industry, shall conduct himself in a manner consistent with fairness and honesty, such as to maintain the respect of the public.[[8]](#footnote-9)8

The opening sentence of section 2 of the Code of Ethics again stresses fairness and honesty: "Competition among those engaged in the mineral and energy industries shall be kept at a high level with careful adherence to established rules of honesty and courtesy."[[9]](#footnote-10)9

The AAPL also has a Standards of Practice, which the AAPL adopted "[i]n order to inform the members of the specific conduct, business principles and ideals mandated by the Code of Ethics."[[10]](#footnote-11)10 The standards state in part: "It is the duty of the land professional to protect the members of the public with whom he deals against fraud, misrepresentation and unethical practices. He shall eliminate any practices which could be damaging to the public or bring discredit to the petroleum, mining or environmental industries."[[11]](#footnote-12)11

Several local petroleum landmen associations in the United States also have codes of ethics that impose a duty of honesty.[[12]](#footnote-13)12 In many cases the codes are patterned after the AAPL's code. Further, the bylaws of the Canadian Association of Petroleum Landmen similarly require that its members "conduct the member's business dealings with honesty"[[13]](#footnote-14)13

The landmen associations that have codes of ethics generally have procedures for the investigation of alleged ethics violations by their members, as well as rules that authorize penalties such as censure, temporary suspension of membership, or permanent expulsion for landmen who violate the codes of ethics.[[14]](#footnote-15)14

**[b] Lawyer Rules of Ethics**

Many landman are lawyers. Lawyers are governed by numerous ethical rules, some of which apply even when a lawyer is not acting in the capacity or the role of lawyer. In the United States, the regulations governing lawyers are primarily a matter of state law, and most states base their attorney ethics rules on the American Bar Association (ABA) *Model Rules of Professional Conduct* (*Model Rules*).[[15]](#footnote-16)15

At least three of the *Model Rules* impose a duty of honesty. The rule most relevant to lawyers who are working as landmen is Rule 8.4,[[16]](#footnote-17)16 which states in part: "It is professional misconduct for a lawyer to: . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Authorities have interpreted Rule 8.4's duties as applying even when a lawyer is not acting in the role of a lawyer.[[17]](#footnote-18)17 Thus, if a landman is a lawyer, Rule 8.4's duty to avoid "conduct involving dishonesty, fraud, deceit or misrepresentation" likely would apply to the landman's negotiation of a mineral lease.

In Canada, the practice of law is governed at the province level. Each province imposes ethical standards, and those standards generally are similar to standards contained in the Canadian Bar Association's *Code of Professional Conduct.*[[18]](#footnote-19)18 The code's first chapter, entitled "Integrity," states: "The lawyer must discharge with integrity all duties owed to clients, the court or tribunal or other members of the profession and the public."[[19]](#footnote-20)19 Comments to the rule state that "[d]ishonourable or questionable conduct on the part of the lawyer in either private life or professional practice will reflect adversely upon the lawyer;' and if conduct "would be likely to impair the client's trust in the lawyer as a professional consultant, a governing body may be justified in taking disciplinary action."[[20]](#footnote-21)20 The comments go on to state that examples of conduct that infringe upon the rule include "committing, whether professionally or in the lawyer's personal capacity, any act of fraud or dishonesty."[[21]](#footnote-22)21

The ethical rules of the individual provinces generally contain similar provisions. For example, British Columbia's *Professional Conduct Handbook* states that "[a] lawyer must not, in private life, extra-professional activities or professional practice, engage in dishonourable or questionable conduct that casts doubt on the lawyer's professional integrity or competence, or reflects adversely on the integrity of the legal profession."[[22]](#footnote-23)22

States and provinces have procedures for enforcing the rules of professional conduct, and lawyers found guilty of violating these rules can receive sanctions that include public reprimands, temporary suspension of their licenses to practice law, and permanent disbarment.[[23]](#footnote-24)23

**[2] Tort Law and Contract Law**

Both tort law and contract law recognize that individuals have a duty to avoid misrepresentations. Generally, tort and contract claims will be governed by state law.

**[a] Tort Law**

Tort law recognizes at least two potential causes of action based on a person's alleged misrepresentations: (a) fraud, also called intentional misrepresentation;[[24]](#footnote-25)24 and (b) negligent misrepresentation.

**[i] Intentional Misrepresentation or Fraud**

States and provinces generally recognize a tort that is known interchangeably as "fraud" or "intentional misrepresentation:' Courts from different jurisdictions use slightly different phrasing in describing the necessary elements of a fraud claim, but the substance of the necessary elements is largely the same throughout the United States and Canada. To prevail in a fraud claim, a plaintiff generally must prove that: (1) the defendant made a material misrepresentation; (2) the defendant knew the representation was false; (3) the defendant intended for the plaintiff to rely on the representation; (4) the plaintiff did rely on the representation; (5) the plaintiff's reliance was reasonable; and (6) the plaintiff incurred damages.[[25]](#footnote-26)25 The remedy for tortious fraud is monetary damages.[[26]](#footnote-27)26

**[ii] Negligent Misrepresentation**

Most jurisdictions also recognize a tort for negligent misrepresentation. The elements of a claim for negligent misrepresentation are: (1) a representation; (2) falsity of the representation; (3) the tortfeasor's failure to use reasonable care in obtaining the information; (4) the tortfeasor's provision of the false information during the course of a business transaction, with the intent that the recipient would rely on the information; (5) the plaintiff's actual reliance on the information; and (6) an injury to the plaintiff that results from his acting in reliance on the information.[[27]](#footnote-28)27 The remedy for negligent misrepresentation is monetary damages.[[28]](#footnote-29)28

**[b] Contract Law**

Contract law also provides a basis for relief when a person has been induced to enter a contract by fraud or by a non-fraudulent misrepresentation regarding a material matter.[[29]](#footnote-30)29 To prove fraud for purposes of contract law, a party generally must prove the same elements as a party must prove to establish fraud for purposes of tort law.[[30]](#footnote-31)30 To establish that a non-fraudulent misrepresentation was "material," a party must show that the misrepresentation was one that would induce a reasonable person to consent to a contract, or that the maker knew was likely to induce the recipient do so.[[31]](#footnote-32)31 Potential remedies include monetary damages,[[32]](#footnote-33)32 reformation of the contract,[[33]](#footnote-34)33 or a judgment that the contract is void.[[34]](#footnote-35)34

**§ 27.04 Application of the Rules Beyond Expressly Stated Falsehoods**

Ethical rules, tort law, and contract law each recognize that, in some circumstances, a person can make a misrepresentation even if he does not expressly make a false statement.

**[1] Nondisclosure of Information**

Plaintiffs sometimes claim that another party committed fraud by failing to disclose information. The general rule is that a nondisclosure is not deemed to be a misrepresentation, but there are exceptions.

**[a] General Rule: Affirmative Disclosures Not Required**

In every contract negotiation, each party will possess some information that the other side does not have, and sometimes the information will be material to the contract. This raises the question of whether a party has an affirmative duty to disclose information to the other side.

The general answer is that no such duty exists.[[35]](#footnote-36)35 Ethics rules, tort law, and contract law each recognize that a person generally does not have an affirmative duty to make disclosures. Comment 1 to ABA Model Rule 4.1 states that a lawyer "generally has no affirmative duty to inform an opposing party of relevant facts"[[36]](#footnote-37)36 The *Restatement (Second) of Torts* and the comments to it also recognize a general rule that a party to a transaction generally has no duty to disclose information, even if he knows that the other party lacks certain information that the party would consider material to the transaction.[[37]](#footnote-38)37 Comment (a) to the *Restatement (Second) of Contracts* § 161 states in part: "A party making a contract is not expected to tell all that he knows to the other party, even if he knows that the other party lacks knowledge on some aspects of the transaction:' Numerous court decisions have applied this general rule.

In *Peterson v. Koch Industries, Inc.,*[[38]](#footnote-39)38 a landman for Koch Industries, Inc. (Koch), sought a mineral lease over certain property in Utah. Jo Dee Peterson, who was 17 years old, owned a fractional mineral interest in the land. The landman contacted Peterson and her father, who both lived in California, and they agreed to sign a lease. The landman mailed a lease to them, and they both signed-Peterson as owner and her father in his role as guardian. A few months later, a company drilled two productive wells on land unitized with Peterson's land. About the same time, the landman sent a letter to Peterson, who by then had reached the age of majority, asking her to affirm the lease that she had signed during her minority.[[39]](#footnote-40)39 The landman did not mention the recent completion of the two productive wells. Without inquiring about drilling activity, Peterson signed a document affirming the lease.[[40]](#footnote-41)40

She also later signed a division order. Koch then began sending royalty checks to her. She declined to cash the checks and brought suit seeking to cancel the lease on the basis of fraud. She argued that the landman had an affirmative duty to inform her about the productive wells when he requested that she affirm the lease. She asked the court to enter an order that the lease was no longer in effect, which would have resulted in her receiving much larger payments on production than she would receive under the lease. But the court rejected her claim, stating that the landman did not have an affirmative duty to disclose information to her.[[41]](#footnote-42)41

In *Mallon* ***Oil*** *Co. v. Bowen/Edwards Associates,*[[42]](#footnote-43)42 the Southern Ute Indian Tribe (Tribe) granted an ***oil*** and gas lease to Mallon ***Oil*** Co. (Mallon), but the Tribe retained the right to explore for and produce coal. The Tribe then began a program to evaluate its coal reserves. As part of that process, the Tribe entered a contract with the U.S. Geological Survey (USGS) to assess the coal reserves contained beneath the Tribe's land.[[43]](#footnote-44)43

In conducting its evaluation, the USGS drilled test holes to certain coal formations, and during that drilling, the USGS observed gas kicks. The USGS also extracted core samples, and several of those core samples emitted natural gas. This information was provided to the Tribe, which employed a geologist who had access to the information. The geologist left the Tribe and went to work for Bowen/Edwards Associates, Inc. (BEA). BEA subsequently purchased from Mallon the latter's natural gas rights with respect to a particular coal formation. At the time of the sale, Mallon was not yet aware of the USGS study. About a year later, Mallon learned about the study, which showed that the area had great promise for coal-bed methane production. Mallon also learned that BEA had access to the study's findings prior to its purchase of Mallon's lease rights.[[44]](#footnote-45)44

Mallon brought suit to rescind the sale, asserting that BEA had a duty to reveal that information prior to the sale, and that BEA committed fraud by concealing the information. The Colorado Supreme Court disagreed. The court stated that a plaintiff who seeks to recover for fraud based on a failure to disclose information "must show that the defendant had a duty to disclose material information."[[45]](#footnote-46)45 Because Mallon failed to show that BEA had a duty to disclose, the general rule-that a party has no affirmative duty to disclose information-was applicable, and Mallon's fraud claim lacked merit.[[46]](#footnote-47)46

**[b] Exceptions: When Affirmative Disclosures Are Required**

Although a person generally has no affirmative duty to disclose information, the law recognizes several exceptions to this rule. The most widely recognized exception is that a person has a duty to disclose material information to a person to whom he owes fiduciary duties or with whom he has a relationship of trust and confidence.[[47]](#footnote-48)47 The fiduciary duty exception will rarely apply to a landman's negotiations with a landowner because fiduciary duties do not normally apply during arm's-length negotiations,[[48]](#footnote-49)48 and because a lessee generally does not owe fiduciary duties to a lessor.[[49]](#footnote-50)49

Further, neither a landman nor the lessee is likely to have a relationship of trust and confidence with the landowner.[[50]](#footnote-51)50 What constitutes a relationship of trust and confidence is difficult to define. Typical examples include the relationship between attorney and client, business partners, and family members.[[51]](#footnote-52)51 In *Consolidated* ***Oil*** *& Gas, Inc. v. Ryan,*[[52]](#footnote-53)52 a court held that a relationship of trust and confidence existed between a Colorado-based exploration and production company and a geologist that it had hired to do work on multiple occasions in Arkansas. Thus, when the geologist offered to buy the company's mineral interests in Arkansas, he had a duty to inform the company of the true value.[[53]](#footnote-54)53 A landman negotiating on behalf of a prospective lessee is unlikely to have a position of trust and confidence with a landowner.

Some authorities recognize other exceptions, such as a duty to make a disclosure if a person knows that the other party is mistaken about the contents or effect of a proposed contract.[[54]](#footnote-55)54 A party who does not read a contract generally cannot avoid the contract if he is mistaken about its contents, but if a lessee knows that the lessor is mistaken about a particular fact-perhaps the lessor thinks the lease contains a Pugh Clause, but it does not-the lessee might be obligated to make a disclosure that corrects the mistake.[[55]](#footnote-56)55 Another exception exists when a person knows the other party is mistaken about a basic assumption and failure to make a disclosure would "amount[] to a failure to act in good faith."[[56]](#footnote-57)56 It can be difficult to define what constitutes a "basic assumption," but one way to think about it is that a basic assumption concerns an inherent quality of the object of the contract. For example, if a house is infested with termites or land is contaminated from past ***oil*** and gas activity, a seller might be obligated to disclose those facts, because the absence of such problems might constitute basic assumptions by a buyer.[[57]](#footnote-58)57 On the other hand, because the value of the land is not a basic assumption, a buyer need not disclose that land has appreciated in value because of the prospect of mineral development in the area.[[58]](#footnote-59)58

Another noteworthy exception occurs if a prospective buyer or lessee learns material information about land by improperly invading the landowner's rights, such as by a physical trespass or a seismic trespass. In such circumstances, the prospective buyer or lessee would have a duty of disclosure.[[59]](#footnote-60)59 Thus, if a company learns through seismic trespass that valuable minerals are beneath a landowners property, the company may be liable for fraudulent misrepresentation if it obtains a mineral lease from the owner without disclosing that information.

Still other exceptions may exist under extraordinary fact situations. In *Mallon,* the Colorado Supreme Court stated that a duty to disclose exists if, in "equity or good conscience," the information should be disclosed.[[60]](#footnote-61)60 That statement gives courts some latitude in deciding when a duty of disclosure exists, though the statement does not appear to be intended to significantly broaden the obligation to disclose. In *Mallon,* the plaintiff was a company that held an ***oil*** and gas lease covering certain land. The defendant learned about geophysical information that showed that the land had substantial promise for coalbed methane production. Knowing that the ***oil*** and gas lessee lacked that information, the defendant negotiated a purchase of the lessees ***oil*** and gas rights without disclosing the information. The court concluded that, because the defendant had not obtained the geophysical information through improper means, equity and good conscience did not require the defendant to disclose the information.[[61]](#footnote-62)61

**[2] Partial Information**

The law also recognizes that a person sometimes can mislead others by making a statement that is literally true, but only part of the truth.[[62]](#footnote-63)62 Consider the following hypothetical. A landowner makes it clear that he is concerned about the environmental compliance record of a prospective lessee, and he asks whether the lessee has ever been accused of breaching an environmental regulation. The landman answers: "Yes, last year when the manager who handles environmental compliance was out with the flu, we were a few days late in filing a routine report, but we filed the report when he returned to work and since then we have implemented a back-up plan to ensure timely filing when the manager is out of the office." The answer is literally true, but the landman knows and leaves out the fact that the company has been accused of serious environmental lapses and regulatory violations on numerous occasions. Although the landman did not expressly state that the late report was the only environmental lapse, his answer arguably is a misrepresentation because it implies that.

Consider a second hypothetical. A local landman seeks a lease from a landowner who lives out of state. The landowner asks whether there has been any drilling in the area. The landman answers that the year before, a few wells were drilled and they had minor shows of gas. The landman leaves out the fact that the week before his conversation with the landowner, a company completed a well that tested as being capable of producing a high rate of gas. The landman did not expressly state that the drilling he mentioned was the only drilling in the area, but his answer arguably implies that and therefore may be a misrepresentation.

**[3] Correcting Prior Statements**

In some circumstances, a person can commit fraud by failing to correct a prior statement. This can occur in three types of situations. The first relates to a statement that was true when made but is no longer true.[[63]](#footnote-64)63 For example, suppose a landman who seeks a lease for certain property speaks to the owner, who lives in another state. They negotiate over an appropriate bonus, and the landowner asks if any successful wells have been completed in the area near the property. The landman truthfully answers that there have been none, and the landowner agrees to sign a lease for a particular bonus if a form is mailed to him. A couple of days later, when the landowner has not yet signed the lease, the landmans employer completes a well on neighboring property and it tests at a very high rate of ***oil*** production. The landman may have a duty of disclosure.

The second type of situation in which a person has a duty to correct his prior statement is when he made the prior statement believing at the time that it was true, but he has now learned that the statement was not true. The *Restatement (Second) of Torts* refers to a persons duty to correct statements that he "believed to be" true, but which he subsequently learns are not true.[[64]](#footnote-65)64 The *Restatement (Second) of Contracts* also recognizes such a duty,[[65]](#footnote-66)65 as do the rules governing attorney ethics.[[66]](#footnote-67)66

The third situation is when a person knowingly makes an incorrect statement without the intent that the other person rely on it, but later learns that the other individual is going to rely on it.[[67]](#footnote-68)67 For example, suppose that in casual conversation a landman who is speaking to an acquaintance in the ***oil*** and gas industry refers to a tract of land that his employer recently leased as containing 1,000 acres. The tract is really 910 acres in size, but the landman was not expecting his acquaintance to rely on that information and the landman was not worried about being precise. But later he learns that the acquaintance is planning to acquire a top lease from the landowner and pay a bonus based on 1,000 acres. In that situation, the landman might have an affirmative duty to disclose the true size of the tract.

**[4] Puffing, Sales Talk, Estimates of Value, and Opinions**

There are several types of statements that are not considered fraudulent. Examples include puffing or trade talk by salesmen, such as a statement that "this is a fine car." Such statements can also occur in lease negotiations. Such statements as "you'll be glad you entered this lease," or "this is a good way to potentially provide for your family's security," or "ABC ***Oil*** is the best company around" might constitute mere puffing.[[68]](#footnote-69)68 Estimates of value, statements regarding a party's bargaining position ("XYZ ***Oil*** will pay no more than $1,000 per acre"), and statements of legal opinion generally will not support a claim for fraud. Similarly, other expressions of opinion generally will not support a claim for fraud.[[69]](#footnote-70)69

But notwithstanding courts' widespread recognition that statements like these will not support a claim for fraud, landmen should be careful about such statements. In some cases, courts have held that such statements can support a fraud claim if the statements were "intended and understood" as statements of fact, rather than opinion.[[70]](#footnote-71)70

Moreover, despite the general rule that such statements will not support a claim for fraud, landowners sometimes assert fraud claims based on such statements, and it is best to avoid litigation-the outcome is uncertain and even if the defendants prevail in court, doing so may be expensive. A recent example of such litigation is *Koonce v. Chesapeake Exploration, LLC,*[[71]](#footnote-72)71 in which a large group of plaintiffs sued two Chesapeake Energy Corp. (Chesapeake) entities and several individuals, asserting various claims. Seven of the plaintiffs asserted fraud claims against the Chesapeake entities and the landmen with whom the plaintiffs negotiated.[[72]](#footnote-73)72 The plaintiffs claimed that the landmen knowingly made false representations that the plaintiffs would never receive a higher bonus offer than the bonus then being offered to them. Assuming the landmen made such statements, the statements should be classified as either comments about the lessee's bargaining position or an opinion about what other companies might offer. And either type of statement generally will not support a claim for fraud. Nevertheless, seven plaintiffs have asserted fraud claims against the lessee and its landmen based on the alleged statements.

Another recent example is supplied by *Starvaggi Industries, Inc. v. For-tuna Energy, Inc.,*[[73]](#footnote-74)73 in which the plaintiff owned land in Ohio, Pennsylvania, and West Virginia. The plaintiff granted a lease that covered the tracts in all three states, with production from a tract in one state being sufficient to maintain the entire lease. The plaintiff filed suit, alleging fraudulent inducement. Specifically the plaintiff alleged that the lessee's landman had promised that production in one state would not maintain the lease as to tracts in another state. To the extent that the landmans alleged statement is an opinion about the legal effect of the lease, such a statement generally would not support a fraud claim.[[74]](#footnote-75)74 Nevertheless, the plaintiff sued the lessee and its landman for fraud, alleging damages exceeding $1 million.[[75]](#footnote-76)75

**§ 27.05 Recent Lease Litigation Involving Alleged Misrepresentations**

Several recent cases involving allegations of fraud, misrepresentation, or other unethical conduct in the acquisition of leases can be divided into three groups: (1) "rejected lease" cases; (2) hydraulic fracturing cases; and (3) failure to disclose cases.

**[1] "Rejected Lease" Cases**

It is not uncommon for companies to obtain a landowner's signature on a proposed mineral lease, with consummation of the lease being conditioned on the lessee verifying that the landowner has good title to the minerals he purports to lease. And sometimes companies will obtain a landowners signature on a proposed lease, with consummation of the lease being based on the company's approval of the lease, and with the company having the right to grant or deny approval in its discretion. As a matter of contract law, it is well-established that these practices are permissible.

Conditioning a lease on verification of title is permissible because parties to a contract can agree that contractual obligations will be conditioned on the occurrence of some event.[[76]](#footnote-77)76 Such conditions sometimes are called "conditions precedent."[[77]](#footnote-78)77 A couple of common conditions precedent from everyday life are ones that make the purchase of a house conditional on a satisfactory inspection and on the buyer obtaining a loan. Similarly, parties can agree that a lease will be conditioned on confirmation of the lessor's good title.

Conditioning a lease on the prospective lessee's discretionary approval of the lease is permissible for a different reason. No one would dispute that, as part of contract negotiations, a party can solicit an offer without being bound to accept the offer. Further, contract law recognizes that a party can solicit for an offer to be made on specific terms. The *Restatement (Second) of Contracts* contains the following illustration:

A writes B, "I am eager to sell my house. I would consider $20,000 for it." B promptly answers, "I will buy your house for $20,000 cash." There is no contract. As letter is a request or suggestion that an offer be made to him. B has made an offer.[[78]](#footnote-79)78

The Restatement also states that "forms used or statements made by a traveling salesman may make it clear that the customer is making an offer to be accepted at the salesmans home office."[[79]](#footnote-80)79 In such a case, the salesman is not making an offer, but instead is soliciting an offer on terms that he specifies. Similarly, if a landman asks a landowner to sign a lease form, but the prospective lessee reserves the right to approve or disapprove the lease, then the landman has simply solicited an offer from the landowner.[[80]](#footnote-81)80

Although these concepts are well-established in contract law, some landowners may believe they have a binding contract once they have signed a lease form. Further, if a lessee rejects a lease because of an alleged cloud on the lessors title, the lessor may disagree about whether there really is a cloud. If a lessee does not find a cloud on title, but rejects a lease because it could not verify good title, the lessor may allege bad faith. If a lessee reserves unfettered discretion to approve or reject a lease, a lessor might allege a lack of good faith or that there was an implied acceptance prior to a subsequent rejection.

In the last few years, numerous landowners have sued exploration and production companies that rejected leases. Chesapeake is a defendant in several cases involving proposed leases that were conditioned on verification of title. Chesapeake and some of its subsidiaries have been sued in several so-called "cold drafting" cases. In these cases, a Chesapeake entity or one of its subsidiaries obtained landowners' signatures on proposed leases and gave the landowners sight drafts, payable at a later date, that represented bonus payments for the leases. Later, the Chesapeake entity rejected numerous leases and refused to authorize payment of the corresponding bank drafts, stating that it was not able to verify title. Several landowners have filed lawsuits, alleging that the title issue was merely a pretext for rejecting leases after market conditions changed. The plaintiffs have asserted various causes of action, including fraud. One group of plaintiffs who own mineral interests in the Barnett Shale area have filed a putative class action that is now pending in federal court.[[81]](#footnote-82)81 Chesapeake also has been sued in numerous state court actions in Michigan under similar facts.[[82]](#footnote-83)82

Range Resources (Range) is a defendant in several cases involving leases that were conditioned on Ranges discretionary approval. Most of the disputes arise from lease negotiations that began sometime during summer 2008. At that time, natural gas prices were at historically high levels, and Range's landmen were actively acquiring leases in the Marcellus Shale regions of West Virginia and Pennsylvania. The leases were conditioned on verification of title, as well as approval by Range's management. When natural gas prices started to decline in 2008, Range began to reject proposed leases. From Range's point of view, it had solicited offers from the property owners and simply exercised its right to decline the offers.

But a number of plaintiffs have filed suit, asserting various causes of action that include fraud. For example, in *Backwater Properties v. Range Resources-Appalachia, LLC,*[[83]](#footnote-84)83 two named plaintiffs filed a putative class action against Range and its landmen in the U.S. District Court for the Northern District of West Virginia. The plaintiffs in *Backwater* allege that Range developed a nefarious plan in which it would "offer [] landowners above market signing bonuses and revenue percentages if they would sign leases designating Range as the lessee."[[84]](#footnote-85)84 When the landowners signed the leases, that would discourage Range's competitors from seeking leases from the same landowners, and would discourage those landowners from granting other leases over the same property.[[85]](#footnote-86)85 Thus, the scheme would "exclude other competitors from the West Virginia markets for ***oil*** and gas leases."[[86]](#footnote-87)86

At the same time, the lease would be subject to a 180-day approval period by Range's management.[[87]](#footnote-88)87 This would allow Range to accept the lease if subsequent market conditions made the lease terms appear favorable, but to reject the lease if future market conditions made the proposed lease terms look unfavorable.[[88]](#footnote-89)88 Thus, the effect was that Range obtained an option to lease without having to pay for an option. Further, allege the plaintiffs, Ranges landmen misled the plaintiffs by assuring them that the management approval process was a mere formality, and that as long as Range did not find any title problems, the leases would be approved.[[89]](#footnote-90)89

The plaintiffs noted that a "Dear Property Owner" letter distributed to many landowners, including the plaintiffs, begins by stating: "Thank you for entering into an ***oil***, gas and coalbed methane lease with our firm. We are pleased to add your property to our exploration and development program!"[[90]](#footnote-91)90 Although the letter stated that the lease was subject to approval of title and management approval of the lease,[[91]](#footnote-92)91 the plaintiffs assert that the effect of the opening sentence and the landmens assurances was to fraudulently mislead the plaintiffs into believing that the only real condition on the lease was a verification that the landowners had good title. This led the plaintiffs to forego other leasing opportunities that had been available, but which had disappeared by the time Range rejected the leases.

The defendants filed a Rule 12(b)(6) motion to dismiss.[[92]](#footnote-93)92 The court granted the motion to dismiss as to antitrust claims asserted by the plaintiffs, but denied the motion to dismiss as to the breach of contract and fraud claims[[93]](#footnote-94)93 The case remained pending at the time this chapter was prepared.

Several other cases involving similar facts have been filed against Range in West Virginia and Pennsylvania. Most of the cases have settled. In at least two, a district court granted Range's Rule 12(b)(6) motion to dismiss all claims,[[94]](#footnote-95)94 and the parties settled while the cases were on appeal.[[95]](#footnote-96)95 In one, the parties settled[[96]](#footnote-97)96 a few months after the court denied the defendants' motion to dismiss the plaintiffs' fraud and breach of contract claims.[[97]](#footnote-98)97 In another, the parties settled while the defendants' motion to dismiss plaintiffs' fraud and breach of contract claims was pending.[[98]](#footnote-99)98 In at least two cases in which the plaintiffs alleged breach of contract, but not fraud, the parties settled early in the case, a few months after the court denied the defendants' Rule 12(b)(6) motion to dismiss.[[99]](#footnote-100)99

In addition to Range and its landmen, at least one other company was sued under somewhat similar facts.[[100]](#footnote-101)100

**[2] Hydraulic Fracturing Cases**

Hydraulic fracturing has become controversial, and in about two dozen or so cases across the nation, plaintiffs have brought suit alleging that fracturing operations have caused contamination of the plaintiffs' underground sources of drinking water. The plaintiffs in those cases typically have asserted several causes of action, sometimes including fraud.[[101]](#footnote-102)101

In two of the cases, the plaintiffs' original allegations regarding fraud contained very little detail, and the fraud claims ultimately were dismissed. In *Mitchell v. Encana* ***Oil*** *& Gas (USA), Inc.,* the plaintiff's original complaint contained vague allegations regarding the defendants' alleged failure to warn the plaintiff about dangers associated with hydraulic fracturing.[[102]](#footnote-103)102 The plaintiff voluntarily dismissed her fraud claim[[103]](#footnote-104)103 after the defendants filed motions to dismiss[[104]](#footnote-105)104 in which they asserted that the plaintiff had failed to plead fraud with particularity.[[105]](#footnote-106)105

In *Harris v. Devon Energy Production Co.,* the plaintiffs also made vague allegations about the defendants' alleged failure to disclose dangers associated with fracturing.[[106]](#footnote-107)106 After the defendants moved to dismiss, on grounds that the plaintiffs had not pleaded fraud with particularity and that plaintiffs had not alleged elements necessary to establish fraud,[[107]](#footnote-108)107 the plaintiffs amended their petition to add details regarding an alleged conversation with a representative of the defendant that occurred after the plaintiffs had granted a lease and begun to suspect that the defendant's activities may have contaminated their water.[[108]](#footnote-109)108 The court then granted the defendant's motion to dismiss the fraud claim asserted in the amended complaint, agreeing with defendants that the timing of the conversation demonstrated that it could not have been the cause of the plaintiffs' alleged harm.[[109]](#footnote-110)109

In contrast, the plaintiffs in *Fiorentino v. Cabot* ***Oil*** *& Gas Corp.* asserted fraud claims that have survived motions to dismiss.110 In *Fiorentino,* the plaintiffs' original complaint contained more information regarding their fraud allegations than had been included in the pleadings filed by the plaintiffs in *Mitchell* and *Harris,* but even the *Fiorentino* plaintiffs' original allegations regarding fraud were little more than conclusory assertions that tracked the elements necessary to state a claim in fraud,[[110]](#footnote-111)111 without supplying the "who, where, when, and why" detail that courts have stated[[111]](#footnote-112)112 is necessary to satisfy Federal Rule of Civil Procedure 9(b)'s requirement that fraud be pleaded with particularity.

After defendants moved to dismiss on the basis that the plaintiffs had not pleaded fraud with particularity,[[112]](#footnote-113)113 the plaintiffs filed an amended complaint that added substantial detail in support of their fraud claims. The amended complaint included details about specific statements made by particular landmen to specific plaintiffs. The allegations varied from one plaintiff to the next, but included such alleged false statements as:

the royalties being offered were "unprecedented"

drilling would have no impact whatsoever on the landowner's land

the most that the landowners would see on their property would be a pipe no bigger than a fire hydrant

the landowners were the only people in the neighborhood who had not yet signed a lease

lessee would never place a well on the landowner's property

the landowners would start receiving royalty payments shortly after they signed a lease

landowners would receive no less than some stated amount of royalties

lessee would be able to take gas from beneath the landowner's property even without a lease

lessee could drill under the landowner's property even if he did not grant a lease

lessee's bonus and royalty offer were as high an offer as the lessee would ever make.[[113]](#footnote-114)114

The amended complaint also included allegations of actions or statements that would not amount to fraud, but which could be classified as high pressure tactics, including allegations that landmen would: show up at a landowner's home unannounced, urge the landowner to sign a lease that the landowner had not seen before, urge the landowner to sign without taking a few days to think about it, and state that there was no reason to consult an attorney.[[114]](#footnote-115)115*Fiorentino* was still pending when this chapter was prepared.

**[3] Failure to Disclose Cases**

Many of the fraud claims filed by landowners against mineral lessees in recent years have been based on alleged failures to disclose information. Some of the fraud allegations in the hydraulic fracturing cases fall into this category. In some of the other failure to disclose cases, landowners have complained that the defendants committed fraud by not informing the landowners about the value of mineral rights associated with the land or the likelihood of finding minerals. Some of these actions have been filed by landowners who granted leases early in the life of a shale play, and who received a lower bonus or royalty than some landowners who granted leases later. Landowners generally have had little success with such claims.

An example is *Thomas v. Pride* ***Oil*** *& Gas Properties, Inc.,*[[115]](#footnote-116)116 in which the plaintiff granted a mineral lease to the defendant for 17 acres in Red River Parish in northwest Louisiana in February 2007, slightly more than a year before Haynesville Shale activity reached a frenzy. The lease provided for a bonus of $100, a three-sixteenths royalty, an initial primary term of three years, and an option for the lessee to extend the primary term by two years.[[116]](#footnote-117)117 The next year, the plaintiff filed suit to rescind the lease. The plaintiff asserted that his land was over the Haynesville Shale formation, and that the defendant had known this at the time the lease was negotiated, but that the defendant had failed to disclose the information. The plaintiff asserted that the nondisclosure was fraudulent and that the true value of a lease might be 100 times what he had been paid. He argued that he had a right to rescind the lease on the basis of fraud.[[117]](#footnote-118)118$%$%The district court rejected plaintiff's fraud claim. Under Louisiana law, as in other states, a plaintiff cannot state a claim for fraud by silence unless the defendant had a duty to disclose information.[[118]](#footnote-119)119 The court held the defendant had no duty to disclose because the defendant did not owe a fiduciary duty to plaintiff. Mineral Code article 122 expressly states that a lessee generally does not owe fiduciary duties to a lessor.[[119]](#footnote-120)120 Further, a mere contractual relationship does not create fiduciary obligations and no special relationship of confidence existed between plaintiff and defendant.[[120]](#footnote-121)121

**§ 27.06 Strategies to Lessen the Chance of Misrepresentation Allegations**

Most landmen would not deliberately make an express false statement to a landowner. Misrepresentation claims are more likely to result from misunderstandings; negligent misrepresentations that a landman makes when addressing factual matters beyond his knowledge; a landman's attempt to address the legal effects of some lease provision, the legal effect of the absence of a lease, or some other aspect of ***oil*** and gas law; statements about the lessee's future plans; comments about what the lessee has paid other lessors or whether the lessee's offer is its best offer; comments about whether the lease is a good deal; whether the lessee is likely to drill on the lessor's property; the degree of inconvenience that the lessee's activities will cause; or the likelihood of the lessor receiving royalties or royalties in a particular amount or by a particular time.

A landman is less likely to make such statements in his initial pitch to a landowner than in response to a question, or in attempting to persuade a skeptical landowner to sign, or to sign without taking time to study the lease, ponder it, or consult an attorney. The best strategy to minimize the likelihood of misrepresentation claims is for landmen and lessors to think ahead and plan regarding what a landman should say and should not say in response to particular types of questions and situations. Further, the companies that use landmen to acquire leases should consider giving written guidelines to their landmen and reinforcing the guidelines with training.

The following is a list of potential guidelines for minimizing the likelihood that a landowner will make allegations of fraud.

1. Although landmen sometimes will be under pressure to obtain leases quickly, they should not encourage a landowner to sign a lease without taking time to read it. In fact, the landman should tell the landowner that he should read the lease.
2. Lessees should consider having their landmen suggest to landowners that they consider consulting an attorney regarding the proposed lease. At the very least, a landman should not discourage a landowner from consulting an attorney. If a landowner asks whether he should consult an attorney, the landman should answer "Yes."
3. There are a number of questions that landmen should avoid answering. These include questions about ***oil*** and gas law, the legal effect of the lease, whether the lease is a good deal, what the lessee's future plans are, how much the lessee has paid others, and whether the lessee would pay more than the lessee is currently offering. If the landman does not know the answer to those questions, that could provide an easy way to respond to a landowner's question. But a landman who knows the answer to a question cannot claim ignorance-that in itself would be a misrepresentation. Further, even if a landman does not know the answer to a question, the landowner later might allege that the landman did know, and that he lied when he said he did not. The safest course for the landman is to answer that he is not authorized to discuss the lessee's future plans, the legal effects of the lease, whether the lease is a good deal, and other such topics.
4. If landmen do not know the answer to a question (assuming they are not going to answer that they are not authorized to discuss the subject), they should say that they do not know. They should not guess or speculate.
5. Lessees should include in their leases a merger clause stating that the written lease represents the complete agreement between the parties, and that any preexisting agreements, promises, and understandings between the parties have been merged into the written lease. This may protect against claims relating to alleged promises that are not included in the written document.[[121]](#footnote-122)122 Of course, many lessees already include such clauses in their leases.
6. Lessees should include in their leases a clause stating that the lease can only be amended by a writing signed by both parties.
7. Lessees should consider including in their leases a clause in which the parties agree that they are not relying on any statement or representation by the other party, other than statements made in the written lease.[[122]](#footnote-123)123 Such a clause might read something like this:

LACK OF RELIANCE ON REPRESENTATIONS: In deciding to sign and agree to this Lease, the Parties acknowledge and promise to one another that they are not relying on any statements or representations (except for statements or representations expressly contained in this written Lease) made by any of the other Parties or the employees, representatives, contractors, consultants, lawyers, landmen, or brokers of any of the other Parties regarding any matter, including: past or current Mineral exploration and production; future or planned Mineral exploration or production; the past, current, or future value of Minerals, rights in Minerals, or Mineral Leases; the existence or likelihood of existence of Minerals beneath the Leased Premises or land in the vicinity of the Leased Premises; whether or not any particular types of exploration, drilling, or production activity will be conducted on or beneath the Leased Premises or land in the vicinity of the Leased Premises; the legal effect of this Lease, any other agreement, or any statute, ordinance, regulation, or court decision; the likelihood of any changes in any law; the Parties' bargaining positions; the effects and consequences of exploration, drilling, and production activity; any future agreements or amendments of this Lease; or any other matter relevant to the Parties' decision to sign and agree to this Lease.

1. Lessees should consider including in their leases a clause stating that, whether or not each party has consulted an attorney regarding the lease, each party understands that it had a right to do so. Such a clause might have no legal effect, but it can help put a landowner on notice of his rights, and thus might be useful if a landowner complains that he did not get the advice of a lawyer.
2. Lessees should consider having landmen distribute a "Dear Property Owner" letter that states that the landowner should carefully review the lease and consider consulting an attorney, and that the landman is not authorized to discuss the legal effects of the lease.

**§ 27.07 Conclusion**

A duty to avoid fraud and misrepresentations is imposed by several authorities, including the codes of ethics that govern many landmen's associations, the rules of professional responsibility that govern lawyers, and private law-that is, tort and contract law. A breach of this duty, and even an erroneous allegation of a breach, can have significant adverse effects on a landman and a mineral lessee, including professional sanctions, damages awards, reformation of a lease, or rescission of a lease.

The most effective way to avoid allegations that a landman has made misrepresentations during the negotiation of a lease is for the landman to avoid making statements about several subjects, including the legal effect of the proposed lease, the lessee's future plans, and what the lessee would be willing to pay.

So that landmen do not venture into the discussion of these subjects without having planned to do so (perhaps in response to a landowner's questions), landmen should plan ahead regarding how they will respond when asked questions that they should avoid answering. Landmen should plan diplomatic ways to state that they are not authorized to discuss a subject, so that they are not tempted to give an evasive answer or an answer that gives some information, though not complete information, when a landowner asks about such a topic. When a landman does not know the answer to a question a landowner asks, the landman should not guess or speculate.

Finally, companies that use landmen should train them regarding what they can say, what they should not say, and the importance of ethics in negotiations.

100*See, e.g.,* Fiorentino v. Cabot ***Oil*** & Gas Corp., 750 F. Supp. 2d 506 (M.D. Pa. 2010).

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1. 1Cite as Keith B. Hall, "Fraud, Misrepresentation, and Related Ethical Issues in Obtaining Leases." 58 *Rocky Mt. Min. L. Inst.* 27-1 (2012). [↑](#footnote-ref-2)
2. 2A "landman" is "[a]n employee of an ***oil*** company whose primary duties are the management of the company's relations with its landowners. Such duties include the securing of ***oil*** and gas leases, lease amendments, pooling and unitization agreements and instruments necessary for curing title defects from landowners" *See* Patrick H. Martin & Bruce M. Kramer, *Manual of* ***Oil*** *and Gas Terms* 505 (14th ed. 2009). [↑](#footnote-ref-3)
3. 3This chapter will refer to lessors as "landowners" even though lessors are not always landowners. [↑](#footnote-ref-4)
4. 4A person generally has liability for the torts he commits, even if he was acting as an agent for another person at the time. Leyendecker & Assocs. v. Wechter, 683 S.W.2d 369, 375 (Tex. 1984). This rule holds true when the tort is fraud. Casciola v. F.S. Air Serv., 120 P.3d 1059, 1063 n.11 (Alaska 2005); Kaveny v. MDA Enters., 120 P.3d 854, 859 (N.M. Ct. App. 2005). [↑](#footnote-ref-5)
5. 5El Paso Exploration Co. v. Olinde, 527 So. 2d 511, 513 (La. Ct. App. 1988); L & B ***Oil*** Co. v. Arnold, 620 S.W.2d 191, 193 (Tex. Ct. App. 1981). [↑](#footnote-ref-6)
6. 6*See* AAPL, "About AAPL," http://www.landman.org/about-aapl. [↑](#footnote-ref-7)
7. 7AAPL, *ByLaws,* at art. XVI (June 15, 2012), http://www.landman.org/about-aapl/bylaws. The AAPL bylaws have been amended, effective January 1, 2013, but the amended bylaws retain the Code of Ethics. [↑](#footnote-ref-8)
8. 8*Id.* at art. XVI, § 1. [↑](#footnote-ref-9)
9. 9*Id.* at art. XVI, § 2. [↑](#footnote-ref-10)
10. 10The Standards of Practice can be found at the end of the AAPL ByLaws webpage. *See* http://www.landman.org/about-aapl/bylaws. [↑](#footnote-ref-11)
11. 11*Id.* [↑](#footnote-ref-12)
12. 12Local associations that have ethics codes include the Oklahoma City Association of Professional Landmen, http://www.ocapl.org/Bylaws; the Houston Association of Professional Landmen, http://hapl.org/en/cms/?87; the Nevada Landmen's Association, http:// nvlandman.org/nlabylaws.html; the Utah Association of Professional Landmen (by reference to AAPL's Code of Ethics), http://www.utahapl.org/membership.html; and the Denver Association of Petroleum Landmen, http://www.dapldenver.org/images/stories/documents/final%20bylaws2.pdf. [↑](#footnote-ref-13)
13. 13*See* Canadian Association of Petroleum Landmen, *By-Laws,* at art. 5.1 (Apr. 22, 2009), http://www.landman.ca/pdf/constitution.pdf. [↑](#footnote-ref-14)
14. 14*See* AAPL, *ByLaws,* at art. XVII, § 4. [↑](#footnote-ref-15)
15. 15California is an exception. ABA, *Model Rules of Professional Conduct* (2010). [↑](#footnote-ref-16)
16. 16Two other *Model Rules* explicitly require honesty, but probably will not apply to a lawyer's work as a landman. Rule 3.3 prohibits a lawyer from "knowingly" making "a false statement of fact or law to a tribunal." Rule 4.1 prohibits a lawyer from "knowingly" making a false statement to a third person "[i]n the course of representing a client:' In the context of Rule 4.1, "client" appears to refer to someone who is a client for legal services, not someone who is a client for other professional services, such as a landman's services. [↑](#footnote-ref-17)
17. 17*See, e.g.,* People v. Parsley, 109 P.3d 1060 (Colo. O.P.D.J. 2005) (misrepresentations during loan application); *In re* Richmond, 996 So. 2d 282 (La. 2008) (misrepresentation in application to be candidate for public office). [↑](#footnote-ref-18)
18. 18Canadian Bar Ass'n, *Code of Professional Conduct* (2009), http://www.cba.org/CBA/ activities/pdf/codeofconduct.pdf. [↑](#footnote-ref-19)
19. 19*Id.* at 1. [↑](#footnote-ref-20)
20. 20*Id.* at 1-2. [↑](#footnote-ref-21)
21. 21*Id.* at 2. [↑](#footnote-ref-22)
22. 22The Law Soc'y of British Columbia, *Professional Conduct Handbook,* at ch. 2, Rule 1 (June 2012), http://www.lawsociety.bc.caipage.cfm?cid=383&t=Professional-Conduct-Manual. British Columbia is replacing the Professional Conduct Handbook with a new *Code of Professional Conduct for British Columbia,* effective January 1, 2013, but Rule 1.02 of the new code similarly contains a mandate that a lawyer act with integrity, both in professional and private life. The new code is available at http://www.Alawsociety.bc.ca/docs/practice/ resources/bc-code/bc-code.pdf. [↑](#footnote-ref-23)
23. 23*See, e.g.,* La. Sup. Ct. R. 19, § 10(A). [↑](#footnote-ref-24)
24. 24*See, e.g.,* Universal Drilling Co. v. R & R Rig Serv., 271 P.3d 987, 994 (Wyo. 2012) (equating "fraud" and "intentional misrepresentation"). [↑](#footnote-ref-25)
25. 25*See* La. Civ. Code Ann. art. 1953; Shamas v. Koch Indus., Inc., 759 F.2d 796, 799 (10th Cir. 1985) (Utah law); Exxon Corp. v. Emerald ***Oil*** & Gas Co., 348 S.W.3d 194, 217 (Tex. 2011); *Universal Drilling Co.,* 271 P.3d at 994. For a Canadian case, see *Skuratow v. Commonwealth Ins. Co.* (2005), 46 B.C.L.R. 4th 52 (B.C. C.A.). [↑](#footnote-ref-26)
26. 26*Restatement (Second) of Torts* § 549 (1977). A landman who commits fraud would have personal liability. *See supra* note 3. A thorough discussion of vicarious liability is beyond the scope of this chapter, but if the landman is the lessee's employee, the lessee likely will be liable under the doctrine of respondeat superior. See Baptist Mem'l Hosp. Sys. v. Sampson, 969 S.W.2d 945, 947 (Tex. 1998). Occasionally, defendants escape liability for the fraud of an independent contractor. *See* S & I Mgmt., Inc. v. Sungju Choi, 331 S.W.3d 849, 853 (Tex. Ct. App. 2011). But often they do not. *See* Lawyers Title Ins. Corp. v. Phillips Title Agency, 361 F. Supp. 2d 443, 451 (D.N.J. 2005); *see also Restatement (Second) of Agency* § 261 (1958). [↑](#footnote-ref-27)
27. 27*See Restatement (Second) of Torts* § 552(1) (1977); McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787, 791 (Tex. 1999). [↑](#footnote-ref-28)
28. 28*Restatement (Second) of Torts* § 552B (1977). [↑](#footnote-ref-29)
29. 29*E.g.,* Miller v. Celebration Mining Co., 29 P.3d 1231, 1235 (Utah 2001). [↑](#footnote-ref-30)
30. 30*Id.* [↑](#footnote-ref-31)
31. 31*Restatement (Second) of Contracts* § 162(2) (1981). [↑](#footnote-ref-32)
32. 32*See, e.g.,* La. Civ. Code Ann. art. 1958. [↑](#footnote-ref-33)
33. 33*Restatement (Second) of Contracts* § 166 (1981). [↑](#footnote-ref-34)
34. 34*See, e.g.,* Nygaard v. Robinson, 341 N.W.2d 349 (N.D. 1983). Even fraud by a person not a party (or agent of a party) to the contract can make the contract voidable in certain circumstances. *See* La. Civ. Code Ann. art. 1956; *Restatement (Second) of Contracts* § 164(2) (1981). [↑](#footnote-ref-35)
35. 35*See* Shamas v. Koch Indus., Inc., 759 F.2d 796, 799 (10th Cir. 1985) ("If the lessee is asked if he has tested the land, or knows of the existence of ***oil*** and gas structure, he may remain silent, but if he undertakes to answer, he must tell the truth." (quoting 4 *Summers* ***Oil*** *& Gas* § 662)). [↑](#footnote-ref-36)
36. 36*See also Restatement (Third) of The Law Governing Lawyers* § 98 cmt. (e) ("In general, a lawyer has no legal duty to make an affirmative disclosure of fact or law when dealing with a nonclient."). [↑](#footnote-ref-37)
37. 37*See Restatement (Second) of Torts* § 551(1) & cmt. (a) (1977). [↑](#footnote-ref-38)
38. 38684 F.2d 667 (10th Cir. 1982). [↑](#footnote-ref-39)
39. 39*Id.* at 668-69. *See* Utah Code Ann. § 15-2-2 (a person who executes a contract while a minor generally has the right to disaffirm the contract later, as long as she does so within a reasonable time of reaching majority). [↑](#footnote-ref-40)
40. 40684 F.2d at 669. [↑](#footnote-ref-41)
41. 41*Id.* at 669-72. [↑](#footnote-ref-42)
42. 42965 P.2d 105 (Colo. 1998). [↑](#footnote-ref-43)
43. 43*Id.* at 107. [↑](#footnote-ref-44)
44. 44*Id.* at 107-08. [↑](#footnote-ref-45)
45. 45*Id.* at 111. [↑](#footnote-ref-46)
46. 46*Id.* at 112. Similarly, several decades ago a court held that a lessee was not obligated to make an affirmative disclosure to a lessor. Henderson v. Shell ***Oil*** Co., 202 S.W.2d 492, 499 (Tex. Civ. App. 1947). [↑](#footnote-ref-47)
47. 47*See, e.g.,* Thomas v. Pride ***Oil*** & Gas Props., Inc., 633 F. Supp. 2d 238, 241 (W.D. La. 2009). [↑](#footnote-ref-48)
48. 48*Id.* at 241-42. [↑](#footnote-ref-49)
49. 49*See, e.g.,* La. Rev. Stat. Ann. § 31:122; Finley v. Marathon ***Oil*** Co., 75 F.3d 1225, 1229 (7th Cir. 1996). [↑](#footnote-ref-50)
50. 50*Thomas,* 633 F. Supp. 2d at 241. [↑](#footnote-ref-51)
51. 51*Restatement (Second) of Torts* § 551 cmt. (f) (1977). [↑](#footnote-ref-52)
52. 52250 F. Supp. 600 (W.D. Ark. 1966). [↑](#footnote-ref-53)
53. 53*Id.* at 607. Although the court found that a relationship of trust and confidence existed, it should be noted that some of the geologist's statements were or came close to being express false statements. [↑](#footnote-ref-54)
54. 54*Restatement (Second) of Contracts* § 161(c) (1981). [↑](#footnote-ref-55)
55. 55*Id.* § 161 illus. 12. [↑](#footnote-ref-56)
56. 56*Id.* § 161(b). [↑](#footnote-ref-57)
57. 57*Id.* § 161 illus. 4 & 5. [↑](#footnote-ref-58)
58. 58*Id.* § 161 illus. 7 & 10; *cf.* Mallon ***Oil*** Co. v. Bowen/Edwards Assocs., 965 P.2d 105 (Colo. 1998). [↑](#footnote-ref-59)
59. 59*Restatement (Second) of Contracts* § 161 illus. 11 (1981); *cf. Mallon,* 965 P.2d at 111-12. [↑](#footnote-ref-60)
60. 60*Mallon,* 965 P.2d at 111. [↑](#footnote-ref-61)
61. 61*Id.* at 112. [↑](#footnote-ref-62)
62. 62*See* Hoggett v. Brown, 971 S.W.2d 472, 487 (Tex. Ct. App. 1997); *Restatement (Second) of Torts* § 529 (1977). [↑](#footnote-ref-63)
63. 63*See* Susanoil, Inc. v. Cont'l ***Oil*** Co., 519 S.W.2d 230, 236, 236 n.6 (Tex. Civ. App. 1975); *Restatement (Second) of Torts* § 551(2)(c) (1977); *Restatement (Second) of Contracts* § 161(a) & cmt. (c) (1981). [↑](#footnote-ref-64)
64. 64*Restatement (Second) of Torts* § 551(2)(c) (1977). [↑](#footnote-ref-65)
65. 65*Restatement (Second) of Contracts* § 161 cmt. (c) (1981). [↑](#footnote-ref-66)
66. 66*Restatement (Third) of The Law Governing Lawyers* § 98 cmt. (d) ("A lawyer who has made a representation on behalf of a client reasonably believing it true when made may subsequently come to know of its falsity. An obligation to disclose before consummation of the transaction ordinarily arises, unless the lawyer takes other corrective action."). [↑](#footnote-ref-67)
67. 67*Restatement (Second) of Torts* § 551(2)(d) & cmt. (i) (1977); *Restatement (Second) of Contracts* § 161 cmt. (c) (1981). [↑](#footnote-ref-68)
68. 68Bulbman, Inc. v. Nev. Bell, 825 P.2d 588, 592 (Nev. 1992); Cont'l Potash, Inc. v. Freeport-McMoran, Inc., 858 P.2d 66, 79 (N.M. 1993). [↑](#footnote-ref-69)
69. 69*Bulbman,* 825 P.2d at 592. [↑](#footnote-ref-70)
70. 70*See, e.g.,* Fina Supply, Inc. v. Abilene Nat'l Bank, 726 S.W.2d 537, 540 (Tex. 1987). [↑](#footnote-ref-71)
71. 71No. 4:12-cv-00736 (N.D. Ohio filed Mar. 27, 2012). The case was filed in state court (the Court of Common Pleas, Columbiana County, Lisbon, Ohio, Feb. 27, 2012) but was removed to federal court. Notice of Removal, No. 4:12-cv-00736 (N.D. Ohio Mar. 27, 2012). The case was later remanded to state court. Stipulation to Remand, No. 4:12-cv-00736 (N.D. Ohio Apr. 13, 2012). [↑](#footnote-ref-72)
72. 72*See* Notice of Removal, No. 4:12-cv-00736 (plaintiffs' state court complaint is attached). [↑](#footnote-ref-73)
73. 73No. 5:10-cv-00130 (N.D. W. Va. filed Dec. 6, 2010) (state court complaint, filed by defendant as part of removal papers in removing case to federal court). [↑](#footnote-ref-74)
74. 74Portions of the plaintiff's complaint suggest that the plaintiff is alleging that the landman promised to draft the lease a particular way, as opposed to alleging that the landman was stating an opinion about the effect of particular language. *Id.* [↑](#footnote-ref-75)
75. 75The case settled at an early stage. Order of Dismissal, *Starvaggi Indus.,* No.5:10-cv-00130 (N.D. W. Va. Apr. 22, 2011) (referring to settlement). [↑](#footnote-ref-76)
76. 76*Restatement (Second) of Contracts* § 224 (1981). [↑](#footnote-ref-77)
77. 77*Restatement (First) of Contracts* § 250 (1932). Louisiana Civil Code art. 1767 refers to such a condition as being "suspensive." [↑](#footnote-ref-78)
78. 78*Restatement (Second) of Contracts* § 26 illus. 4 (1981). [↑](#footnote-ref-79)
79. 79*Id.* at cmt. (d). [↑](#footnote-ref-80)
80. 80Hollingsworth v. Range Res.-Appalachia, LLC, No. 3:09cv838, 2009 WL 3601586 (M.D. Pa. Oct. 28, 2009). [↑](#footnote-ref-81)
81. 81Ahrend v. Chesapeake Energy Corp., No. 3:09-cv-01558-F (N.D. Tex. filed Aug. 21, 2009). [↑](#footnote-ref-82)
82. 82*See, e.g.,* Cook v. W. Land Servs., Inc., No. 11-8654-CK (13th Cir. Ct., Antrim Cnty., Mich, filed June 1, 2011). [↑](#footnote-ref-83)
83. 83No. l:10-cv-00103 (N.D. W. Va. filed July 9, 2010). [↑](#footnote-ref-84)
84. 84Complaint, *Backwater,* No. 1:10-cv-00103, at ¶ 11. [↑](#footnote-ref-85)
85. 85*Id.* at ¶ 12. [↑](#footnote-ref-86)
86. 86*Id.* at ¶ 10. [↑](#footnote-ref-87)
87. 87*Id.* at ¶ 11. [↑](#footnote-ref-88)
88. 88*Id.* at ¶ 12. [↑](#footnote-ref-89)
89. 89*Id.* at ¶ 17. [↑](#footnote-ref-90)
90. 90*Id.* at ¶ 17 & ex. 1. [↑](#footnote-ref-91)
91. 91*Id.* [↑](#footnote-ref-92)
92. 92*See* Fed. R. Civ. P. 12(b)(6). [↑](#footnote-ref-93)
93. 93*Backwater,* No. 1:10-cv-103, 2011 WL 1706521 (N.D. W. Va. May 5, 2011). [↑](#footnote-ref-94)
94. 94Hollingsworth v. Range Res.-Appalachia, LLC, No. 3:09cv838, 2009 WL 3601586 (M.D. Pa. Oct. 28, 2009); Lyco Better Homes, Inc. v. Range Res.-Appalachia, LLC, No. 4:09-cv-00249, 2009 U.S. Dist. Lexis 110425 (M.D. Pa. May 21, 2009). [↑](#footnote-ref-95)
95. 95Order, Hollingsworth v. Range Res.-Appalachia, LLC, No. 09-4506 (3d Cir. Mar. 1, 2010) (dismissing appeal and noting settlement); Stipulation of Dismissal, Lyco Better Homes, Inc. v. Range Res.-Appalachia, LLC, No. 09-2645 (3d Cir. filed Jan. 18, 2010) (noting settlement).A court also granted a defendant's motion to dismiss all claims in ***Kerns*** *v. Range Res.-Appalachia, LLC,* No. 1:10cv23, 2011 WL 3753117 (N.D. W. Va. Aug. 23, 2011), though the court did so without prejudice. The record in ***Kerns*** does not reflect a settlement. [↑](#footnote-ref-96)
96. 96Stipulation of Dismissal, Windstar Holdings LLC v. Range Res. Corp., No. 1:10-cv-00204 (N.D. W. Va. filed Oct. 7, 2011). [↑](#footnote-ref-97)
97. 97*See id.,* No. 1:10cv204, 2011 WL 2709849 (N.D. W. Va. July 12, 2011). [↑](#footnote-ref-98)
98. 98Order, Pigeon Creek Presbyterian Church v. Range Res.-Appalachia, LLC, No. 2:09-cv-1399 (W.D. Pa. Apr. 8, 2010) (order of dismissal, noting settlement). [↑](#footnote-ref-99)
99. 99*See* Valentino v. Range Res.-Appalachia, LLC, No. 09-1615, 2010 WL 2034550 (W.D. Pa. May 21, 2010); Joint Stipulation for Dismissal, Valentino v. Range Res.-Appalachia, LLC, No. 09-1615 (W.D. Pa. filed Aug. 26, 2010); Shafer v. Range Res.-Appalachia, LLC, No. 2:10-cv-1142, 2011 WL 677479 (W.D. Pa. Feb. 16, 2011); Stipulation for Dismissal, Shafer v. Range Res.-Appalachia, LLC, No. 10-1142 (W.D. Pa. filed Aug. 30, 2011). [↑](#footnote-ref-100)
100. 100*See* Dufour v. Carrizo ***Oil*** & Gas, Inc., No. 3:10-cv-00013, 2011 WL 1136801 (W.D. Pa. Mar. 25, 2011) (granting the motion to dismiss fraud claims, but denying motion to dismiss breach of contract claim). [↑](#footnote-ref-101)
101. 101*See* Keith B. Hall, "Contamination Claims: Hydraulic Fracturing Litigation," *For The Defense* 66, 68-69 (Jan. 2012); Barclay Nicholson & Kadian Blanson, "Tracking Fracking Case Law: Hydraulic Fracturing Litigation," 26 *Nat. Res. & Env.* 25 (Fall 2011). [↑](#footnote-ref-102)
102. 102Plaintiffs' [sic] Original Complaint, Mitchell v. Encana ***Oil*** & Gas (USA), Inc., No. 3:10-cv-02555-N, at VII (N.D. Tex. filed Dec. 15, 2010). [↑](#footnote-ref-103)
103. 103Plaintiff's Motion to File First Amended Complaint, *Mitchell,* No. 3:10-cv-02555-N, at 6-7 (N.D. Tex. filed Mar. 31, 2011). [↑](#footnote-ref-104)
104. 104Defendants Chesapeake Operating, Inc. and Chesapeake Exploration, LLC's Motion to Dismiss and Brief in Support, *Mitchell,* No. 3:10-cv-02555-N (N.D. Tex. filed Mar. 15, 2011); EnCana's Partial Motion to Dismiss Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and Brief in Support Thereof, *Mitchell,* No. 3:10-cv-02555-N, at 4-5 (N.D. Tex. filed Mar. 16, 2011). [↑](#footnote-ref-105)
105. 105Federal Rule of Civil Procedure 9(b) requires fraud to be pleaded with particularity. Many state rules of procedure contain similar provisions. *E.g.,* Colo. R. Civ. P. 9(b); N.D. R. Civ. P. 9(b); Wyo. R. Civ. P. 9(b); La. Code Civ. Ann. art. 856; 231 Pa. Code § 1019(c). [↑](#footnote-ref-106)
106. 106Plaintiff's Original Complaint, Harris v. Devon Energy Prod. Co., No. 3:10-cv-02554, at pt. VII (N.D. Tex. filed Dec. 15, 2010). [↑](#footnote-ref-107)
107. 107Partial Motion to Dismiss and Brief in Support, *Harris,* No. 4:10-cv-00708-MSH (N.D. Tex. filed Jan. 6, 2011). [↑](#footnote-ref-108)
108. 108Plaintiffs' First Amended Complaint, *Harris,* No. 4:10-cv-00708-MSH-ALM (N.D. Tex. filed Apr. 8, 2011). [↑](#footnote-ref-109)
109. 109Memorandum Adopting Report and Recommendation of the United States Magistrate Judge, *Harris,* No. 4:10-cv-708 (N.D. Tex. filed July 13, 2011). [↑](#footnote-ref-110)
110. 111Complaint, *Fiorentino,* No. 09CV02284, 2009 WL 4623704, at ¶¶ 90-93 (M.D. Pa. filed Nov. 19, 2009). [↑](#footnote-ref-111)
111. 112Flaherty & Crumrine Preferred Income Fund, Inc. v. TXU Corp., 565 F.3d 200, 207 (5th Cir. 2009) (to plead fraud with particularity, plaintiff must identify the speaker, state where and when statement was made, and explain why statement was fraudulent). [↑](#footnote-ref-112)
112. 113Defendants' Motion to Dismiss, *Fiorentino,* No. 3:09-cv-02284-TIV, 2010 WL 367437 (M.D. Pa. filed Jan. 29, 2010). [↑](#footnote-ref-113)
113. 114Amended Complaint, *Fiorentino,* No. 3:09-cv-02284-TIV, 2010 WL 931974, at ¶¶ 91-115 (M.D. Pa. filed Mar. 5, 2010). [↑](#footnote-ref-114)
114. 115*Id.* [↑](#footnote-ref-115)
115. 116633 F. Supp. 2d 238 (W.D. La. 2009). [↑](#footnote-ref-116)
116. 117*Id.* at 239, 239 n.1. [↑](#footnote-ref-117)
117. 118*Id.* at 239-40. [↑](#footnote-ref-118)
118. 119*Id.* at 241. [↑](#footnote-ref-119)
119. 120La. Rev. Stat. Ann. § 31:122. [↑](#footnote-ref-120)
120. 121*Thomas,* 633 F. Supp. 2d at 241. [↑](#footnote-ref-121)
121. 122*See, e.g.,* Coal Res. v. Gulf & W. Indus., 756 F.2d 443, 447 (6th Cir. 1985) (Ohio law). [↑](#footnote-ref-122)
122. 123A disclaimer of reliance will not always defeat a fraud claim, but in some circumstances it can. *See, e.g.,* Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171,180-81 (Tex. 1997). [↑](#footnote-ref-123)