

## **LESSER KNOWN BREACH OF CONTRACT DEFENSES**

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**LESSER KNOWN BREACH OF CONTRACT DEFENSES**

**I. INTRODUCTION**

This first section of this paper provides a general background on construction contracts as well as some helpful definitions. The second section sets forth a list of various breach of contract claim defenses and the supporting substantive law.

**II. BACKGROUND ON CONSTRUCTION CONTRACTS**

**A. Contract Documents**

Generally speaking, a construction contract contains the following parts: (1) owner-contractor agreement; (2) conditions of contract (general & supplementary); (3) drawings and specifications; (4) bonds to secure payment or performance; and (5) exhibits, modifications, or addenda. However, because a construction contract is not a single document but consists of a group of "construction documents." These are typically referred to as the "Contract Documents," and include the following: (1) agreement between the owner and contractor, which sets for the basic provisions between of the relationship; (2) General Conditions, which describe the legal terms and conditions of the work of the contractor for the owner; (3) Supplementary and Special Conditions, which modify the terms of the General Conditions; (4) Plans or Drawings, which describe in graphic terms the construction to be performed; (5) Specifications, which contain detailed technical instructions and descriptions of the materials form that the building is to be constructed; (6) Addenda, which are modifications issued before the Agreement is signed; (7) Change Orders, which are subsequent modifications to the contract; and (8) Soils reports or other engineering data. One or more of the contract documents, usually the agreement and/or the general conditions, defines what documents comprise the "contract" and refer to them as the "Contract Documents." Additionally, there are three general ways to set the payment price for construction contracts: (1) lump-sum contracts; (2) cost plus fee agreement (cost-plus); and (3) guaranteed maximum price contracts. Finally, there are three general types of construction project delivery: (1) design-bid-build; (2) design-build; and (3) construction management.

**B. Checklist of Issues Covered in a Contract**

The following is a general list of issues to look for in a contract. Specifically, in reviewing a contract, determine whether the contract does the following: (1) identify the owner and contractor and include the legal method of operation (e.g., corporation, partnership, or sole proprietorship-of each party to the contract); (2)

describe the project in detail, with specific reference to drawings, special contracts, bid documents, addenda, and specifications and try to avoid performance specifications; (3) include the specific time of commencement, and establish a completion date within reasonable and realistic deadlines; (4) set forth the contract sum, subject to provisions for additions and deductions by properly approved change orders; (5) describe change order procedures in detail, to avoid disputes as to whether or not the work was approved or authorized; (6) set forth progress payment schedules and documentation required as a condition of payment; (7) include final payment guidelines to determine when the contractor and subcontractors are entitled to final payment; (8) key interest for sums not paid to the subcontractor when due to the local prime rate to avoid frivolous payment delays by general contractors; (9) describe working conditions and scheduling responsibilities between the specialty trades with particularity to avoid overlapping responsibility and conflicting access to the site by the trades; (10) specify the insurance responsibilities of the owner, contractor, and subcontractor; (11) describe the rights and remedies of the parties in the event of contract disputes; (12) define the owner's and contractor's rights and liabilities with regard to stopping the work prior to completion; (13) define the risk of loss for stored materials, and establish the responsibility for protection and insurance of the materials; (14) provide for extraordinary or unanticipated delays due to severe and unusual weather conditions not usually encountered in order to permit time extensions when such conditions prevent performance; (15) provide for extra compensation to the contractor for unforeseen subsurface conditions, which could not reasonably have been contemplated or discovered by the parties; (16) if performance bond and labor and material payment bonds are to be required by the owner, ensure that the cost is paid for by the owner; (17) establish progress schedules for each subcontractor (e.g., use of bar charts or Critical Path Method); (18) key retention to performance, not punishment, and provide for line-item reductions as each trade completes its portion of the contract; (19) ensure that delays, extensions of time, and change orders are always in writing; (20) establish the subcontractor's right to payment when there is a wrongful failure of payment by the owner or general contractor, and include the right of the subcontractor to obtain shutdown costs; (21) define "Substantial Completion," and clearly set forth the method by which it is established; (22) set forth change order procedures and requirements, including a procedure to be followed when the parties are unable to reduce change orders to writing due to "practical" difficulties (e.g., field conditions); (23) to avoid a statutory prohibition against the recovery of attorney's fees, provide for attorney's fees in the contract to be



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awarded to the prevailing party, if you want to recover such fees from a party; and; (24) prepare a contract notification checklist, to make sure you do not lose any rights by failing to act in a timely manner.

### C. Definitions

*Assignment.* The right to transfer to another person the contract rights of a party to the contract. By assignment, a contractor may transfer to a bank, factor, or other creditor the right to receive contract funds. Many construction contracts permit assignment only with the consent of the other party to the contract. Frequently, the contract includes a provision that allows an owner to assume subcontracts by assignment upon termination of a general contract,

*Condition Precedent.* An act or event that must occur before a right dependent upon it accrues. Frequently used in the payment context, i.e., the contractor must perform the work and submit a fully completed and acceptable payment application/requisition before its right to be paid accrues.

*Design Specification.* Specifications set forth precise measurements, tolerances, materials, in-process, and finished product tests, QC measures, inspection requirements, and other specific information about how the project or a portion of the project is to be built. The owner is responsible for the correctness and adequacy of the design and engineering. Compare with Performance Specification.

*Performance Specification.* Technical requirements that set forth the operational characteristics desired for the work or a portion of the work. The contractor accepts general responsibility for product design and engineering and for achievement of the stated performance requirements.

*Differing Site Condition (DSC).* An unanticipated physical condition at the site that differs materially from those set forth in the contract or ordinarily encountered in work of the same nature. In federal construction contracts, DSCs are distinguished as Type I, subsurface, or latent physical conditions at a construction site that differ materially from the conditions indicated in the contract; or Type II, unknown physical conditions at the site, of an unusual nature, that differ materially from conditions ordinarily encountered and generally recognized as inherent in work of the kind provided for in the contract.

*Final Acceptance.* The owner's acceptance of the project from the contractor upon the architect or engineer's certification that it is complete and in accordance with the contract requirements. Final payment usually is what confirms final acceptance unless otherwise stipulated in the contract.

*Final Completion.* The time when the contractor completes the work and fulfills all of the contract requirements.

*Force Majeure.* A superior or irresistible force, such as lightning, earthquakes, storms, hurricanes, flood, sunstroke, and freezing occurs without any human intervention. Some contracts include war, governmental action, or labor strikes in their definition of force majeure. Force majeure clauses are commonly used to protect the parties if part of the contract cannot be performed as a result of causes outside the control of either party and could not be avoided by the exercise of due care.

*Latent Defect.* A hidden defect in materials, equipment, or the work that a reasonably careful observation during the performance of the contract or during any warranty period would not have revealed.

*Patent Defect.* A defect which is open or obvious or which the owner should have discovered by reasonable observation. A patent defect is the opposite of a latent defect.

*Liquidated Damages.* Contracts often include completion dates to which the contractor agrees. In the event there is a delay in the contractual completion date, the liquidated damage clause obligates the contractor to pay the owner a daily rate that compensates the owner for damages, assuming the contractor and not the owner caused the delay.

*No Damages For Delay.* A provision contained in some contracts prohibiting the contractor (or subcontractor) from seeking or recovering damages for delays caused by persons other than the contractor (or subcontractor). Some states have legislatively banned the use of no-damages-for-delay clauses in public contracts, finding them void and against public policy.

*Order of Precedence.* The order of hierarchy of various parts of the contract. Commonly defined in the contract, the order of precedence clause resolves conflicts and omissions in the contract drawings and contract documents by defining which part of the contract controls over another conflicting part.

*Spearin Doctrine.* The legal theory, first pronounced in *United States v. Spearin*, 248 U.S. 132 (1918), imposing responsibility under an implied warranty theory, on the government that the specifications it furnishes for construction are suitable for their intended purpose.

*Substantial Completion.* The date certified by the architect when the work or a designated portion thereof is sufficiently complete, in accordance with the contract documents, so the owner may occupy or utilize the work or designated portion thereof for the use for which it is intended. Some contracts have a very specific definition of substantial completion and set out express conditions that the contractor must satisfy.

*Plans.* Plans are the drawings that the design professional has prepared and that are the graphic expressions of the work that the contractor is to perform. The plans may be in electronic as well as

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printed media. Disputes on failed construction projects often involve questions as to whether the plans and the specifications were defective.

*Specifications.* Specifications are the written technical requirements for the materials, equipment, systems, and standards for the work.

*Contract.* An agreement between two or more persons that creates an obligation to do or not do a particular thing.<sup>1</sup> The term "contract" can also refer to the physical document executed by the parties that sets forth their obligation or obligations.<sup>2</sup>

*Promise.* An assurance that a party will do something or refrain from doing some-thing, conveyed in such a way that another party understands a commitment has been made.<sup>3</sup>

*Dependent promise.* A promise that is conditioned on the performance of a reciprocal promise by the other party.<sup>4</sup> Dependent promises are usually intended to be mutual and concurrent acts; the parties do not intend that either party should perform some act as a condition precedent to the act of the other.<sup>5</sup> A dependent promise is sometimes referred to as a "concurrent condition."<sup>6</sup>

*Independent promise.* A promise that must be performed by a party even if another party does not perform according to the parties' agreement.<sup>7</sup>

### III. CONTRACT DEFENSES

#### A. Limitations (Statute of Limitations & Statute of Repose)

A defendant can assert the defense of limitations to a breach of contract action. The statute of limitations for a breach of contract is four years.<sup>8</sup> However, parties to a contract can agree to a different limitations period in the underlying contract.<sup>9</sup> If the parties agree to a different limitations period, it must be a period of at least two years, unless the contract involves the purchase or sale of a business entity and one of the parties will pay or receive at least \$500,000 in consideration.<sup>10</sup>

Breach of contract claims generally accrue at the time of the breach.<sup>11</sup> However, a claim for breach of a continuing contract accrues at the earlier of the following: (1) when the work is completed; (2) when the contract is terminated in accordance with its terms; or (3) when the contract is anticipatorily repudiated by the defendant and this repudiation is adopted by the plaintiff.<sup>12</sup> Further, an action for breach of a

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<sup>1</sup> *Frady v. May*, 23 S.W.3d 558, 565 (Tex.App.—Fort Worth 2000, pet. denied); see *Black's Law Dictionary* 341-42 (8th ed. 2004); 1 Lord, Williston on Contracts §11 (4th ed. 1990); see also *Perillo, Calamari & Perillo on Contracts* §1.1 (5th ed. 2003).

<sup>2</sup> *Black's Law Dictionary* 341 (8th ed. 2004); see *Calamari & Perillo on Contracts* §1.1.

<sup>3</sup> *Montgomery Cty. Hosp. Dist. v. Brown*, 965 S.W.2d 501, 502 (Tex.1998); Restatement (2d) of Contracts §2(1) (1979); *Black's Law Dictionary* 1249-50 (8th ed. 2004).

<sup>4</sup> *46933, Inc. v. Z&B Enters.*, 899 S.W.2d 800, 807-08 (Tex.App.—Amarillo 1995, writ denied); *D.E.W., Inc. v. Depco Forms, Inc.*, 827 S.W.2d 379, 382 (Tex.App.—San Antonio 1992, no writ); see *Greenstein v. Simpson*, 660 S.W.2d 155, 160 (Tex.App.—Waco 1983, writ ref'd n.r.e.).

<sup>5</sup> See *Perry v. Little*, 419 S.W.2d 198, 200-01 (Tex. 1967).

<sup>6</sup> *Id.*

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<sup>7</sup> *Black's Law Dictionary* 1250 (8th ed. 2004); see *World Broad Sys. v. Eagle Broad. Co.*, 162 S.W.2d 463, 465 (Tex.App.—San Antonio 1942, writ dismissed) see, e.g., *Hanks v. GAB Bus.*, 644 S.W.2d 707, 708 (Tex. 1982).

<sup>8</sup> Tex. Civ. Prac. & Rem. Code §16.051; *Stine v. Stewart*, 80 S.W.3d 586, 592 (Tex. 2002).

<sup>9</sup> See Tex. Civ. Prac. & Rem. Code §16.070.

<sup>10</sup> *Id.*

<sup>11</sup> *Jones v. Blume*, 196 S.W.3d 440, 446 (Tex.App.—Dallas 2006, pet. denied); *Barker v. Eckman*, \_\_\_ S.W.3d \_\_\_, \_\_\_ (Tex. 2006); e.g., *F.D. Stella Prods. v. Scott*, 875 S.W.2d 462, 464 (Tex.App.—Austin 1994, no writ) there is failure to perform); see also *Pickett v. Keene*, 47 S.W.3d 67, 77 (Tex.App.—Corpus Christi 2001, pet. dismissed).

<sup>12</sup> *City of Corpus Christi v. Taylor*, 126 S.W.3d 712, 725 (Tex.App.—Corpus Christi 2004, pet. dismissed); *Hubble v. Lone Star Contracting Corp.*, 883 S.W.2d 379, 382 (Tex.App.—Fort Worth 1994, writ denied); see *Ingersoll-Rand Co. v. Valero Energy Corp.*, 997 S.W.2d 203, 211 (Tex. 1999).

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contractual indemnity provision accrues when all the potential liabilities of the party to be indemnified have become fixed and certain.<sup>13</sup> Additionally, the discovery rule applies to breach of contract claims if the nature of the plaintiff's injury is inherently undiscoverable and the injury is objectively verifiable by physical evidence.<sup>14</sup>

A statute of repose cuts off a plaintiff's cause of action before it accrues.<sup>15</sup> A statute of repose begins to run from a specified date without regard to the accrual of the plaintiff's cause of action.<sup>16</sup> The effect of a statute of repose is that unless a plaintiff's cause of action arises within the time allowed, the plaintiff does not have a cause of action, regardless of the plaintiff's diligence after discovering the defect or problem.<sup>17</sup> The following are some statutes of repose that cut off a plaintiff's cause of action: (1) actions against architects, engineers & design professionals; (2) actions against persons furnishing construction; (3) actions against surveyors; (4) actions involving products liability; (5) actions involving a fraudulent conveyance; (6) actions against agricultural operations; and (7) actions involving a health-care-liability claim.

An action arising out of a defective or unsafe condition of real property or an improvement to or equipment attached to real property against a registered or licensed architect, a landscape architect, an engineer, or an interior designer who designed, planned, or inspected the construction of the improvement or equipment must be brought no later than ten years after the substantial completion of the improvement or the beginning of operation of the equipment.<sup>18</sup> An action arising out of a defective or

unsafe condition of real property or a deficiency in the construction or repair of an improvement to real property against a person who constructed or repaired the improvement must be brought no later than ten years after the substantial completion of the improvement.<sup>19</sup> Texas Civil Practice and Remedies Code section 16.009 does not bar an action based on willful misconduct or fraudulent concealment in connection with the performance of the construction or repair.<sup>20</sup> An action arising from an injury or loss caused by an error in a survey conducted by a registered public surveyor or licensed state land surveyor must be brought no later than ten years after the date the survey was completed.<sup>21</sup>

A products-liability action against a manufacturer or seller of products must be brought no later than either of the following: (1) Fifteen years after the date of the sale of the product by the manufacturer or seller;<sup>22</sup> or (2) if the manufacturer or seller expressly warranted in writing that the product had a useful safe life of longer than 15 years, the number of years warranted after the date of the sale of the product by the seller.<sup>23</sup> An action arising from the fraudulent conveyance of property by a debtor with the intent to hinder, delay, or defraud his creditors by placing his property beyond the creditors' reach must be brought no later than either of the following: (1) four years after the conveyance;<sup>24</sup> or (2) if more than four years after the conveyance, one year after the creditor knew

<sup>13</sup> *Ingersoll-Rand Co.*, 997 S.W.2d at 210.

<sup>14</sup> *HECI Expl. Co. v. Neel*, 982 S.W.2d 881, 886 (Tex. 1998); e.g., *Wagner & Brown, Ltd. v. Norwood*, 58 S.W.3d 732, 736-37 (Tex. 2001). *Slusser v. Union Bankers Ins. Co.*, 72 S.W.3d 713, 718 (Tex.App.—Eastland 2002, no pet.).

<sup>15</sup> *Holubec v. Brandenberger*, 111 S.W.3d 32, 37 (Tex. 2003); *Trinity River Auth. v. URS Consultants, Inc.*, 889 S.W.2d 259, 263 (Tex. 1994).

<sup>16</sup> *Trinity River Auth.*, 889 S.W.2d at 261; *Trunkhill Capital, Inc. v. Jansma*, 905 S.W.2d 464, 467 (Tex.App.—Waco 1995, writ denied).

<sup>17</sup> *Trunkhill Capital*, 905 S.W.2d at 467.

<sup>18</sup> Tex. Civ. Prac. & Rem. Code § 16.008(a); *Sonnier v. Chisholm-Ryder Co.*, 909 S.W.2d 475, 478 (Tex. 1995); *Trinity River Auth.*, 889 S.W.2d at 261.

<sup>19</sup> Tex. Civ. Prac. & Rem. Code § 16.009(a); *Sanchez v. Mica Corp.*, 107 S.W.3d 13, 31 (Tex.App.—San Antonio 2002, pet. granted, judgment vacated w.r.m.); *Fuentes v. Continental Conveyor & Equip. Co.*, 63 S.W.3d 518, 520 (Tex.App.—Eastland 2001, pet. denied); see *Sonnier*, 909 S.W.2d at 478, 483 (comparing Tex. Civ. Prac. & Rem. Code §16.008 to §16.009).

<sup>20</sup> Tex. Civ. Prac. & Rem. Code § 16.009(e)(3); *Ryland Group v. Hood*, 924 S.W.2d 120, 121 (Tex. 1996); *Texas Gas Expl. Corp. v. Fluor Corp.*, 828 S.W.2d 28, 32-33 (Tex.App.—Texarkana 1991, writ denied).

<sup>21</sup> Tex. Civ. Prac. & Rem. Code § 16.011(a)(1).

<sup>22</sup> Tex. Civ. Prac. & Rem. Code §16,012(b).

<sup>23</sup> *Id.* §16.012(c).

<sup>24</sup> Tex. Bus. & Com. Code § 24.010(a)(1); *Duran v. Henderson*, 71 S.W.3d 833, 837 (Tex.App.—Texarkana 2002, pet. denied)

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or reasonably should have known about the conveyance.<sup>25</sup> A nuisance action against an agricultural operation that has been in lawful operation for more than a year must be brought no later than one year after the start of the conditions or circumstances that give rise to the nuisance action.<sup>26</sup> A health-care-liability claim must be brought no later than ten years after the date of the act or omission that gives rise to the claim.<sup>27</sup>

### B. Standing/Privity

If a plaintiff is not the proper party to assert a breach of contract claim, the defendant can allege that the plaintiff "lacks standing" to sue.<sup>28</sup> To be a proper party, a plaintiff must be (1) a party to the contract; (2) an assignee of a party to the contract; (3) an agent entitled to sue on behalf of a party to the contract; or (4) an intended third-party beneficiary of the contract.

Parties to a contract are the signatories to the contract or those who have otherwise indicated their consent to be bound by the contractual promises.<sup>29</sup> Parties are considered to be in "privity of contract," when they have formed a relationship that allows them to sue each other based on their contractual duties.<sup>30</sup> In

certain circumstances, a party to a contract may be entitled to seek damages on behalf of others. For example, a party to a contract can sue for an injury to an intended third-party beneficiary of the contract.<sup>31</sup> However, it is unclear whether a party suing on behalf of a third-party beneficiary can seek damages or is limited to seeking specific performance.<sup>32</sup> In construction contracts involving owners, general contractors, and subcontractors, the general contractor can sue the owner for breach of contract on behalf of a subcontractor if the contract between the general contractor and the subcontractor includes a "pass-through" agreement, also known as a "liquidation" or "consolidation-of-claims" agreement.<sup>33</sup> These agreements are designed to prevent unnecessary litigation between contractors and subcontractors over money owed by a property owner.<sup>34</sup>

An assignee is a person to whom a party to the contract assigned its contractual rights. "Assignment" refers to the transfer of property or some right or interest from one person to another;<sup>35</sup> and Texas law generally allows parties to assign their contractual rights and affords assignees the same rights as an original party to a contract.<sup>36</sup> An assignee of a party's interests in a contract can sue for breach of contract.<sup>37</sup> Unless otherwise stipulated, contracts are freely assignable.<sup>38</sup> Contractual rights can be assigned orally

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<sup>25</sup> Tex. Bus. & Com. Code § 24.010(a)(1); *Duran*, 71 S.W.3d at 837.

<sup>26</sup> Tex. Agric. Code § 251.004(a); *Holubec*, 111 S.W.3d at 38; *Barrera v. Hondo Creek Cattle Co.*, 132 S.W.3d 544, 547 (Tex.App.—Corpus Christi 2004, no pet.).

<sup>27</sup> Tex. Civ. Prac. & Rem. Code § 74.251(b).

<sup>28</sup> *Stine v. Stewart*, 80 S.W.3d, 586, 590 (Tex. 2002); *Mandell v. Hammon Oil & Ref Co.*, 822 S.W.2d 153, 161 (Tex.App.—Houston [1st Dist.] 1991, writ denied).

<sup>29</sup> See, e.g., *Willis v. Donnelly*, 199 S.W.3d 262, 271 (Tex. 2006); *Bookout v. Bookout*, 165 S.W.3d 904, 911-12 (Tex.App.—Texarkana 2005, no pet.); *ANCO Ins. Servs. v. Romero*, 27 S.W.3d 1, 5-6 (Tex.App.—San Antonio 2000, pet. denied).

<sup>30</sup> Black's Law Dictionary 1237 (8th ed. 2004). The doctrine of privity in contract law provides that a contract cannot confer rights or impose obligations arising under it on any person or agent except the parties to it. This is based on the desire to afford only the parties to contracts the ability to sue to enforce their rights or claim damages as such.

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<sup>31</sup> *Zuniga v. Wooster Ladder Co.*, 119 S.W.3d 856, 862 (Tex.App.—San Antonio 2003, no pet.); *Copeland v. Alsobrook*, 3 S.W.3d 598, 608 (Tex.App.—San Antonio 1999, pet. denied).

<sup>32</sup> Compare *Zuniga*, 119 S.W.3d at 862, with *Delaney v. Davis*, 81 S.W.3d 445, 449-50 (Tex.App.—Houston [14th Dist.] 2002, no pet.).

<sup>33</sup> See *Interstate Contracting Corp. v. City of Dallas*, 135 S.W.3d 605, 607 (Tex 2004).

<sup>34</sup> See *id.* at 610.

<sup>35</sup> *Twelve Oaks Tower I, Ltd. v. Premier Allergy, Inc.*, 938 S.W.2d 102, 113 (Tex.App.—Houston [14th Dist.] 1996, no writ); Black's Law Dictionary 128 (8th ed. 2004).

<sup>36</sup> See *Phoenix Network Tech. v. Neon Sys.*, 177 S.W.3d 605, 620 (Tex.App.—Houston [1st Dist.] 2005, no pet.).

<sup>37</sup> See *Vaughn v. DAP Fin. Servs.*, 982 S.W.2d 1, 7 (Tex.App.—Houston [1st Dist.] 1997, no pet.).

<sup>38</sup> *Id.*; see also Tex. Bus. & Com. Code §2.210(b).

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unless the contract giving rise to the claim, or a statute pertaining to the claim, requires a written transfer.<sup>39</sup> An assignee of a party's breach-of-contract claim can also sue for breach of contract.<sup>40</sup> To recover on an assigned cause of action, the plaintiff must prove that the cause of action was in fact assigned.<sup>41</sup>

An agent of a party to a contract can sometimes sue for breach of contract on behalf of its principal.<sup>42</sup> Generally, an agent cannot sue for a breach of its principal's contract.<sup>43</sup> However, an agent can bring suit if (1) the agent contracts in its own name; (2) the principal is undisclosed; (3) the agent is authorized to act as owner of the property; or (4) the agent has an interest in the subject matter of the contract.<sup>44</sup>

An intended third-party beneficiary of a contract can bring suit for breach of the contract.<sup>45</sup> A third party is an intended third-party beneficiary of a contract when (1) the contracting parties intended to secure a benefit to the third party, and (2) the contracting parties entered into the contract directly for the third party's benefit.<sup>46</sup> Plaintiffs are not required to

give consideration for the agreement to be considered third-party beneficiaries.<sup>47</sup> However, there is a presumption against third-party beneficiary agreements.<sup>48</sup> In order to show that contracting parties intend to secure a benefit to a third party, the contract must clearly and fully express the intent to confer a direct benefit on the third party.<sup>49</sup> To determine the parties' intent regarding a third-party beneficiary, courts examine the entire contract and give effect to all its provisions so that none are rendered meaningless.<sup>50</sup> A contract does not directly benefit a third party if the benefit received is merely incidental to the contract.<sup>51</sup> To show a direct benefit, a third party must establish that it is either a "donee" beneficiary or a "creditor" beneficiary of the contract.<sup>52</sup> A contract benefits a donee beneficiary if the performance promised in the contract will, when rendered, be a pure donation to the third party.<sup>53</sup> A contract benefits a creditor beneficiary if the performance promised in the contract by the promisor will satisfy a legal duty owed by the promisee to the beneficiary.<sup>54</sup> This duty may be an indebtedness, contractual obligation, or other legally enforceable commitment owed to the third party.<sup>55</sup>

### C. Failure of consideration / Lack of consideration

In response to a breach of contract claim, a defendant can assert the defenses of failure of

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<sup>39</sup> *Adkins Servs. v. Tisdale Co.*, 56 S.W.3d 842, 845 (Tex.App.—Texarkana 2001, no pet.).

<sup>40</sup> *See Conquest Drilling Fluids, Inc. v. Tri-Flo Intl.*, 137 S.W.3d 299, 308 (Tex.App.—Beaumont 2004, no pet.). *River Consulting, Inc. v. Sullivan*, 848 S.W.2d 165, 169 (Tex.App.—Houston [1st Dist.] 1992, writ denied), *disapproved on other grounds, Formosa Plastics Corp. v. Presidia Eng'rs & Contractors, Inc.*, 960 S.W.2d 41 (Tex. 1998).

<sup>41</sup> *Delaney*, 81 S.W.3d at 448-49. *See generally State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696, 705-11 (Tex. 1996).

<sup>42</sup> *See Perry v. Breland*, 16 S.W.3d 182, 187 (Tex.App.—Eastland 2000, pet. denied).

<sup>43</sup> *Tinsley v. Dowell*, 26 S.W. 946, 948 (Tex. 1894).

<sup>44</sup> *Id.*; *Perry*, 16 S.W.3d at 187; *Wilson Cty. Peanut Co. v. Hahn*, 364 S.W.2d 468, 470 (Tex.App.—San Antonio 1963, no writ).

<sup>45</sup> *In re Palm Harbor Homes, Inc.*, 195 S.W.3d 672, 677 (Tex. 2006); *Stine v. Stewart*, 80 S.W.3d 586, 589 (Tex. 2002).

<sup>46</sup> *Stine*, 80 S.W.3d at 589; *MCI Telecomms. Corp. v. Texas Utils. Elec. Co.*, 995 S.W.2d 647, 651 (Tex. 1999).

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<sup>47</sup> *In re Palm Harbor Homes*, 195 S.W.3d at 677.

<sup>48</sup> *MCI*, 995 S.W.2d at 652; *Carson Energy, Inc. v. Riverway Bank*, 100 S.W.3d 591, 600 (Tex.App.—Texarkana 2003, pet. denied).

<sup>49</sup> *Stine*, 80 S.W.3d at 589; *MCI*, 995 S.W.2d at 651.

<sup>50</sup> *Stine*, 80 S.W.3d at 589; *MCI*, 995 S.W.2d at 652.

<sup>51</sup> *Stine*, 80 S.W.3d at 589; *MCI*, 995 S.W.2d at 651; *e.g., Raymond v. Rahme*, 78 S.W.3d 552, 561 (Tex.App.—Austin 2002, no pet.).

<sup>52</sup> *Stine*, 80 S.W.3d at 589; *MCI*, 995 S.W.2d at 651.

<sup>53</sup> *Stine*, 80 S.W.3d at 589; *MCI*, 995 S.W.2d at 651; *see* Restatement (2d) of Contracts §302(1)(b) (1981).

<sup>54</sup> *Stine*, 80 S.W.3d at 589; *MCI*, 995 S.W.2d at 651; *see also* Restatement (2d) of Contracts §302(1)(a).

<sup>55</sup> *Stine*, 80 S.W.3d at 589; *MCI*, 995 S.W.2d at 651.

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consideration or lack of consideration. Although the courts sometimes use these terms interchangeably, they represent different defenses.<sup>56</sup> Both defenses must be raised by verified pleading.<sup>57</sup> The verified defense places the burden on the defendant to prove the failure or lack of consideration.<sup>58</sup> Failure of consideration occurs when, after the inception of the contract, the plaintiff does not perform a condition precedent to the defendant's duty to perform.<sup>59</sup> In a few instances, failure of consideration is not a defense to a breach-of-contract suit.<sup>60</sup> Lack of consideration occurs when the contract, at its inception, does not impose obligations on both parties. A contract that lacks consideration is unenforceable.<sup>61</sup>

### D. Mistake

Mistake is a defense to a breach of contract claim. There are two kinds of mistake that can be raised as a defense to a breach of contract: unilateral mistake and mutual mistake.<sup>62</sup> Both forms of mistake involve only mistakes concerning past or present facts.<sup>63</sup> A mistake in predicting a future fact known to be uncertain cannot be raised as a defense.<sup>64</sup>

Generally, a unilateral mistake is not grounds for equitable relief.<sup>65</sup> However, equitable relief may be

granted for a unilateral mistake when all of the following conditions are met: (1) the mistake is of so great a consequence that to enforce the contract as made would be unconscionable;<sup>66</sup> (2) the mistake relates to a material feature of the contract;<sup>67</sup> (3) the mistake would have been made regardless of the exercise of ordinary care;<sup>68</sup> and (4) the parties can be returned to the status quo; that is, the rescission will not result in prejudice to the other party except for the loss of its bargain.<sup>69</sup> A mutual mistake based on both parties' misconception or ignorance of a material fact can render a contract voidable.<sup>70</sup> Mutual mistake is determined by the language of the document and not by self-serving subjective statements of the parties' intent.<sup>71</sup> The objective circumstances surrounding the execution of the contract can be examined, such as the parties' knowledge at the time of signing, the amount of consideration paid, the extent of the negotiations and discussions, and the haste or lack of haste in obtaining

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<sup>56</sup> *Motor & Indus. Fin. Corp. v. Hughes*, 302 S.W.2d 386, 394 (Tex. 1957); *Belew v. Rector*, 202 S.W.3d 849, 854 n.4 (Tex.App.—Eastland 2006, no pet.).

<sup>57</sup> Tex. R. Civ. P. 93(9), 94; *Kish v. Van Note*, 692 S.W.2d 463, 467 (Tex.1985)(failure of consideration); *Edlund v. Bounds*, 842 S.W.2d 719, 724 (Tex.App.—Dallas 1992, writ denied)(lack of consideration).

<sup>58</sup> See *Edlund*, 842 S.W.2d at 724.

<sup>59</sup> *S&H Sup. v. Hamilton*, 418 S.W.2d 489, 492 (Tex. 1967)(Greenhill, J., dissenting).

<sup>60</sup> See, e.g., *1464-Eight, Ltd. v. Joppich*, 154 S.W.3d 101, 109-10 (Tex. 2004).

<sup>61</sup> *Federal Sign v. Texas S. Univ.*, 951 S.W.2d 401, 409 (Tex. 1997).

<sup>62</sup> See *Green v. Morris*, 43 S.W.3d 604, 606-07 (Tex.App.—Waco 2001, no pet).

<sup>63</sup> See *id.* at 607.

<sup>64</sup> *Id.*

<sup>65</sup> *Cigna Ins. Co. v. Rubalcada*, 960 S.W.2d 408, 412 (Tex.App.—Houston [1st Dist.] 1998, no pet.); *Seymour v. American Engine & Grinding Co.*, 956 S.W.2d 49,

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58 (Tex.App.—Houston [14th Dist] 1996, writ denied).

<sup>66</sup> *James T. Taylor & Son, Inc. v. Arlington ISD*, 335 S.W.2d 371, 372-73 (Tex. 1960); *Welkener v. Welkener*, 71 S.W.3d 364, 367 (Tex.App.—Corpus Christi 2001, no pet.); see, e.g., *Cigna Ins.*, 960 S.W.2d at 412.

<sup>67</sup> *James T. Taylor & Son*, 335 S.W.2d at 373; e.g., *B.D. Holt Co. v. OCE, Inc.*, 971 S.W.2d 618, 620 (Tex.App.—San Antonio 1998, pet. denied); *Harry Brown, Inc. v. McBryde*, 622 S.W.2d 596, 600 (Tex.App.—Tyler 1981, no writ).

<sup>68</sup> *James T. Taylor & Son*, 335 S.W.2d at 373; see *Roland v. McCullough*, 561 S.W.2d 207, 213 (Tex.App.—San Antonio 1977, writ ref'd n.r.e.); see, e.g., *Boland v. Mundaca Inv.*, 978 S.W.2d 146, 149 (Tex.App.—Austin 1998, no pet.); *Guido & Guido, Inc. v. Culberson Cty.*, 459 S.W.2d 674, 676-77 (Tex.App.—El Paso 1970, writ ref'd n.r.e.).

<sup>69</sup> *Monarch Marking Sys. v. Reed's Photo Mart, Inc.*, 485 S.W.2d 905, 906-07 (Tex. 1972); *James T. Taylor & Son*, 335 S.W.2d at 373.

<sup>70</sup> *Williams v. Glash*, 789 S.W.2d 261, 264 (Tex. 1990); *Walden v. Affiliated Computer Servs.*, 97 S.W.3d 303, 326 (Tex.App.—Houston [14th Dist.] 2003, pet. denied); see Restatement (2d) of Contracts §152.

<sup>71</sup> See *Williams*, 789 S.W.2d at 264.

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the agreement.<sup>72</sup> To prove mutual mistake, the party seeking to void the contract must establish the following: (1) both parties had the same misunderstanding of the same material fact;<sup>73</sup> (2) the mistake involved a material part of the contract;<sup>74</sup> and (3) the risk of mistake was not allocated to the defendant.<sup>75</sup>

Unilateral mistake by one party and knowledge of that mistake by the other party is equivalent to mutual mistake.<sup>76</sup> The mistake must not relate merely to a collateral matter.<sup>77</sup> A party cannot void a contract based on mutual mistake if the risk of mistake has been allocated to that party.<sup>78</sup> A party can assume this risk when it (1) specifically agrees to assume the risk or (2) is consciously ignorant of the facts surrounding the mistake (i.e., it proceeds even though it knows it has limited knowledge of the facts).<sup>79</sup> Unilateral mistake

<sup>72</sup> *Id.*

<sup>73</sup> *Walden*, 97 S.W.3d at 326; *A.L.G. Enters v. Huffman*, 660 S.W.2d 603, 606 (Tex.App.—Corpus Christi 1983), *aff'd*, 672 S.W.2d 230 (Tex. 1984); *Newsom v. Starkey*, 541 S.W.2d 468, 472 (Tex.App.—Dallas 1976, writ ref'd n.r.e.); *see, e.g., Champlin Oil & Ref. Co. v. Chastain*, 403 S.W.2d 376, 381-82 (Tex. 1965).

<sup>74</sup> *A.L.G. Enters.*, 660 S.W.2d at 606; *Durham v. Uvalde Rock Asphalt Co.*, 599 S.W.2d 866, 870 (Tex.App.—San Antonio 1980, no writ); *see, e.g., Chastain*, 403 S.W.2d at 392 (Hamilton, J., concurring).

<sup>75</sup> *See Cherry v. McCall*, 138 S.W.3d 35, 40 (Tex.App.—San Antonio 2004, pet. denied); *de Monet v. PERA*, 877 S.W.2d 352, 359 (Tex.App.—Dallas 1994, no writ).

<sup>76</sup> *Davis v. Grammer*, 750 S.W.2d 766, 768 (Tex. 1988); *Atlantic Lloyds Ins. Co. v. Butler*, 137 S.W.3d 199, 213 (Tex.App.—Houston [1st Dist.] 2004, pet. denied); *Seymour*, 956 S.W.2d at 58.

<sup>77</sup> *A.L.G. Enters.*, 660 S.W.2d at 606; *e.g., Brown-McKee, Inc. v. Western Beef, Inc.*, 538 S.W.2d 840, 845 (Tex.App.—Amarillo 1976, writ ref'd n.r.e.).

<sup>78</sup> *Cherry*, 138 S.W.3d at 40; *de Monet*, 877 S.W.2d at 359; *see* Restatement (2d) of Contracts §152 cmt. e. (1981).

<sup>79</sup> *See Cherry*, 138 S.W.3d at 40; *de Monet*, 877 S.W.2d at 359-60; *see Bolle, Inc. v. American Greetings Corp.*, 109 S.W.3d 827, 832 (Tex.App.—Dallas 2003, pet. denied).

and mutual mistake are affirmative defenses that must be pleaded or they are waived.<sup>80</sup>

### E. Ratification

Ratification is a defense to a breach of contract claim.<sup>81</sup> Ratification occurs when the plaintiff, after learning all the material facts, confirms or adopts an earlier act that did not then legally bind it and that it could have repudiated.<sup>82</sup> Once the plaintiff ratifies a contract, it may not later withdraw the ratification and seek to avoid the contract.<sup>83</sup> The elements of ratification are: (1) plaintiff's approval; (2) plaintiff's knowledge; and (3) plaintiff's intention.<sup>84</sup> The defendant must show the plaintiff approved the contract by its acts, words, or conduct.<sup>85</sup> Approval may be proved by silence in the face of actual knowledge of an earlier act.<sup>86</sup> The defendant must show the plaintiff fully knew of the facts of the earlier act.<sup>87</sup> The defendant must show the plaintiff intended to give validity to the earlier act.<sup>88</sup> The plaintiff does not need to have the intent to ratify, but rather must per-form a voluntary, intentional act that is inconsistent

<sup>80</sup> *Tag Res. v. Petroleum Well Servs.*, 791 S.W.2d 600, 604 (Tex.App.—Beaumont 1990, no writ).

<sup>81</sup> *Petroleum Anchor Equip., Inc. v. Tyra*, 419 S.W.2d 829, 834 (Tex. 1967); *Samms v. Autumn Run Cmty. Imprv. Ass'n*, 23 S.W.3d 398, 403 (Tex.App.—Houston [1st Dist.] 2000, pet. denied).

<sup>82</sup> *K.B. v. N.B.*, 811 S.W.2d 634, 638 (Tex.App.—San Antonio 1991, writ denied).

<sup>83</sup> *Missouri Pac. R.R. v. Lely Dev. Corp.*, 86 S.W.3d 787, 792 (Tex.App.—Austin 2002, pet. dismiss'd).

<sup>84</sup> *Motel Enters. v. Nobani*, 784 S.W.2d 545, 547 (Tex.App.—Houston [1st Dist.] 1990, no writ).

<sup>85</sup> *Nobani*, 784 S.W.2d at 547; *see Jamail v. Thomas*, 481 S.W.2d 485, 490 (Tex.App.—Houston [1st Dist.] 1972, writ ref'd n.r.e.).

<sup>86</sup> *Pitman v. Lightfoot*, 937 S.W.2d 496, 523 (Tex.App.—San Antonio 1996, writ denied); *see Southwestern Bell Tel. Co. v. Wilson*, 768 S.W.2d 755, 764 (Tex.App.—Corpus Christi 1988, writ denied).

<sup>87</sup> *Nobani*, 784 S.W.2d at 547; *see Land Title Co. v. M. Stigler, Inc.*, 609 S.W.2d 754, 756 (Tex. 1980).

<sup>88</sup> *Nobani*, 784 S.W.2d at 547.

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with an intention of avoiding the earlier agreement.<sup>89</sup> The inconsistent act does not have to be shown by express word or deed and may be inferred by a party's course of conduct.<sup>90</sup> Any act inconsistent with an intent to avoid a contract has the effect of ratifying the contract.<sup>91</sup>

### F. Waiver

Waiver is a defense to a breach of contract claim.<sup>92</sup> Waiver is an intentional relinquishment of a known right and is either made expressly or indicated by conduct that is inconsistent with an intent to claim the right.<sup>93</sup> Prolonged silence or inaction in asserting a known right may amount to waiver.<sup>94</sup> The plaintiff's intent is the primary factor in determining waiver, and in the absence of a clear intent expressed in words, acts, or conduct, waiver will be implied only to prevent fraud or inequitable consequences.<sup>95</sup> The plaintiff may affirm a breached contract and thus waive its claim of breach in one of two ways: (1) by showing a conscious intent to do so or (2) by acting to induce the defendant's detrimental reliance, thereby creating an estoppel situation.<sup>96</sup> However, the following do not necessarily constitute waiver: (1) a plaintiff's acceptance of a defendant's late performance<sup>97</sup>; (2) a

<sup>89</sup> *Old Republic Ins. Co. v. Fuller*, 919 S.W.2d 726, 728 n.1 (Tex.App.—Texarkana 1996, writ denied).

<sup>90</sup> *Missouri Pac. R.R.*, 86 S.W.3d at 792.

<sup>91</sup> *Id.*

<sup>92</sup> *Cal-Tex Lumber Co. v. Owens Handle Co.*, 989 S.W.2d 802, 812 (Tex.App.—Tyler 1999, no pet.).

<sup>93</sup> *Jernigan v. Langley*, 111 S.W.3d 153, 156 (Tex. 2003); *U.S. Fid. & Guar. Co. v. Bimco Iron & Metal Corp.*, 464 S.W.2d 353, 357 (Tex. 1971); *Martin v. Birenbaum*, 193 S.W.3d 677, 681 (Tex.App.—Dallas 2006, pet. denied); *Cal-Tex Lumber*, 989 S.W.2d at 812.

<sup>94</sup> *Martin*, 193 S.W.3d at 681.

<sup>95</sup> *Stowers v. Harper*, 376 S.W.2d 34, 40 (Tex.App.—Tyler 1964, writ ref'd n.r.e.).

<sup>96</sup> *Consolidated Eng'g v. Southern Steel*, 699 S.W.2d 188, 191 (Tex. 1985).

<sup>97</sup> *Cal-Tex Lumber*, 989 S.W.2d at 812; e.g., *Jon-T Farms, Inc. v. Goodpasture, Inc.*, 554 S.W.2d 743, 747 (Tex.App.—Amarillo 1977, writ ref'd n.r.e.); see, e.g., *Commercial Credit Corp. v. Taylor*, 448 S.W.2d 190, 195 (Tex.App.—Tyler 1969, no writ).

plaintiff's continuing performance after a defendant's breach;<sup>98</sup> or (3) a plaintiff's honest efforts to induce a defendant to perform the contract.<sup>99</sup>

### G. Plaintiff's Prior Material Breach

A defendant is discharged from performing a contract if the plaintiff repudiates a dependent promise or materially breaches the contract.<sup>100</sup> A party that does not perform its obligation cannot enforce the remaining terms of the contract against the other party.<sup>101</sup>

"Breach" means the failure, without legal excuse, to perform any promise that forms all or part of an agreement, the refusal to recognize the existence of an agreement, or the doing of something inconsistent with its existence.<sup>102</sup> Whether a party breached the contract is a question of law for the court, not a fact question for the jury.<sup>103</sup> The court must examine the contract and determine what conduct is required of the parties, and then, if there is a dispute concerning the failure of a party to comply with the contract, the court should submit the disputed fact question to the jury.<sup>104</sup> A party breaches a contract if it neglects to or refuses to perform a contractual obligation.<sup>105</sup> A party also

<sup>98</sup> *Cal-Tex Lumber*, 989 S.W.2d at 812.

<sup>99</sup> *Consolidated Eng'g*, 699 S.W.2d at 191-92; *Cal-Tex Lumber*, 989 S.W.2d at 812.

<sup>100</sup> *Long Trusts v. Griffin*, \_\_\_ S.W.3d \_\_\_ (Tex. 2006)(material breach); *Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 196 (Tex. 2004)(material breach); *Lazy M Ranch, Ltd. v. TXI Opers., L.P.*, 978 S.W.2d 678, 680-81 (Tex.App.—Austin 1998, pet denied)(repudiation and material breach); *MJR Corp. v. B&B Vending Co.*, 760 S.W.2d 4, 20-21 (Tex.App.—Dallas 1988, writ denied)(repudiation and material breach).

<sup>101</sup> *Interceramic, Inc. v. South Orient R.R.*, 999 S.W.2d 920, 924 (Tex.App.—Texarkana 1999, pet. denied).

<sup>102</sup> *DeSantis v. Wackenhut Corp.*, 732 S.W.2d 29, 34 (Tex.App.—Houston [14th Dist.] 1987), *rev'd in part on other grounds*, 793 S.W.2d 670 (Tex.1990).

<sup>103</sup> *Bank One v. Stewart*, 967 S.W.2d 419, 432 (Tex.App.—Houston [14th Dist.] 1998, pet. denied).

<sup>104</sup> *Meek v. Bishop Peterson & Sharp*, 919 S.W.2d 805, 808 (Tex.App.—Houston [14th Dist.] 1996, writ denied).

<sup>105</sup> *Tennessee Gas Pipeline Co. v. Lenape Res.*, 870 S.W.2d 286, 302 (Tex.App.—



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breaches a contract if it prevents the other party from performing the contract.<sup>106</sup> For example, a contractor is excused from performance if the owner refuses to allow the contractor to proceed, does not provide the means required to complete the contract, or does not make payments provided by the contract, including installment payments.<sup>107</sup>

A breach is “material” if it deprives a defendant of the benefit that could have been reasonably anticipated from full performance.<sup>108</sup> A breach will be considered material when the breaching party does not substantially perform a material obligation or duty required under the contract.<sup>109</sup> The determination of whether a breach is material is usually a question of fact.<sup>110</sup> In determining whether a failure to render or offer performance is material, the following circumstances are significant: (1) the extent to which the injured/non-breaching party will be deprived of the benefit it reasonably expected; (2) the extent to which the non-breaching party can be adequately compensated for the benefit it will be deprived of; (3) the extent to which the breaching party who failed to perform or to offer to perform will suffer forfeiture; (4) the likelihood that the breaching party will cure its breach, taking account of all the circumstances including any reasonable assurances; and (5) the extent to which the behavior of the breaching party comports with standards of good faith and fair dealing.<sup>111</sup>

### H. Estoppel by contract & Quasi-estoppel

In response to a breach of contract action, a defendant can assert the defense of estoppel by contract or quasi-estoppel. Generally, estoppel

prevents a party from asserting or denying rights, claims, or matters of fact contrary to or inconsistent with previous allegations, admissions, denials, or acts of the party or those in privity with the party.<sup>112</sup> Estoppel by contract prevents a party from denying the terms of a valid or fully executed contract unless the contract is set aside by fraud, accident, or mistake.<sup>113</sup> There are two kinds of estoppel by contract: (1) estoppel to deny facts set forth in the contract, and (2) estoppel arising from acts done in performance of the contract.<sup>114</sup> Quasi-estoppel is an equitable doctrine that prevents a party from asserting, to another's disadvantage, a right inconsistent with a position the party previously took.<sup>115</sup> Quasi-estoppel requires no proof of a false representation or of detrimental reliance.<sup>116</sup> To establish the defense of quasi-estoppel, a defendant must prove the following: (1) the plaintiff acquiesced to or accepted a benefit under a transaction; (2) the plaintiff's present position is inconsistent with its earlier position when it acquiesced to or accepted the benefit of the transaction; and (3) it would be unconscionable to allow the plaintiff to maintain its present position, which is to another's disadvantage.<sup>117</sup>

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San Antonio 1993), *rev'd in part on other grounds*, 925 S.W.2d 565 (Tex. 1996).

<sup>106</sup> *O'Shea v. IBM Corp.*, 578 S.W.2d 844, 846 (Tex.App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.).

<sup>107</sup> *Sage St. Assocs. v. Northdale Constr. Co.*, 809 S.W.2d 775, 777 (Tex.App.—Houston 114th Dist.] 1991), *remanded in part on other grounds*, 863 S.W.2d 438 (Tex. 1993).

<sup>108</sup> *Hernandez v. Gulf Group Lloyds*, 875 S.W.2d 691, 693 (Tex. 1994).

<sup>109</sup> *Cowman v. Allen Monuments, Inc.*, 500 S.W.2d 223, 226-27 (Tex. App.-Texarkana 1973, no writ).

<sup>110</sup> *Hudson v. Wakefield*, 645 S.W.2d 427, 430 (Tex. 1983).

<sup>111</sup> *Hernandez v. Gulf Group Lloyds*, 875 S.W.2d 691, 693 (Tex. 1994).

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<sup>112</sup> *Perry v. Citizens Life Ins. Co.*, 163 S.W.2d 743, 747 (Tex.Civ.App.1942, no writ); Restatement (2d) of Contracts §90 cmt. a. (1979); Restatement (2d) of Agency §8B (1958); 31 CJS *Estoppel & Waiver* §2 (1996 & Supp.2005).

<sup>113</sup> *Mathews v. Sun Oil Co.*, 411 S.W.2d 561, 564 (Tex.App.—Amarillo 1966), *aff'd*, 425 S.W.2d 330 (Tex 1968); *see Schroeder v. Texas Iron Works, Inc.*, 769 S.W.2d 625, 628 (Tex.App.—Corpus Christi 1989), *aff'd*, 813 S.W.2d 483 (Tex. 1991).

<sup>114</sup> 31 CJS *Estoppel & Waiver* §§55-57.

<sup>115</sup> *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 864 (Tex 2000); *Mulvey v. Mobil Prod'g Tex. & N.M. Inc.*, 147 S.W.3d 594, 607 (Tex.App.—Corpus Christi 2004, *pet. denied*).

<sup>116</sup> *Eckland Consultants, Inc. v. Ryder; Stilwell Inc.*, 176 S.W.3d 80, 87 (Tex.App.—Houston [1st Dist.] 2004, no *pet.*); *Bristol-Myers Squibb Co. v. Burner*, 964 S.W.2d 299, 302 (Tex.App.—Corpus Christi 1998, no *pet.*).

<sup>117</sup> *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 864 (Tex 2000).

**I. Mitigation of damages**

A plaintiff's failure to mitigate its damages is a defense to a breach of contract claim.<sup>118</sup> A plaintiff must exercise reasonable care to minimize damages if the damages can be avoided with only slight expense and reasonable effort.<sup>119</sup> However, a plaintiff is not required to accept an offer to mitigate from the defendant if it is conditioned on the plaintiff surrendering its claim for breach.<sup>120</sup> Further, a defendant bears the burden of proving what damages could have been mitigated.<sup>121</sup>

**J. Repudiation**

In response to a breach of contract claim, a defendant can assert that plaintiff repudiated the contract<sup>122</sup> and/or that defendant timely retracted its own repudiation by notifying the plaintiff that it intended to perform.<sup>123</sup> A plaintiff repudiates a contract if, without just excuse, it indicates by unconditional words or actions that it will not perform its contractual obligations.<sup>124</sup> The plaintiff's conduct must show a fixed intention to abandon, renounce, and refuse to perform the contract.<sup>125</sup> If the plaintiff's

<sup>118</sup> *Cook Composites, Inc. v. Westlake Styrene Corp.*, 15 S.W.3d 124, 135 (Tex.App.—Houston [14th Dist.] 2000, pet. dismissed).

<sup>119</sup> *Great Am. Ins. Co. v. North Austin MUD*, 908 S.W.2d 415, 426 (Tex. 1995); *Walker v. Salt Flat Water Co.*, 96 S.W.2d 231, 232 (Tex. 1936); see, e.g., *Austin Hill Country Rlty., Inc. v. Palisades Plaza, Inc.*, 948 S.W.2d 293, 299 (Tex. 1997).

<sup>120</sup> *Gunn Infiniti, Inc. v. O'Byrne*, 996 S.W.2d 854, 858 (Tex. 1999).

<sup>121</sup> *Cook Composites*, 15 S.W.3d at 135; *Houston Chronicle Publ'g v. McNair Trucklease, Inc.*, 519 S.W.2d 924, 929 (Tex.App.—Houston [1st Dist.] 1975, writ refused n.r.e.).

<sup>122</sup> See *El Paso Prod. Co. v. Valence Oper. Co.*, 112 S.W.3d 616, 621 (Tex. App. Houston [1st Dist.] 2003, pet. denied).

<sup>123</sup> *Griffith v. Porter*, 817 S.W.2d 131, 135 (Tex.App.—Tyler 1991, no writ); *Valdina Farms, Inc. v. Brown, Beasley & Assocs.*, 733 S.W.2d 688, 692 (Tex.App.—San Antonio 1987, no writ).

<sup>124</sup> *Id.*; see *Hauglum v. Durst*, 769 S.W.2d 646, 651 (Tex.App.—Corpus Christi 1989, no writ).

<sup>125</sup> *Hubble*, 883 S.W.2d at 383; *Hauglum*, 769 S.W.2d at 651.

refusal to perform its contractual obligations was based on a genuine mistake or misunderstanding about matters of fact or law, there is no repudiation.<sup>126</sup> The defendant must retract its repudiation before the plaintiff either has materially changed its position in reliance on the repudiation or has notified the defendant that it considers the repudiation to be final.<sup>127</sup>

**K. Revocation**

In response to a breach of contract claim, a defendant can assert that it revoked its offer before the plaintiff accepted, and thus no binding contract was formed.<sup>128</sup> An offeror may revoke an offer at any time before acceptance.<sup>129</sup> The revocation must be communicated to the offeree.<sup>130</sup> Formal notice is not required as long as the offeror does some act inconsistent with the offer and the offeree has knowledge of the act.<sup>131</sup> Revocation sent by mail is effective only when it is actually received by the offeree.<sup>132</sup>

**L. Lack of capacity**

A defendant can assert lack of capacity based on age or mental deficiency as a defense to a breach of contract claim. A contract made with a minor is voidable at the minor's election.<sup>133</sup> A minor may set

<sup>126</sup> *Jenkins v. Jenkins*, 991 S.W.2d 440, 447 (Tex.App.—Fort Worth 1999, pet. denied); *McKenzie v. Farr*, 541 S.W.2d 879, 882 (Tex.App.—Beaumont 1976, writ refused n.r.e.).

<sup>127</sup> *Glass v. Anderson*, 596 S.W.2d 507, 510 (Tex. 1980); *Juarez v. Hamner*, 674 S.W.2d 856, 860 (Tex.App.—Tyler 1984, no writ); e.g., *Helsley v. Anderson*, 519 S.W.2d 130, 133 (Tex.App.—Dallas 1975, no writ).

<sup>128</sup> *Bowles v. Fickas*, 167 S.W.2d 741, 742-43 (Tex. 1943).

<sup>129</sup> *Id.* at 743; see *Echols v. Bloom*, 485 S.W.2d 798, 800 (Tex.App.—Houston [14th Dist.] 1972, writ refused n.r.e.).

<sup>130</sup> *Antwine v. Reed*, 199 S.W.2d 482, 485 (Tex. 1947).

<sup>131</sup> *Id.*

<sup>132</sup> *Peacock v. Harrison*, 189 S.W.2d 500, 503 (Tex.App.—Austin 1945, writ dismissed).

<sup>133</sup> *Dairyland Cty. Mut. Ins. Co. v. Roman*, 498 S.W.2d 154, 158 (Tex. 1973); *Prudential Bldg. & Loan Ass'n v. Shaw*, 26 S.W.2d 168, 171 (Tex. Comm'n App. 1930,

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aside the entire contract at her option, but she cannot enforce portions that are favorable to her and void other provisions that are burdensome.<sup>134</sup> A contract voided by a minor is deemed to have been void for both parties from the beginning.<sup>135</sup> A minor is a person under 18 whose disability has not been removed.<sup>136</sup> A minor's disability can be removed by either (1) marriage,<sup>137</sup> or (2) judicial order.<sup>138</sup> The minor must void the contract within a reasonable time after reaching the age of majority.<sup>139</sup> What constitutes a reasonable time is usually a question of fact to be determined based on the particular circumstances of the case.<sup>140</sup> If the minor voids the contract on the grounds of incapacity, the minor can recover the full amount of consideration paid.<sup>141</sup> The minor must restore any consideration she received from the other party if she still has it.<sup>142</sup> Even if the other party's consideration depreciated in value or was lost, the

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judgm't adopted); *e.g.*, *Kargar v. Sorrentino*, 788 S.W.2d 189, 191 (Tex.App.—Houston [14th Dist] 1990, no writ).

<sup>134</sup> *Roman*, 498 S.W.2d at 158.

<sup>135</sup> *Kargar*, 788 S.W.2d at 191.

<sup>136</sup> See Tex. Civ. Prac. & Rem. Code §129.001; Tex. Fam. Code §101.003(a); *Fernandez v. Fernandez*, 717 S.W.2d 781, 782 (Tex.App.—El Paso 1986, writ dismissed); *Pioneer Cas. Co. v. Bush*, 457 S.W.2d 165, 168 (Tex.App.—Tyler 1970, writ refused n.r.e.).

<sup>137</sup> *Ex parte Williams*, 420 S.W.2d 135, 137 (Tex. 1967); *Fernandez*, 717 S.W.2d at 782.

<sup>138</sup> Tex. Fam. Code §31.001; *Dallas Joint Stock Land Bank v. Dolan*, 120 S.W.2d 798, 800-01 (Tex.Comm'n App. 1938, judgment adopted).

<sup>139</sup> *Searcy v. Hunter*, 17 S.W. 372, 372-73 (Tex. 1891); *Shaw*, 26 S.W.2d at 171; *Robinson v. Roquemore*, 2 S.W.2d 873, 874 (Tex.App.—Texarkana 1928, no writ).

<sup>140</sup> *Robinson*, 2 S.W.2d at 874.

<sup>141</sup> *Shaw*, 26 S.W.2d at 171; *James v. Barnett*, 404 S.W.2d 886, 888 (Tex.App.—Dallas 1966, writ refused n.r.e.).

<sup>142</sup> *Shaw*, 26 S.W.2d at 171; *Hague v. Wilkinson*, 291 S.W.2d 750, 753 (Tex.App.—Texarkana 1956, no writ); *Rutherford v. Hughes*, 228 S.W.2d 909, 911 (Tex.App.—Amarillo 1950, no writ).

minor is entitled to recover the full amount of consideration she paid.<sup>143</sup> A minor cannot void a contract if she obtained it by a fraudulent misrepresentation intended to induce the plaintiff to believe she was at least 18 years old.<sup>144</sup> To prove fraud, the plaintiff must show (1) the minor consciously deceived the plaintiff, (2) the plaintiff was in fact misled by the minor, and (3) the misrepresentation induced the making of the agreement.<sup>145</sup> The mere fact that the plaintiff really believed she was dealing with an adult will not prevent the minor from disaffirming the contract.<sup>146</sup> A minor cannot void a contract for "necessaries."<sup>147</sup> "Necessaries" include items such as food, lodging, clothing, medicine, medical care, education, and legal services.<sup>148</sup> What constitutes a necessary is a mixed question of law and fact.<sup>149</sup> The court decides what classes of articles are necessities; the jury determines whether the particular articles fall within any of these classes and whether they were actually necessary for the minor.<sup>150</sup> A minor can be required to pay only the reasonable value of the items actually furnished under the contract.<sup>151</sup> A minor cannot void a contract if she ratified it after reaching majority.<sup>152</sup> "Ratification" means the former minor, knowing that the contract was not binding because of her minority when she made it,

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<sup>143</sup> *Shaw*, 26 S.W.2d at 171; *James*, 404 S.W.2d at 888; *Hogue*, 291 S.W.2d at 753.

<sup>144</sup> *Evans v. Henry*, 230 S.W.2d 620, 621 (Tex.App.—San Antonio 1950, no writ); see *Hogue*, 291 S.W.2d at 753; *Rutherford*, 228 S.W.2d at 911.

<sup>145</sup> *Evans*, 230 S.W.2d at 621.

<sup>146</sup> *Id.*

<sup>147</sup> *Johnson v. Newberry*, 267 S.W. 476, 478 (Tex.Comm'n App. 1924, holding approved); see *Askey v. Williams*, 11 S.W. 1101, 1101 (Tex. 1889).

<sup>148</sup> *Johnson*, 267 S.W. at 478; *e.g.*, *Searcy*, 17 S.W. at 373 (legal fees for services rendered to minor were necessities).

<sup>149</sup> *Johnson*, 267 S.W. at 480-81.

<sup>150</sup> *Id.*

<sup>151</sup> See *Breaux v. Allied Bank*, 699 S.W.2d 599, 604 (Tex.App.—Houston [14th Dist.] 1985, writ refused n.r.e.).

<sup>152</sup> *Knandel v. Cameron*, 263 S.W.2d 184, 185 (Tex.App.—San Antonio 1953, no writ).

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decided to waive that defect and adopt the contract.<sup>153</sup> The plaintiff must show that the minor, by her actions or words, clearly and distinctly intended to ratify the contract.<sup>154</sup> A contract made with a person who lacks mental capacity is voidable.<sup>155</sup> Examples of persons who lack mental capacity include the following: (1) a person under guardianship after adjudication of mental illness or defect;<sup>156</sup> a person who is insane;<sup>157</sup> a person who is so intoxicated she is incapable of exercising judgment;<sup>158</sup> a person who did not appreciate the effect of what she was doing and did not understand the nature and consequences of her acts and the business she was transacting;<sup>159</sup> a person who suffers from a mental disease or disorder, such as manic depression.<sup>160</sup>

### M. Fraud

The defendant can assert the defense of fraud. Tex.R.Civ.P. 94; *Texas Farmers Ins. Co. v. Murphy*, 996 S.W.2d 873, 879 (Tex. 1999).

### N. Modification

The defendant can assert that the original contract was modified and the defendant complied with the terms of the modification. A contract is modified when a change to the original agreement introduces a new or different element into the contract but leaves the general purpose and effect unchanged.<sup>161</sup> Whether a

contract is modified is a question of fact and depends on the parties' intentions.<sup>162</sup> The burden of proving modification rests on the party asserting the modification. Id. at 229;<sup>163</sup> For a modification to be enforceable, it must satisfy the elements of a contract and comply with the statute of frauds.

There must be a "meeting of the minds" between all parties to the contract on the terms of the modification.<sup>164</sup> A party's failure to object to the unilateral addition of a term to the contract does not support a finding of implied modification.<sup>165</sup>

A modification to a contract must be supported by new consideration.<sup>166</sup>

A written contract can be modified by a subsequent oral agreement.<sup>167</sup> However, the contract as modified must comply with the statute of frauds, if the terms of the oral modification materially change the original contract so that it becomes subject to the statute of frauds, the modification must be in writing to be enforceable.<sup>168</sup> If the modification itself is not subject to the statute of frauds and does not change terms that are material to the original contract, the oral modification is enforceable, Id;<sup>169</sup>

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<sup>153</sup> *Fletcher v. A.W. Koch Co.*, 189 S.W. 501, 503 (Tex.App.—Austin 1916, no writ).

<sup>154</sup> *Id.*

<sup>155</sup> *Missouri Pac. Ry. v. Brazil*, 10 S.W. 403, 406 (Tex. 1888); *Gaston v. Copeland*, 335 S.W.2d 406, 409 (Tex.App.—Amarillo 1960, writ ref'd n.r.e.).

<sup>156</sup> *Breaux*, 699 S.W.2d at 602.

<sup>157</sup> *Brazil*, 10 S.W. at 406-07; see *Nohra v. Evans*, 509 S.W.2d 648, 653 (Tex.App.—Austin 1974, no writ).

<sup>158</sup> *Brazil*, 10 S.W. at 406.

<sup>159</sup> *Board of Regents v. Yarbrough*, 470 S.W.2d 86, 90 (Tex.App.—Waco 1971, writ ref'd n.r.e.); e.g., *Mandell & Wright v. Thomas*, 441 S.W.2d 841, 845 (Tex. 1969).

<sup>160</sup> See *Nohra*, 509 S.W.2d at 654-55.

<sup>161</sup> *Webb v. Finger Contract Sup.*, 447 S.W.2d 906, 908 (Tex. 1969); *Enserch Corp. v. Rebich*, 925 S.W.2d 75, 83 (Tex.App.—Tyler 1996, writ dism'd).

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<sup>162</sup> *Hathaway v. General Mills, Inc.*, 711 S.W.2d 227, 228-29 (Tex. 1986); *Inter Sys. v. Lowrey*, 230 S.W.3d 913, 919 (Tex.App.—Dallas 2007, n.p.h.).

<sup>163</sup> *Inter Sys.*, 230 S.W.3d at 919; *Price Pfister, Inc. v. Moore & Kimmey, Inc.*, 48 S.W.3d 341, 349 (Tex.App.—Houston [14th Dist.] 2001, pet. denied).

<sup>164</sup> *Hathaway*, 711 S.W.2d at 228; *Fubar, Inc. v. Turner*, 944 S.W.2d 64, 67 (Tex.App.—Texarkana 1997, no writ).

<sup>165</sup> See *Tirbelite v. Risica & Sons, Inc.*, 819 S.W.2d 801, 805 (Tex. 1991).

<sup>166</sup> *Hathaway*, 711 S.W.2d at 228; *Walden v. Affiliated Computer Servs.*, 97 S.W.3d 303, 314 (Tex.App.—Houston [14th Dist.] 2003, pet. denied).

<sup>167</sup> *American Garment Props., Inc. v. CB Richard Ellis-El Paso, L.L.C.*, 155 S.W.3d 431, 435 (Tex.App.—El Paso 2004, no pet.); *DiMiceli v. Affordable Pool Maint., Inc.*, 110 S.W.3d 164, 171 (Tex.App.—San Antonio 2003, no pet).

<sup>168</sup> See *Garcia v. Karam*, 276 S.W.2d 255, 257 (Tex. 1955).

<sup>169</sup> *Kerrville HRH, Inc. v. City of Kerrville*, 803 S.W.2d 377, 389 (Tex.App.—San Antonio 1990, writ denied); *Group Hop. Scrim v. I & 2 Brookriver Ctr.*, 704 S.W.2d 886, 890 (Tex.App.—Dallas

**O. Failure to perform conditions precedent**

If the plaintiff invokes Texas Rule of Civil Procedure 54 in its petition, alleging that "all conditions precedent have been performed or have occurred," the defendant must specifically deny any conditions precedent to the contract that the defendant claims the plaintiff did not perform.<sup>170</sup> The plaintiff may counter the defendant's denial by alleging that the defendant, through either words or conduct, waived any conditions precedent.<sup>171</sup> If the defendant does not specifically deny the conditions precedent, the plaintiff is relieved of its burden of proving the performance or occurrence of any condition precedent to its recovery.<sup>172</sup>

**P. Impossibility of performance**

The defendant can assert that its performance is excused because performance was impossible. The defendant's performance can be excused if the contract is impossible to perform from the outset because of facts unknown to the defendant.<sup>173</sup>

The defendant's performance can be excused if it is made impossible by supervening circumstances that could not have been anticipated when the contract was executed.<sup>174</sup> (corporation excused from performance because federal bank regulations prohibited paying

finder's fees);<sup>175</sup> (performance excused by supervening change in law);<sup>176</sup> (legal impediment had been removed, making performance possible);<sup>177</sup> (performance prohibited by injunction); *see, e.g.*,<sup>178</sup> (high wind blowing down wall during construction did not make performance impossible simply because it could not reasonably have been anticipated). If the impossibility was created by the defendant's voluntary act, however, performance is not excused.<sup>179</sup>, pet. filed 10-2-07). If the obligation to perform is absolute, an impossibility of performance arising after the contract is made is not a defense if the impossibility might reasonably have been anticipated and guarded against in the contract.<sup>180</sup> (although foreseeability is one factor used to decide which party assumed risk of supervening impossibility, this factor has de-created in importance).

The defendant's performance can be excused if the defendant is unable to perform because of some intervening, unforeseeable circumstance, such as an act of God, as long as the contract contains a force-majeure clause.<sup>181</sup> A force-majeure clause is a contractual provision that allocates the risk of loss if performance becomes impossible or impracticable as a result of an event or effect that the parties could not

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1986, no writ); *see* BACM2001-11] *San Felipe Rd, L.P. v. Trafalgar Holdings I, Ltd.*, 218 S.W.3d 137, 145-46 (Tex.App. — Houston [14th Dist.] 2007, pet. denied).

<sup>170</sup> . *Greathouse v. Charter Nat'l Bank-Sus*, 851 S.W.2d 173, 174 (Tex. 1992); *Hill v. Thompson & Knight*, 756 S.W.2d 824, 825-26 (Tex.App. —Dallas 1988, no writ).

<sup>171</sup> *See Atomic Fuel Extraction Corp. v. Estate of Slick*, 386 S.W.2d 180, 187 (Tex.App. —San Antonio 1964), writ ref'd n.r.e., 403 S.W.2d 784 (Tex.1965).

<sup>172</sup> *Bencon Mgmt. & Gen. Contracting, Inc. v. Boyer, Inc.*, 178 S.W.3d 198, 204 (Tex.App. —Houston [14th Dist.] 2005, no pet); *MacDonald v. Bank of Kerrville*, 849 S.W.2d 371, 372 (Tex.App. —San Antonio 1993, writ dism'd).

<sup>173</sup> *Janak v. FDIC*, 586 S.W.2d 902, 906-07 (Tex.App.—Houston [1st Dist 1979, no writ); Restatement (2d) of Contracts §266(1).

<sup>174</sup> *Erickson v. Rocco*, 433 S.W.2d 746, 751-52 (Tex.App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.); *e.g.*, *Centex Corp. v. Dalton*, 840 S.W.2d 952, 954 (Tex.1992).

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<sup>175</sup> *Houston Ice & Brewing Co. v. Keenan*, 88 S.W. 197, 198 (Tex.1905).

<sup>176</sup> *Walden v. Affiliated Computer Servs.*, 97 S.W.3d 303, 325 (Tex.App. —Houston [14th Dist] 2003, pet. denied).

<sup>177</sup> *International Bank of Commerce v. Union Nat'l Bank*, 653 S.W.2d 539, 550 (Tex.App.—San Antonio 1983, writ ref'd n.r.e.)

<sup>178</sup> *Metrocon Constr. Co. v. Gregory Constr. Co.*, 663 S.W.2d 460, 462-63 (Tex.App. —Dallas 1983, writ ref'd n.r.e.)

<sup>179</sup> *Stafford v. Southern Vanity Mag., Inc.*, 231 S.W.3d 530, 537 (Tex.App. —Dallas 2007

<sup>180</sup> *Huffines v. Senor Sand & Gravel Co.*, 750 S.W.2d 38, 40 (Tex.App. —Fort Worth 1988, no writ); *Metrocon Constr.*, 663 S.W.2d at 462; *see Centex*, 840 S.W.2d at 954

<sup>181</sup> *See Valero Transmission Co. v. Mitchell Energy Corp.*, 743 S.W.2d 658, 663 (Tex.App. —Houston [1st Dist.] 1987, no writ).

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have anticipated or controlled. Black's Law Dictionary 674 (8th ed. 2004);<sup>182</sup>

The defendant's performance can be excused when it is contingent on the continued existence of a set of circumstances and, through no fault of the defendant, those circumstances cease to exist.<sup>183</sup> Performance may be excused if (1) an unexpected contingency occurs, (2) the risk of the contingency was not allocated either by agreement or by custom, and (3) the occurrence of the contingency has made the defendant's performance impossible.<sup>184</sup> For example, when two parents enter into a contractual agreement regarding child support, and custody is later changed from one parent to the other parent, the continued payment of child support according to the contract is excused because it does not accomplish the underlying purpose of the agreement, which is to support the child. *Id*

The defendant's performance cannot be excused simply because it became more economically burdensome than anticipated.<sup>185</sup>

### Q. Limitation-of-liability provisions

The defendant can assert that its liability is limited by contract. Agreements that limit the contracting parties' liability in damages to a specified amount are enforceable if they do not violate public policy.<sup>186</sup> These provisions do not violate public policy if there is no disparity in bargaining power between the parties.<sup>187</sup> Thus, a contractual provision setting an upper limit on

the amount recoverable for a breach of the contract may be enforce-able as a limitation on the defendant's liability.<sup>188</sup>

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<sup>182</sup> *see Sun Opera, Ltd. v. Holt*, 984 S.W.2d 277, 282-83 (Tex.App.—Amarillo 1998, pet. denied).

<sup>183</sup> *Texas Seed & Floral Co. v. Chicago Set & Seed Co.*, 187 S.W. 747, 750 (Tex.App.—Amarillo 1916, writ ref'd); *In re Doe*, 917 S.W.2d 139, 142 (Tex.App.—Amarillo 1996, writ denied).

<sup>184</sup> *In re Doe*, 917 S.W.2d at 142.

<sup>185</sup> *Huffines*, 750 S.W.2d at 40; *Alamo Clay Prods. v. Gunn Tile Co.*, 597 S.W.2d 388, 392 (Tex.App.—San Antonio 1980, writ ref'd n.r.e.); *see Northern Nat Gas Co. v. Chisos Jt.V.I.*, 142 S.W.3d 447, 458 (Tex.App. —El Paso 2004, no pet ).

<sup>186</sup> *Valiance & Co. v. De Anda*, 595 S.W.2d 587, 590 (Tex.App.—San Antonio 1980, no writ); *see Affright, Inc. v. Elledge*, 515 S.W.2d 266, 267 (Tex. 1974); *Fox Elec. Co. v. Tone Guard Sec., Inc.*, 861 S.W.2d 79, 82-83 (Tex.App.—Fort Worth 1993, no writ).

<sup>187</sup> *Affright*, 515 S.W.2d at 267; *Fox Elec. Co.*, 861 S.W.2d at 82-83.

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<sup>188</sup> *Arthur's Garage, Inc. v. Racal-Chubb Sec. Sys.*, 997 S.W.2d 803, 810 (Tex.App. —Dallas 1999, no pet.); *see Fox Elec. Co.*, 861 S.W.2d at 83.