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Contract Defenses

If you reach this point on the verdict slip, you must consider whether DFT has proven a defense to PLF's contract claim. A defense is a legally justified reason not to perform the contract.

DFT has the burden of proving his/her/its defense(s). PLF has no burden to disprove the defense(s). To establish a defense, DFT must prove to you that, more likely than not, it has a legal reason for not performing the contract.

(1) Waiver.

DFT claims that PLF waived provisions of the contract by [describe actions]. Waiver occurs when a party intentionally gives up a known right under the contract.

To prove waiver, DFT must show that two things are more likely true than not true. First, that PLF unconditionally accepted the benefit of the contract instead of demanding that DFT comply with the contract. Second, that DFT reasonably relied on PLF's actions. If DFT proves these two things, then PLF waived complaints about DFT's performance of the contract

(2) Payment.

DFT claims that s/he/it has paid all [some] of the money due under the contract and therefore is not liable [for the entire amount of PLF's claim]. DFT has the burden to prove payment. PLF has no burden to show the amount of any payment. DFT is not liable for breach of contract if DFT has proven that s/he/it paid the agreed contract in full. If DFT has proven that s/he/it paid some but not all of the money due under the contract, then DFT is liable only for the amount not paid.

(3) Statute of Limitations. <*if jury issue*>

The law requires PLF to bring the contract claim within six years [three years if the Commonwealth is the defendant[1]] of DFT's breach of contract. Therefore, you should consider only any breach of contract that occurred on or after _____ [date of filing]. You should not consider any breach that occurred before that date. DFT has the burden to prove, more likely than not, that the breach occurred before that date.

(4) Prevention by Plaintiff.

The parties also dispute whether PLF prevented DFT from performing under their contract. There is no breach of contract if PLF prevented DFT from performing his/her/its obligations under the contract.

(5) Condition Precedent.

DFT contends that, according to the contract, a particular event or condition had to happen before s/he/it had to perform the contract. In this case, DFT claims that the contract required [describe alleged condition precedent]. DFT claims performance under the contract did not become due because the event or condition did not occur.

<*If contract is unambiguous*> In this case, DFT had no obligation to perform [specify obligation] until the following events occurred/ circumstances existed: [list condition[s]]. DFT did not breach the contract if this event/these circumstances did not occur.

<*if contract is ambiguous*> [Refer to Instruction on Ambiguous language. The judge should decide how best to avoid duplication with that instruction]

In this case, you will need to determine what the parties intended. Did they intend to require DFT to perform without waiting for certain events or circumstances to occur? Or did they intend to make DFT's obligation

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[1] *Wong v. University of Massachusetts*, 438 Mass. 29, 35–36 (2002); G.L. c. 260, § 3A.

conditional by excusing DFT from performing under the contract unless and until certain events occurred/ circumstances existed.

The contract does not have to use any specific language to make DFT's performance conditional upon the occurrence of a particular event or circumstance. Often words such as "on the condition that," "provided that," and "if" can show an intent to make DFT's performance conditional, but that is not always true. You should consider all the contract language, the nature of the acts involved and other evidence to decide what the parties intended.

If you find that the contract excused DFT from performing [specify obligation] until the following events occurred/circumstances existed: [list condition[s]], then you should determine whether those events occurred/circumstances existed. If so, then DFT had an obligation to perform and may be liable if s/he/it failed to perform. If, however, you find that the parties intended to condition DFT's performance upon an event/ circumstances and that event/those circumstances did not occur, then DFT had no obligation to perform and did not breach the contract.

(6) Illegality.

DFT claims that the contract was unlawful, because it violated [title of statute, regulation or legal rule].

A contract is invalid if it requires a party to perform an illegal act. Under the [statute, regulation, etc.], it is unlawful to [describe prohibited action]. You must decide two things in order to determine whether DFT has established this defense. First, you must decide whether PLF violated the law by [INSERT]. If so, you must then decide whether DFT has proven that the contract must be invalidated to uphold the policy of the law to [describe policy]. If DFT has proven both parts of this defense, the contract is not valid and you will answer "No" to Question ___.

(7) Impossibility.[2]

DFT claims that s/he/it did not have to perform under the contract because performance was impossible. To prove this defense, DFT must prove that three things are more likely true than not true:

- A circumstance occurred that the parties did not anticipate when they made the contract;
- That circumstance made performance of the contract vitally different from what the parties reasonably expected when they made the contract; and
- As a result of that circumstance, DFT cannot perform the contract.

DFT cannot prove this defense if, at the time of contracting, s/he/it knew or should have known about the risk that the circumstance would occur. Nor can DFT establish this defense by showing that, in hindsight, the predictable risks have turned out to DFT's disadvantage.

(8) Mental Capacity.

DFT claims that the contract was invalid because s/he lacked the necessary mental capacity at the time the contract was formed.

<*if issues as to both cognitive and affective capacity*> There are two ways to prove mental incapacity. The first way is to prove that more likely than not, s/he was not able to realize the true purpose of the transaction.

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[2] "The Supreme Judicial Court has held that the doctrine of frustration of purpose is a companion rule to the doctrine of impossibility." *Karaa* v. *Yim*, 86 Mass. App. Ct. 714, 717–718 (2014), citing *Mishara Constr. Co.* v. *Transit-Mixed Concrete Corp.*, 365 Mass. 122, 128–129 (1974); *Chase Precast Corp.* v. *John J. Paonessa Co.*, 409 Mass. 371, 374 (1991). "The principal question in both kinds of cases remains whether an unanticipated circumstance, the risk of which should not fairly be thrown on the promisor, has made performance vitally different from what was reasonably to be expected." *Id.* (citations omitted).

<*if the sole issue is cognitive capacity*> To prove mental incapacity, DFT must prove that, more likely than not, s/he was not able to realize the true purpose of the transaction.

To determine mental incapacity, you should ask two questions:

1. Did DFT lack the mental ability to understand the nature and quality of the transaction? and
2. Did DFT lack the mental ability to understand the significance and consequences of the transaction?[3]

If the answer to either question is "Yes," DFT has proven mental incapacity and cannot be liable for breach of contract. That is true even if PLF acted fairly and did not know about DFT's inability to enter into the contract.[4] You evaluate DFT's mental incapacity solely at the time the parties entered into the contract. DFT does not have to prove that the mental incapacity lasted for a significant period of time or was permanent.

On the other hand, it is not enough simply to prove that DFT had some intellectual limitations at the time, as long as s/he understood the true significance of the transaction.[5]

<*if also issue of mental illness or condition*> DFT also claims mental incapacity because of a mental condition or illness s/he suffered on [DATE] [from [date]/ at the time the contract was formed]. S/he claims, that, although she had some or sufficient knowledge of the nature and consequences of the transaction, this mental condition or illness made him/her unable to act in a reasonable manner regarding the transaction. To prove this type of mental incapacity, DFT must prove, more likely than not, that three things are true:

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[3] *Sparrow* v. *Demonico*, 461 Mass. 322, 328–331 (2012); *Krasner* v. *Berk*, 366 Mass. 464, 467–468 (1974); *Maimonides School* v. *Coles*, 71 Mass. App. Ct. 240, 251 (2008).

[4] *Meserve* v. *Jordan Marsh*, 340 Mass. 660, 662 (1960).

[5] *Krasner* v. *Berk*, 366 Mass. 464, 467–468 (1974).

1. S/he had a mental illness or mental condition at the time of contract formation;
2. This mental illness or condition caused him/her to be unable to act in a reasonable manner regarding the transaction even though s/he had some understanding of–the nature and consequences of the contract; and
3. PLF had reason to know of DFT's mental illness or condition on [DATE] [from [date]/ at the time the contract was formed].[6]

Again, the only relevant time for evaluating DFT's mental condition or illness is the time of contract formation. DFT does not have to prove a permanent or long-lasting mental condition or illness.

In evaluating whether DFT's mental illness or condition caused him/her to enter in the contract, the most important consideration is whether a reasonably competent person might have made this transaction.[7] [<*If Applicable:*> You should also consider whether an independent, competent attorney represented DFT's interests in this matter.[8]]

<*if the incapacity lies beyond lay observation and understanding*> Under either test for mental incapacity, you must rely upon the expert or medical testimony in evaluating two questions. The first is whether DFT had a mental condition or illness. The second is the effect of that condition or illness. By that, I mean whether, and to what extent DFT's mental condition affected his/her ability to understand the nature of the transaction and its consequences, or how that affected DFT's understanding or ability to act in a reasonable manner.[9] You may not guess or use your own understanding of mental illness or mental conditions. When you decide whether or not to accept the expert's opinions, you may, of course, consider testimony from

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[6] *Sparrow* v. *Demonico*, 461 Mass. 322, 328–331 (2012).

[7] *Sparrow* v. *Demonico*, 461 Mass. 322, 330 (2012); *Krasner* v. *Berk*, 366 Mass. 464, 467–468 (1974).

[8] *Sparrow* v. *Demonico*, 461 Mass. 322, 330 (2012).

[9] *Sparrow* v. *Demonico*, 461 Mass. 322, 333–334 (2012); *Krasner* v. *Berk*, 366 Mass. 464, 467–468 (1974).

all witnesses about DFT's physical appearance, condition, acts and statements, and all the other evidence.

Finally, DFT must show that PLF had reason to know of DFT's mental illness or condition on [DATE] [from [date]/at the time the contract was formed]. DFT can do this by showing that PLF actually knew of the mental condition or that PLF was aware of facts that would lead a reasonable person to realize that DFT had the mental condition.

<*if both types of incapacity are contested*> On this question of what PLF knew, please note one difference between the two types of mental incapacity I have described. In the first type, if DFT lacked the ability to understand the basic significance of the transaction or its consequences, it does not matter what PLF knew.[10] In the second type, incapacity based upon a mental condition or mental illness, however, DFT must prove that PLF had reason to know of the mental condition.[11]

So, if DFT lacked the mental capacity to enter into the contract, you must find for DFT on the breach of contract claim by answering "Yes" to Question ___, which reads: "Did DFT lack the mental capacity to enter into the contract?"

(9) Contract Voidable—Misrepresentation.

As a defense, DFT claims that the contract is invalid because of PLF's fraudulent misrepresentations. In particular, DFT claims that PLF intentionally misrepresented that [insert allegations]. On this question, DFT, not PLF, has the burden of proof. To establish this defense, DFT must prove that four things are more likely true than not:

1. PLF made a false statement of material fact;
2. PLF made the statement fraudulently;

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[10] *Meserve* v. *Jordan Marsh*, 340 Mass. 660, 662 (1960).

[11] *Sparrow* v. *Demonico*, 461 Mass. 322, 328–331 (2012); *Krasner* v. *Berk*, 366 Mass. 464, 467–468 (1974).

3. PLF intended for DFT to rely on the statement; and
4. DFT reasonably relied on the statement in agreeing to the contract.

Let me explain each of these items in more detail.

First, DFT must prove that PLF made a false statement of material fact. A fact is material if it was one of the main reasons why DFT entered into the contract. It does not have to be the only reason, but DFT must prove that s/he/it would not have entered into the contract without the statement. It is not enough to prove a misrepresentation about a fact that made no difference to forming the contract. The statement must also concern a fact and not just an expectation about future events. [A statement of opinion is not enough, unless PLF did not actually have that opinion.]

Second, DFT must prove that PLF made the statement fraudulently. That can happen in three ways: If PLF knew that the statement was untrue, or if s/he/it did not believe in the statement's truth or if PLF knew that s/he/it had no factual basis for making the statement.

The third and fourth items are self-explanatory, namely, that PLF knew that DFT would rely on the statement; that DFT did in fact rely on the statement; and that DFT's reliance was reasonable.

(10) Contract Voidable—Mutual Mistake.

As a defense, DFT claims that the contract is invalid because the parties both made a mistake about an essential element of the contract. In particular, DFT claims that both parties mistakenly believed that [insert allegations]. To prove this defense, DFT must prove by clear and convincing evidence that, when the parties made the contract, they shared a mistake, in other words, they shared a belief that was wrong. DFT must also prove, by clear and convincing evidence, the following four things about the mistake:

1. Both parties shared the same mistake;

2. The mistake concerned an essential element of the contract;
3. The mistake involved a fact that someone could have discovered at the time of contract formation; and
4. The mistake did not involve a mere expectation or opinion about future events.

As I said, DFT must prove these things by clear and convincing evidence. *< The Judge should instruct on clear and convincing evidence. See model instruction on clear and convincing evidence.>*

(11) Economic Duress.

DFT claims that there was no legally binding contract because PLF forced DFT to make the contract through what we call "economic duress." To prove this defense, DFT must prove that, more likely than not, three things are true:

1. DFT did not voluntarily accept the terms of the contract;
2. DFT accepted the terms of the contract because the circumstances left him/her/it no other feasible alternative; and
3. PLF acted unfairly and through coercion to create those circumstances.[12]

Hard bargaining, using unequal bargaining power or taking advantage of DFT's financial difficulty is not duress. Nor is it enough for DFT to prove economic necessity or other difficulty resulting from mismanagement or poor business judgment. Rather, DFT must prove that DFT's financial difficulty resulted from PLF's unfair and coercive conduct, which left DFT with no feasible alternative but to accept the contract's terms.

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[12] *Boston Med. Ctr. Corp.* v. *Sec'y of the Executive Office of Health & Human Servs.*, 463 Mass. 447, 468–469 (2012); *Cabot Corp* v. *AVX Corp.*, 448 Mass. 629, 637–638 (2007); *Int'l Underwater Contractors, Inc.* v. *New Eng. Tel. & Tel. Co.*, 8 Mass. App. Ct. 340, 342 (1979).