

## 1 of 6 DOCUMENTS

## COLORADO JURY INSTRUCTIONS for CIVIL TRIALS

Copyright ©2007 by Continuing Legal Education in Colorado, Inc. and by the Supreme Court of Colorado for the State of Colorado. All Rights Reserved.

## CHAPTER 30. CONTRACTS

## Introductory Note

1. The instructions in this chapter have been drafted for use in contract cases generally. They have not been drafted to incorporate relevant provisions of the Uniform Commercial Code. C.R.S. title 4. That is, no instructions have been prepared for breach of warranty cases under the Uniform Commercial Code (title 4, C.R.S.) when the plaintiff is seeking contract like damages as opposed to tort-like damages for injuries or damage to persons or property allegedly caused by a breach of warranty.

2. In cases involving contracts for the sale of goods, however, several instructions in this chapter may be applicable, subject to their being appropriately modified to conform with the U.C.C. See § 4-1-103, C.R.S. See also instructions in subpart B of Chapter 14 which may be adapted for use in cases involving claims for contract (as opposed to tort) damages for breach of warranty of a contract for the sale of goods.

## E. AFFIRMATIVE DEFENSES

*CJI-Civ 30:18*

## 30:18 FRAUD IN THE INDUCEMENT

**The defendant, *(name)*, is not legally responsible to the plaintiff, *(name)*, on the plaintiff's claim of breach of contract if the affirmative defense of fraud is proved. This defense is proved if you find all of the following:**

**1. The plaintiff (concealed a past or present fact) (failed to disclose a past or present fact that the plaintiff had a duty to disclose) (made a false representation of a past or present fact);**

**2. The fact was material;**

**3. The defendant entered into the (claimed) contract relying on the assumption that the ([concealed] [undisclosed] fact did not exist or was different from what it actually was) (falsely stated fact was true);**

**4. The defendant's reliance was justified;**

**5. The defendant's reliance caused (him) (her) (damages) (losses); and**

**6. The defendant has returned or offered to return to plaintiff *(describe whatever, if anything, the defendant would be legally obligated to return to the plaintiff in order to prevent the defendant from being unjustly enriched)*.**

**Notes on Use**

1. Use whichever parenthesized portions are appropriate in light of the evidence in the case.

2. Omit any numbered paragraphs, the facts of which are not in dispute.

3. Numbered paragraph 6 of this instruction states the rule of *Gerbaz v. Hulsey*, 132 Colo. 359, 288 P.2d 357 (1955). If it is clear, however, that the contract is wholly executory, this paragraph should be omitted. Also, even though the defendant may have received some performance from the plaintiff, the defendant is not always under a duty to return what, or the value of what, he or she received. See RESTATEMENT (SECOND) OF CONTRACTS § 384 (1981). While it "is the general rule that a party seeking to rescind a contract must return the opposite party to the position in which he was prior to entering into the contract . . . [that rule] is not a technical rule, but rather . . . is [an] equitable [one], and requires practicality in readjusting the rights of the parties. . . . The standard [to be] used is 'substantial restoration of the status quo.' . . . How [that] is to be accomplished, or indeed whether it can, is a matter . . . within the discretion of the trial court, under the facts as [they may be] found to exist by the trier of [facts]." *Smith v. Huber*, 666 P.2d 1122, 1124-25 (Colo.App. 1983). In those cases, paragraph 6 should be omitted or modified appropriately, depending on the evidence in the case.

4. When one has been induced to enter into a contract because of a material misrepresentation on the part of the other party, that person may have several courses of action open to him or her, depending on the particular facts. See generally PROSSER & KEETON, TORTS § 105 (5th ed. 1984). Among other courses of action where both sides have fully performed the contract, the one defrauded may:

a. As a plaintiff, affirm the contract, and sue at law for damages in a tort action for deceit (see Chapter 19), or

b. As a plaintiff, disaffirm the contract, tender back what the plaintiff has received, and sue to recover what he or she gave as performance (rescission and restitution; see Instructions 30:33 and 30:34), or

c. As a defendant, in a breach of contract action, he or she may take course a or b above as a counterclaim. If the defendant chooses to rescind and seek restitution as a counterclaim, the defendant may also use the fraud as a defense to the plaintiff's claim for breach of contract. If the defendant chooses to counterclaim for deceit, the fraud may not be used as a defense to the damage claim (except as a counterclaim), since by suing for deceit the defendant affirms the contract and is liable to render to the plaintiff what is due under the contract.

5. Where the one defrauded has not fully performed, he or she may:

a. As a plaintiff, disaffirm any obligation to perform the contract further, but, affirm the contract to the extent he or she has performed it and sue for damages (if any) in a common law action for deceit (see, e.g., *Ackmann v. Merchants Mortgage & Trust Corp.*, 659 P.2d 697 (Colo.App. 1982), *rev'd on other grounds*, 679 P.2d 599 (Colo. 1984)), or

b. As a plaintiff, disaffirm the contract *in toto*, tender back what he or she has received, and sue for rescission and restitution as above, or

c. As a defendant in a breach of contract action, counterclaim for a or b above, or, if the contract is totally executory, simply use the fraud as a defense to any damages for breach.

6. In many cases, the courts of Colorado have recognized the defrauded person's basic alternative remedies of deceit or rescission and restitution. *Western Cities Broad., Inc. v. Schueller*, 849 P.2d 44 (Colo. 1993); *Martinez v. Affordable Housing Network, Inc.*, 109 P.3d 983 (Colo.App. 2004), *cert. granted* (2007); *Sims v. Sperry*, 835 P.2d 565 (Colo.App.), *cert. denied* (1992); *Colorado Interstate Gas Co. v. Chemco, Inc.*, 833 P.2d 786 (Colo.App. 1991), *aff'd on other grounds*, 854 P.2d 1232 (Colo. 1993). See also *Trimble v. City & County of Denver*, 697 P.2d 716 (Colo. 1985); *Neiheisel v. Malone*, 150 Colo. 586, 375 P.2d 197 (1962); *Aaberg v. H.A. Harman Co.*, 144 Colo. 579, 358 P.2d 601 (1960). On many occasions, the courts have also stated the rule that the defrauded person, having learned of the fraud, must, if that person elects to rescind, give notice of his or her intention to do so promptly. See, e.g., *Gerbaz v.*

*Hulsey*, 132 Colo. 359, 288 P.2d 357 (1955); *Tisdell v. Central Sav. Bank & Trust Co.*, 90 Colo. 114, 6 P.2d 912 (1931); *Elk River Assocs. v. Huskin*, 691 P.2d 1148 (Colo.App. 1984).

7. While a party electing to rescind a contract is required to give prompt notice of his or her election, a party who has been induced fraudulently to enter into two related contracts as part of the same general transaction need not elect the same remedy for both contracts. That party may elect to affirm one and sue for damages in deceit, and rescind the other and seek restitution for any consideration paid or rendered. A party should not be required to elect the same remedy for both contracts unless necessary to prevent double recovery or because the assertion of different remedies would be so inconsistent that the assertion of one would necessarily be a repudiation of the other. *Stewart v. Blanning*, 677 P.2d 1382 (Colo.App. 1984).

8. When one uses fraud in the inducement as a defense to a breach of contract action that person is in effect claiming a right to "rescind" the contract and consider himself or herself discharged. The elements of proof of this defense are, therefore, the same as an action for rescission and restitution. Compare Instruction 30:29. The only difference is that if the defendant has not in any way rendered performance under the contract, he or she will not generally seek or be entitled to any restitution. *But see Murray v. Montgomery Ward Life Ins. Co.*, 196 Colo. 225, 584 P.2d 78 (1978), applying these rules and the elements of this instruction to a life insurance contract, but requiring that the misrepresentation or concealment be made "knowingly."

9. Comparing the differences between the tort remedy of deceit and the remedy of rescission, whether used as a basis for a restitution action (Instruction 30:17) or a defense to a breach of contract action (this instruction), the only basic difference in terms of what must be proved appears to be that, in a deceit action, the plaintiff must prove the defendant made the statement without an honest belief in the truth and with the intent that the plaintiff rely on the statement, whereas, in a rescission action, an innocent misrepresentation is sufficient. *See Bassford v. Cook*, 152 Colo. 136, 380 P.2d 907 (1963) (dictum), following what now appears to be the majority rule. *But see Murray*, 584 P.2d 78; *Coon v. District Court*, 161 Colo. 211, 420 P.2d 827 (1966).

10. In view of the above, when this instruction is given, those instructions in Chapter 19 as would be appropriate in the light of the evidence in the case should also be given, including Instruction 19:3.

11. One who has been induced to enter into a contract with a third person because of the fraud of another may affirm the contract and sue the other for damages in deceit and may also sue the third person for damages for any breach of the contract by the third person. Because these remedies are not inconsistent in that they would not necessarily result in double recovery, the defrauded person need not make an election between the two. *Trimble v. City & County of Denver*, 697 P.2d 716 (Colo. 1985).

12. For cases involving contracts for the sale of goods, see § 4-2-721, C.R.S.

### Source and Authority

In addition to the authorities cited and discussed above, see *Sears v. Hicklin*, 13 Colo. 143, 21 P. 1022 (1889); RESTATEMENT (SECOND) OF CONTRACTS §§ 159-173 (1981). *See also Ice v. Benedict Nuclear Pharm'l, Inc.*, 797 P.2d 757 (Colo.App.), *cert. denied* (1990) (unless damages resulted from alleged misrepresentation, plaintiff's fraud is not a defense to a breach of contract claim).

## CHAPTER 30. CONTRACTS

## Introductory Note

1. The instructions in this chapter have been drafted for use in contract cases generally. They have not been drafted to incorporate relevant provisions of the Uniform Commercial Code. C.R.S. title 4. That is, no instructions have been prepared for breach of warranty cases under the Uniform Commercial Code (title 4, C.R.S.) when the plaintiff is seeking contract like damages as opposed to tort-like damages for injuries or damage to persons or property allegedly caused by a breach of warranty.

2. In cases involving contracts for the sale of goods, however, several instructions in this chapter may be applicable, subject to their being appropriately modified to conform with the U.C.C. See § 4-1-103, C.R.S. See also instructions in subpart B of Chapter 14 which may be adapted for use in cases involving claims for contract (as opposed to tort) damages for breach of warranty of a contract for the sale of goods.

## E. AFFIRMATIVE DEFENSES

*CJI-Civ 30:19*

## 30:19 UNDUE INFLUENCE

**The defendant, (*name*), is not legally responsible to the plaintiff, (*name*), on the plaintiff's claim of breach of contract if the affirmative defense of undue influence is proved. This defense is proved if you find both of the following:**

**1. At the time the defendant entered into the (claimed) contract, the defendant was not acting of (his)(her) own free will; and**

**2. The plaintiff caused the defendant's lack of free will by dominating the defendant through the use of words, conduct, or both.**

**The mere use of persuasion or argument to cause another who is of sound mind to enter into a contract is not undue influence.**

**Notes on Use**

1. This instruction should not be used in a case involving a confidential or fiduciary relationship. Compare Instructions 26:2, 26:3, 30:15, and 34:15.

2. Use whichever parenthesized words are appropriate to the evidence in the case.

3. This instruction must be appropriately modified if the claimed undue influence was that of a third person. *See* RESTATEMENT (SECOND) OF CONTRACTS § 177(3) (1981).

4. The burdens of pleading and proving undue influence in an arm's length transaction are on the party asserting it. C.R.C.P. 8(c).

**Source and Authority**

This instruction is based on *Lighthall v. Moore*, 2 Colo.App. 554, 31 P. 511 (1892); RESTATEMENT (SECOND) OF CONTRACTS § 177(1) and cmt. b (1981). See also cases cited in Source and Authority to Instruction 34:12.

## 3 of 6 DOCUMENTS

## COLORADO JURY INSTRUCTIONS for CIVIL TRIALS

Copyright ©2007 by Continuing Legal Education in Colorado, Inc. and by the Supreme Court of Colorado for the State of Colorado. All Rights Reserved.

## CHAPTER 30. CONTRACTS

## Introductory Note

1. The instructions in this chapter have been drafted for use in contract cases generally. They have not been drafted to incorporate relevant provisions of the Uniform Commercial Code. C.R.S. title 4. That is, no instructions have been prepared for breach of warranty cases under the Uniform Commercial Code (title 4, C.R.S.) when the plaintiff is seeking contract like damages as opposed to tort-like damages for injuries or damage to persons or property allegedly caused by a breach of warranty.

2. In cases involving contracts for the sale of goods, however, several instructions in this chapter may be applicable, subject to their being appropriately modified to conform with the U.C.C. See § 4-1-103, C.R.S. See also instructions in subpart B of Chapter 14 which may be adapted for use in cases involving claims for contract (as opposed to tort) damages for breach of warranty of a contract for the sale of goods.

## E. AFFIRMATIVE DEFENSES

*CJI-Civ 30:20*

## 30:20 DURESS

**The defendant, (name), is not legally responsible to the plaintiff, (name), on the plaintiff's claim of breach of contract if the affirmative defense of duress is proved. This defense is proved if you find both of the following:**

- 1. At the time the defendant entered into the (claimed) contract, the defendant was not acting of (his)(her) own free will; and**
- 2. The plaintiff caused the defendant's lack of free will by (insert the wrongful act or threat that the court has determined to be legally sufficient to constitute duress).**

**Notes on Use**

1. The first two Notes on Use to Instruction 30:19 are also applicable to this instruction.
2. This instruction must be appropriately modified if the claimed duress was that of a third person. *See* RESTATEMENT (SECOND) OF CONTRACTS § 175(2) (1981).
3. The burdens of pleading and proving duress in an arm's length transaction are on the party asserting it. C.R.C.P. 8(c).
4. This instruction is not applicable to "business compulsion" cases.
5. As to cases involving the sale of goods, see § 4-2-302, C.R.S.
6. As to what constitutes an improper threat, see *Vail/Arrowhead, Inc. v. District Court*, 954 P.2d 608 (Colo. 1998)

(economic threats may give rise to duress so as to render contract voidable).

### Source and Authority

This instruction is based on *Barrows v. McMurtry Manufacturing Co.*, 54 Colo. 432, 131 P. 430 (1913) (no evidence that threats did in fact overcome defendant's free choice); *Heald v. Crump*, 73 Colo. 251, 215 P. 140 (1923) (a threat to do what one may lawfully do does not constitute duress); *Miller v. Davis' Estate*, 52 Colo. 485, 122 P. 793 (1912) (defense of duress is lost if one accepts the benefits of the contract or remains silent for a considerable length of time after that person has had an opportunity to avoid or rescind the contract); *McClair v. Wilson*, 18 Colo. 82, 31 P. 502 (1892); *Adams v. Schiffer*, 11 Colo. 15, 17 P. 21 (1888) (duress exists where one person having control or possession of another's property refuses to surrender it to the owner except upon compliance with a demand that is unlawful); *Pittman v. Larson Distributing Co.*, 724 P.2d 1379, 1384 (Colo.App. 1986), cert. denied (1986) ("The threat of blacklisting an employee in an industry is a form of coercion that constitutes duress as a matter of law."); *Wiesen v. Short*, 43 Colo.App. 374, 604 P.2d 1191 (1979) (insufficient evidence that any force or threats had actually subjugated the mind and will of the person against whom they were directed). See also *DeJean v. United Airlines, Inc.*, 839 P.2d 1153 (Colo. 1992) (if airline had legal right to terminate employment of trainee pilots, threat to do so did not constitute duress); RESTATEMENT (SECOND) OF CONTRACTS §§ 174-176 (1981).

4 of 6 DOCUMENTS

## COLORADO JURY INSTRUCTIONS for CIVIL TRIALS

Copyright ©2007 by Continuing Legal Education in Colorado, Inc. and by the Supreme Court of Colorado for the State of Colorado. All Rights Reserved.

### CHAPTER 30. CONTRACTS

#### Introductory Note

1. The instructions in this chapter have been drafted for use in contract cases generally. They have not been drafted to incorporate relevant provisions of the Uniform Commercial Code. C.R.S. title 4. That is, no instructions have been prepared for breach of warranty cases under the Uniform Commercial Code (title 4, C.R.S.) when the plaintiff is seeking contract like damages as opposed to tort-like damages for injuries or damage to persons or property allegedly caused by a breach of warranty.

2. In cases involving contracts for the sale of goods, however, several instructions in this chapter may be applicable, subject to their being appropriately modified to conform with the U.C.C. See § 4-1-103, C.R.S. See also instructions in subpart B of Chapter 14 which may be adapted for use in cases involving claims for contract (as opposed to tort) damages for breach of warranty of a contract for the sale of goods.

#### E. AFFIRMATIVE DEFENSES

*CJI-Civ 30:26*

30:26 MINORITY

**The defendant, (name), is not legally responsible to the plaintiff, (name), on the plaintiff's claim of breach of contract if the affirmative defense of minority is proved. This defense is proved if you find (both of the following):**

**1. The defendant was under the age of 18 at the time the (claimed) contract was entered into (; and)**

**(2. The defendant disaffirmed or rejected the [claimed] contract before becoming 18 or within a reasonable time after becoming 18.).**

#### Notes on Use

1. For "any legal contractual obligation," the age of competence is 18. *Section 13-22-101(1)(a), C.R.S.*

2. Use whichever parenthesized and bracketed words are appropriate. The second numbered paragraph should be omitted if there is no dispute that the defendant is not yet 18 or if the only dispute is whether the defendant was 18 at the time the alleged contract was entered into. Also, if the contract is wholly executory, the second paragraph may not be applicable. See 1 CORBIN, CONTRACTS § 6 (1963).

3. Although the plaintiff may not be able to recover damages for breach of contract because of the defense of minority, the plaintiff may nonetheless be able to recover some damages on the theory of deceit (see Chapter 19) or on the theory of rescission and restitution (Instruction 30:17). *Doenges-Long Motors, Inc. v. Gillen*, 138 Colo. 31, 328 P.2d 1077 (1958).

4. This instruction is not applicable, without appropriate modification, in cases involving certain contracts relating to insurance. See § 10-4-104, C.R.S. Also this instruction may not be applicable, without modification, in cases involving contracts for the acquisition of necessities of life. See *Perkins v. Westcoat*, 3 Colo.App. 338, 33 P. 139 (1893); 2 WILLISTON, CONTRACTS §§ 240-244 (W. Jaeger 3d ed. 1959).

#### Source and Authority

See *Keser v. Chagnon*, 159 Colo. 209, 410 P.2d 637 (1966); *Doenges-Long Motors, Inc. v. Gillen*, 138 Colo. 31, 328 P.2d 1077 (1958). See also *Fellows v. Cantrell*, 143 Colo. 126, 352 P.2d 289 (1960), where the plaintiff was seeking to recover on a loan he had made to the defendant; applying the rule of the second paragraph, the court held a disaffirmance after the defendant had reached the age of 26 was not effective.

5 of 6 DOCUMENTS

#### COLORADO JURY INSTRUCTIONS for CIVIL TRIALS

Copyright ©2007 by Continuing Legal Education in Colorado, Inc. and by the Supreme Court of Colorado for the State of Colorado. All Rights Reserved.

#### CHAPTER 30. CONTRACTS

##### Introductory Note

1. The instructions in this chapter have been drafted for use in contract cases generally. They have not been drafted to incorporate relevant provisions of the Uniform Commercial Code. C.R.S. title 4. That is, no instructions have been prepared for breach of warranty cases under the Uniform Commercial Code (title 4, C.R.S.) when the plaintiff is seeking contract like damages as opposed to tort-like damages for injuries or damage to persons or property allegedly caused by a breach of warranty.

2. In cases involving contracts for the sale of goods, however, several instructions in this chapter may be applicable, subject to their being appropriately modified to conform with the U.C.C. See § 4-1-103, C.R.S. See also instructions in subpart B of Chapter 14 which may be adapted for use in cases involving claims for contract (as opposed to tort)

damages for breach of warranty of a contract for the sale of goods.

#### E. AFFIRMATIVE DEFENSES

*CJI-Civ 30:27*

#### 30:27 MENTAL INCAPACITY

**The defendant, (*name*), is not legally responsible to the plaintiff, (*name*), on the plaintiff's claim of breach of contract if the affirmative defense of lack of mental capacity is proved. This defense is proved if you find at the time the defendant entered into the (claimed) contract, (he) (she) was not mentally capable of understanding the terms and consequences of the contract.**

#### Notes on Use

1. Use whichever parenthesized words are appropriate to the evidence in the case.
2. This instruction may not be applicable in a case where the contract was entered into in good faith for a fair consideration and without notice of any incapacity and the parties cannot be restored to their original positions. *See 2 WILLISTON, CONTRACTS §§ 251, 254 (W. Jaeger 3d ed. 1959).*
3. The subject matter of this instruction would appear to be a matter of affirmative defense on which the party asserting it has the burdens of pleading and proof. C.R.C.P. 8(c).

#### Source and Authority

This instruction is based on *Hanks v. McNeil Coal Corp.*, 114 Colo. 578, 168 P.2d 256 (1946). Accord *Forman v. Brown*, 944 P.2d 559 (Colo.App.), cert. denied (1997). *See generally* WILLISTON, CONTRACTS §§ 249-257 (W. Jaeger 3d ed. 1959).

6 of 6 DOCUMENTS

#### COLORADO JURY INSTRUCTIONS for CIVIL TRIALS

Copyright ©2007 by Continuing Legal Education in Colorado, Inc. and by the Supreme Court of Colorado for the State of Colorado. All Rights Reserved.

#### CHAPTER 30. CONTRACTS

##### Introductory Note

1. The instructions in this chapter have been drafted for use in contract cases generally. They have not been drafted to incorporate relevant provisions of the Uniform Commercial Code. C.R.S. title 4. That is, no instructions have been prepared for breach of warranty cases under the Uniform Commercial Code (title 4, C.R.S.) when the plaintiff is seeking contract like damages as opposed to tort-like damages for injuries or damage to persons or property allegedly caused by a breach of warranty.
2. In cases involving contracts for the sale of goods, however, several instructions in this chapter may be applicable, subject to their being appropriately modified to conform with the U.C.C. See § 4-1-103, C.R.S. See also instructions in subpart B of Chapter 14 which may be adapted for use in cases involving claims for contract (as opposed to tort) damages for breach of warranty of a contract for the sale of goods.

## E. AFFIRMATIVE DEFENSES

CJI-Civ 30:28

## 30:28 STATUTE OF LIMITATIONS

**The defendant, (name), is not legally responsible to the plaintiff, (name), on the plaintiff's claim of breach of contract if the affirmative defense of the expiration of the statute of limitations is proved. This defense is proved if you find (describe the events that would cause the applicable statute to run) occurred before (insert the appropriate date).**

**Notes on Use**

1. This instruction should only be given if there is a disputed question of fact that would be proper to submit to the jury, *e.g.*, when the alleged breach occurred.

2. If an event is claimed to have occurred that would toll the applicable statute and the facts are disputed, this instruction should be appropriately modified. *See, e.g., First Interstate Bank of Denver, N.A. v. Berenbaum*, 872 P.2d 1297 (Colo.App. 1993), *cert. dismissed* (1994) (burden on plaintiff to show that statute had been tolled).

3. In some instances, a demand or notice may be a condition precedent to creating a cause of action for breach of contract. *See, e.g., Stice v. Peterson*, 144 Colo. 219, 355 P.2d 948 (1960).

4. The defense of statute of limitations is an affirmative defense on which the party asserting it has the burdens of pleading and proof. C.R.C.P. 8(c). *But see First Interstate Bank, N.A. v. Berenbaum*, 872 P.2d 1297 (Colo.App. 1993), *cert. denied* (1984).

5. Generally, in breach of contract actions, the statute of limitations is three years. § 13-80-101(1)(a), C.R.S. *See Hersh Cos. Inc. v. Highline Village Assocs.*, 30 P.3d 221 (Colo. 2001) (breach of express warranty governed by three year statute for contracts); *Camas Colo., Inc., v. Board of County Comm'rs*, 36 P.3d 135 (Colo.App.), *cert. denied* (2001) (contractor's claims for breach of contract, quantum meruit, rescission and restitution for mistake were all governed by three year statute of limitations for contracts). The statute of limitations for contracts involving the sale of goods is the same. *See* § 4-2-725(1), C.R.S., incorporating the period of limitation set out in § 13-80-101(1)(a), C.R.S.

**Source and Authority**

This instruction is supported by *Stice v. Peterson*, 144 Colo. 219, 355 P.2d 948 (1960), and *Koon v. Barmettler*, 134 Colo. 221, 301 P.2d 713 (1956).