

Chapter 9

Defenses based on Public Policy
or Societal Controls

I. 9 Types

- A. Duress
- B. Undue Influence
- C. Fraud
- D. Misrepresentation
- E. Concealment
- F. Capacity
- G. Illegality
- H. Unconscionability
- I. Breach of Warranty

II. Duress

- A. A compelled or involuntary consent
- B. Threat to obtain a contract advantage
- C. Aggrieved party can elect to:
 - Enforce contract
 - Void contract
- D. Economic Duress – wrongful act that seriously threatens financial welfare. Must show:
 1. Wrongdoing by aggressor
 2. Economic hardship to aggrieved party
 3. Very little choice about entering into contract
 4. Chuinard v. Chuinard

III. Undue Influence

- A. Occurs when there is a confidential or fiduciary relationship
- B. Abuse of relationship to obtain advantageous contract
- C. Fiduciary Relationship - legal relationship where one with superior knowledge or expertise has obligation to protect one with less knowledge or expertise
 - Trustee / Executor / Insurance Co. / Bank / Corporate BOD / Accountant / Attorney
- D. Procurement of a contract through abuse of a position of special trust and confidence → Contract is VOIDABLE
- E. Movement by courts to extend where no fiduciary relationship existed. Has occurred in CO

IV. Fraud

- A. A defense based on the argument that a contract was procured by, or involves material deceit.
- B. Aggrieved party must actively rely on the fraudulent words
- C. Colorado Requires Reliance

D. Intentional Fraud (p. 180)

1. Deceitful Conduct
2. Deliberately engaged in (“Intent to defraud”)
3. That actually caused harm to the aggrieved party
4. Harm has a material effect on the contract

E. Unintentional / Negligent Fraud

1. Deceitful conduct
2. Negligently or unintentionally engaged in
3. Actually causing demonstrated harm to aggrieved party
4. Harm has material effect on contract

F. No fraud if conduct involved statement of opinion

- Used car dealers
- Commercial puffing – build up the car

V. Misrepresentation

- Intentional or negligent assertion of facts that were untrue

VI. Concealment

- Contracting party takes action to cover up information that has material effect on contract
- Withholding information material to the contract

VII. Non-Disclosure

- Intentional or negligent failure to reveal material facts concerning contract

- In all instances - **CONTRACT IS VOIDABLE**

V. Lack of Capacity

A. Minority

- Party is too young to make a contract
- Colorado - 18 years old

B. Mental Incapacity

- Mentally handicapped persons cannot make contracts
- Unable to understand the nature and extent of each party's rights and responsibilities under the contract

C. In both instances the contract is voidable at the choice of the minor / incapacitated person

D. EXCEPTION: Contracts made for necessities (food shelter, clothing, medical care) are enforceable

VI. Illegality

A. Illegal contract

- Purpose or consideration is illegal
- Not enforceable by one or both parties

B. Illegality

- Violation of public policy, statute, administrative regulation

C. Definitions

1. In Pari Delicto
 - Equally wrong on conduct
 - Deny enforcement to requesting party
2. Malum in Se
 - Wrong “Evil in and of itself”
 - Deny enforcement to either party
3. Malum Prohibitum
 - Act made illegal by legislature
 - Conduct society wishes to discourage
 - Parties not automatically equally wrong

D. Goldberg v. Sangler

VII. Unconscionability

- A. At the time the contract was made
- B. UCC §2-302
 - Can refuse to enforce contract
 - Enforce remainder of contract
 - Court might limit application to avoid unconscionable result
- C. Contract provision so one sided as to be extremely unfair
- D. Need:
 - 1. Provision so one-sided as to be oppressive
 - 2. One-sided provision is not what a reasonable person would find in the contract
 - 3. Parties were of unequal bargaining strength (BOGC)
 - 4. Weaker party had little or no choice to enter into contract

D. Where do you find Unconscionability?

1. Adhesion Contracts

- » Contracts where you take it as it is
- » Tickets, Airline Tickets
- » Hospital Contracts
- » Insurance Contracts

2. Exculpatory Clauses

- » Release of liability for damages caused by deliberate or negligent wrongdoing
- » Can contract away negligence NOT deliberate or reckless conduct
- » Disclaimers and limits on warranty

3. Warranty

- » Guarantee of performance or quality
- » Express: Explicitly stated in the contract
- » Implied: Parties would reasonable assume were present in contract or which law construes to be in the contract

E. Procedural Unconscionability

- Unfair conduct during the bargaining process

F. Substantive Unconscionability

- Unfair provision in the actual terms of the contract