

Breach of Contract Defenses: Illinois

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A Q&A guide to common defenses to contract claims under Illinois common law. This Q&A covers defenses to contract formation, performance, and damages. It also covers procedural and equitable defenses specific to breach of contract.

Defenses to Contract Formation

1. Does your jurisdiction recognize ambiguity as a defense to contract formation? If so, when should a defendant assert this defense?

Ambiguity is not a formal “defense” to contract formation under Illinois law. However, a defendant may argue that the wording of a written contract is ambiguous and that the plaintiff’s interpretation of the ambiguous contract language does not match the defendant’s interpretation.

Illinois courts look to resolve ambiguities that appear on the face of the contract. The court must consider the entire agreement to clarify what the parties meant by the provision in question. (*Thompson v. Gordon*, 241 Ill. 2d 428, 442-43 (2011).) If the court cannot resolve the ambiguity by reference to the entire agreement, the court may admit parol evidence to determine the meaning by reference to the parties’ statements and conduct. As a rule of last resort, the court should construe an ambiguous term against the drafter. (*Baker v. Am.’s Mortg. Servicing, Inc.*, 58 F.3d 321, 327 (7th Cir. 1995) (applying Illinois law) (“This canon of construction (*contra proferentem*) is a rule of last resort, a ‘tie-breaker’ of sorts, that comes into play only when neither the extrinsic evidence nor other methods of construction can resolve the ambiguity”); *Premier Title Co. v. Donahue*, 328 Ill. App. 3d 161, 165-66 (2002).)

2. Does your jurisdiction recognize duress as a defense to contract formation? If so, when should a defendant assert this defense?

Duress is a defense to contract formation under Illinois law. A defendant may assert duress where:

- The plaintiff induces the defendant, by a wrongful act or threat, to enter into a contract under circumstances that deprive the defendant of the exercise of its own free will.
- The plaintiff’s conduct is legally or morally wrongful.

(*In re Marriage of Tabassum & Younis*, 377 Ill. App. 3d 761, 775 (2007); *Krilich v. Am. Nat’l Bank & Tr. Co. of Chicago*, 334 Ill. App. 3d 563, 572 (2002).) The facts supporting the defense of duress should be pleaded as an affirmative defense (735 Ill. Comp. Stat. Ann. 5/2-613(d)).

3. Does your jurisdiction recognize economic duress as a defense to contract formation? If so, when should a defendant assert this defense?

Economic duress, also known as business compulsion, is an affirmative defense which releases the party entering into the contract under duress from all contractual obligations. A defendant may assert economic duress where:

- The plaintiff induced the defendant, by a wrongful act or threat, to make a contract under circumstances that deprive the defendant of the exercise of its own free will.
- The threat left the defendant “bereft of the quality of mind essential to the making of a contract.”

(*Bank of Am., N.A. v. 108 N. State Retail LLC*, 401 Ill. App. 3d 158, 173-74 (2010); *Krilich*, 334 Ill. App. 3d at 572.)

However, economic duress does not exist where the plaintiff secures the defendant’s consent to an agreement merely in a lawful demand or by doing or threatening to



do that which the plaintiff has a legal right to do (*Bank of Am.*, 401 Ill. App. 3d at 174).

4. Does your jurisdiction recognize failure of a condition precedent as a defense to contract formation? If so, when should a defendant assert this defense?

Failure of a condition precedent is a defense to contract formation under Illinois law. A defendant may assert failure of a condition precedent as a defense where:

- A condition precedent must be performed or an event must occur before:
 - a contract becomes effective; or
 - one party is obligated to perform.
- The plaintiff failed to perform the required condition precedent or the required event failed to occur.

(*Cathay Bank v. Accetturo*, 2016 IL App (1st) 152783, ¶ 32.)

When denying performance of a condition precedent under a contract, the defendant must allege facts in connection with the denial showing that there was a failure to perform (Ill. S. Ct. R. 133(c)).

For more on asserting failure of a condition precedent as a contract performance defense, see Question 21.

5. Does your jurisdiction recognize fraud as a defense to contract formation? If so, when should a defendant assert this defense?

Fraudulent inducement is a defense to contract formation under Illinois law. A defendant may assert fraudulent inducement as a defense where:

- The plaintiff made a false statement concerning an existing material fact.
- The plaintiff made the false statement with knowledge or belief of that representation's falsity.
- The plaintiff made the false statement with the purpose of inducing another party to act or to refrain from acting.
- The defendant reasonably relied on the false statement and to his detriment entered into the contract or transaction.

(*Avon Hardware Co. v. Ace Hardware Corp.*, 2013 IL App (1st) 130750, ¶ 15; *Phil Dressler & Assocs., Inc. v. Old Oak Brook Inv. Corp.*, 192 Ill. App. 3d 577, 584 (1989); see also *Jordan v. Knafel*, 378 Ill. App. 3d 219, 228-29 (2007).)

If pleaded as an affirmative defense, a defendant must plead it with particularity (735 Ill. Comp. Stat. Ann. 5/2-613(d); see *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 496-97 (1996); *First Mercury Ins. Co. v. Ciolino*, 2018 IL App (1st) 171532, ¶¶ 39-40).

6. Does your jurisdiction recognize illegal purpose as a defense to contract formation? If so, when should a defendant assert this defense?

Illegal purpose is an affirmative defense to contract formation under Illinois law (735 Ill. Comp. Stat. Ann. 5/2-613(d)). If the subject matter of a contract is illegal, the contract is void from the outset (*In re Marriage of Newton*, 2011 IL App (1st) 090683, ¶ 39). A defendant should assert illegal purpose where the contract contravenes either Illinois or federal law and therefore violates public policy (*Gamboa v. Alvarado*, 407 Ill. App. 3d 70, 75 (2011)). While this doctrine bars a cause of action for breach of contract, depending on the circumstances, an aggrieved party may still assert a claim for return of consideration given to the defendant based on fraudulent inducement of the illegal contract (*Gamboa*, 407 Ill. App. 3d at 75).

7. Does your jurisdiction recognize infancy as a defense to contract formation? If so, when should a defendant assert this defense?

Infancy is a defense to contract formation under Illinois law. The contract of a minor is not void, but voidable at the minor's election on reaching the age of majority (*Fletcher v. Marshall*, 260 Ill. App. 3d 673, 675 (1994); *Terrance Co. v. Calhoun*, 37 Ill. App. 3d 757, 761 (1976)). A minor or the minor's estate may still be liable for necessities furnished to the minor (*Manago v. Cty. of Cook*, 2016 IL App (1st) 121365, ¶ 31).

A defendant who is a minor at the time of entering into a contract ratifies the contract if the defendant, after attaining the age of majority, either:

- Fails to disaffirm the contract within a reasonable time.
- Does any distinct and decisive act clearing showing an intent to affirm the contract.

(*Fletcher*, 260 Ill. App. 3d at 675.)

Therefore, a defendant may assert infancy if the defendant is still under 18 years old or disaffirmed the contract within a reasonable time of turning 18 years old (755 ILCS 5/11-1

(definition of minor); see *Villalobos v. Cicero Sch. Dist.* 99, 362 Ill. App. 3d 704, 712-13 (2005); *Terrance Co.*, 37 Ill. App. 3d at 760-61).

A minor above the age of 16 may apply to the court for complete or partial emancipation (750 ILCS 30/4). A fully emancipated minor has the right to enter into valid legal contracts (750 ILCS 30/5(a)), but a partially emancipated minor has only the rights and responsibilities specified in the court's emancipation order (750 ILCS 30/5(b)).

When repudiating the contract, the minor generally must return any consideration to the other party unless the consideration is lost or expended (*Terrace Co. v. Calhoun*, 37 Ill. App. 3d at 762).

8. Does your jurisdiction recognize mental deficiency or illness as a defense to contract formation? If so, when should a defendant assert this defense?

Mental deficiency or illness is a defense to contract formation under Illinois law. A defendant may assert this defense if, when it entered into the contract:

- The defendant suffered from a mental or physical weakness.
- That weakness rendered the defendant unable to comprehend the effect and nature of the transaction.

(*In re Marriage of Davis*, 217 Ill. App. 3d 273, 276 (1991); see also *In re Estate of Gruske*, 179 Ill. App. 3d 675, 678 (1989); *In re Lewis-Pride*, 330 B.R. 660, 662-63 (Bankr. N. D. Ill. 2005) (applying Illinois law).)

Even where a party's mental weakness, standing alone, is insufficient to void a contract, mental weakness coupled with undue influence, fraud, or concealment may be a basis to set aside the contract (*Frieders v. Dayton*, 61 Ill. App. 3d 873, 880 (1978)).

9. Does your jurisdiction recognize mutual mistake as a defense to contract formation? If so, when should a defendant assert this defense?

Mutual mistake is a defense to contract formation under Illinois law. A defendant should assert mutual mistake where both parties either:

- Had erroneous beliefs at the time of contracting that certain material facts were true, unless the party seeking to avoid the contract bears the risk of the mistake.

- Came to an understanding and unintentionally drafted and signed a contract that failed to express the true agreement.

(*Alliance Prop. Mgmt., Ltd. v. Forest Villa of Countryside Condo. Ass'n*, 2015 IL App (1st) 150169, ¶ 39.)

A party pleading mutual mistake must plead facts establishing the "who, when, and where" (*Schafer v. UnionBank/Central*, 2012 IL App (3d) 110008, ¶ 23; *Briarcliffe Lakeside Townhouse Owners Ass'n v. City of Wheaton*, 170 Ill. App. 3d 244, 251-52 (1988)).

10. Does your jurisdiction have a statute of frauds that requires certain contracts be in writing and signed by the defendant? If so:

- What types of contracts must be in writing?
- May a defendant assert the statute of frauds as a defense if the plaintiff fully performed its obligations under an oral contract?

Illinois's statute of frauds requires that certain contracts be in writing and signed by the defendant, including:

- A promise to pay for the debt or default of another person (740 ILCS 80/1).
- Any agreement in consideration of marriage (740 ILCS 80/1).
- An agreement for the sale or lease or other disposition of real property. However, the lease of property for less than one year is not within the statute of frauds and may be oral. (740 ILCS 80/2.)
- Any agreement that could not possibly be performed within one year (740 ILCS 80/1). This does not necessarily include contracts that have an indefinite duration if, at the time the contract was made, the contract's full performance could have occurred within one year from inception of the contract (*Dugas-Filippi v. JP Morgan Chase, N.A.*, 66 F. Supp. 3d 1079, 1089 (N.D. Ill. 2014) (applying Illinois law); *Armagan v. Pasha*, 2014 IL App (1st) 121840, ¶ 41).
- A wholesale brewer's agreement (815 ILCS 720/5(4)).
- The sale of a business opportunity that must be registered under the Business Opportunity Sales Law of 1955 (815 ILCS 602/5-40(a)).

The defense should be plead as an affirmative defense (735 Ill. Comp. Stat. Ann. 5/2-613(d) or raised in a pre-answer motion for dismissal (735 Ill. Comp. Stat. Ann. 5/2-619)(a)(7)). A defendant may not assert

the statute of frauds defense if the plaintiff fully performed its obligations under an oral contract (see *Goldwater v. Greenberg*, 2017 IL App (1st) 163003, ¶ 14; *Meyer v. Logue*, 100 Ill. App. 3d 1039, 1043-44 (1981)). The acts allegedly done in performance must be “positively attributable exclusively to the contract” (*John O. Schofield, Inc. v. Nikkel*, 314 Ill. App. 3d 771, 784 (2000); *Blaise v. Stein*, 75 Ill. App. 3d 793, 796 (1979)).

However, contracts for the sale of goods for the price of \$500 or more are governed by the UCC’s statute of frauds (810 ILCS 5/2-201).

11. Does your jurisdiction recognize unclean hands as a defense to contract formation? If so, when should a defendant assert this defense?

Unclean hands is a defense to contract formation under Illinois law. A defendant may assert unclean hands where:

- The plaintiff seeks equitable relief.
- In connection with the transaction, the plaintiff committed either:
 - misconduct;
 - fraud; or
 - bad faith.

(*Zahl v. Krupa*, 365 Ill. App. 3d 653, 658 (2006).)

The doctrine of unclean hands **is not** a defense to a claim for money damages (*Zahl*, 365 Ill. App. 3d at 658).

12. Does your jurisdiction recognize unconscionability as a defense to contract formation? If so, when should a defendant assert this defense?

Unconscionability is a defense to contract formation under Illinois law. A defendant may assert unconscionability where a contract is both:

- Procedurally unconscionable because, for example:
 - the defendant lacked the opportunity to understand the terms of the contract; or
 - important terms were hidden in a maze of fine print.
- Substantively unconscionable because the contract’s terms:
 - are overly harsh; or
 - one-sided.

(*Sweis v. Founders Ins. Co.*, 2017 IL App (1st) 163157, ¶ 63; *Aliaga Med. Ctr., S.C. v. Harris Bank N.A.*, 2014 IL App (1st) 133645, ¶ 27; *Draper & Kramer, Inc. v. King*, 2014 IL App (1st) 132073, ¶ 28.)

13. Does your jurisdiction recognize undue influence as a defense to contract formation? If so, when should a defendant assert this defense?

Undue influence is a defense to contract formation under Illinois law. A defendant may assert undue influence where:

- The defendant was under the domination of the plaintiff or, by virtue of the parties’ relationship, the defendant was justified in assuming that the plaintiff intended to act in a manner consistent with defendant’s welfare.
- The parties entered into a contract in which there was an urgency of persuasion.
- The defendant would not otherwise have voluntarily entered into the contract but for the undue influence.

(Ill. Pattern Jury Instr.-Civ. 700.00 Intro. 1; see *Britton v. Esson*, 260 Ill. 273, 277-79 (1913); *Kuster v. Schaumburg*, 276 Ill. App. 3d 220, 224 (1995).)

This defense often arises in cases where the plaintiff is a fiduciary. Although available as a defense to breach of contract, the cases in which the issue is raised involve testamentary capacity (see *Kuster*, 276 Ill. App. 3d at 224, 227).

14. Does your jurisdiction recognize unilateral mistake as a defense to contract formation? If so, when should a defendant assert this defense?

Unilateral mistake is a defense to contract formation under Illinois law. A defendant may assert unilateral mistake where:

- The mistake is of a material fact.
- The mistake renders enforcement of the contract unconscionable.
- The mistake occurred despite the exercise of due care by the party asserting the defense.
- Rescission of the contract can return the other party to the status quo at the time of contracting.
- Reformation is available to remedy the other party’s fraud (see *Harris Bank Naperville v. Morse Shoe, Inc.*,

716 F. Supp. 1109, 1121 (N.D. Ill. 1989) (applying Illinois law); *Ringgold Capital IV, LLC v. Finley*, 2013 IL App (1st) 121702, ¶¶ 31-32).

(*ZippySack LLC v. Ontel Prod. Corp.*, 182 F. Supp. 3d 867, 872 (N.D. Ill. 2016) (applying Illinois law); *Vandenberg v. Brunswick Corp.*, 2017 IL App (1st) 170181, ¶ 36; *Cameron v. Bogusz*, 305 Ill. App. 3d 267, 273 (1999).)

A party pleading unilateral mistake must plead facts establishing the “who, when, and where” of the mistake (*Schafer*, 2012 IL App (3d) 110008, ¶23).

15. Does your jurisdiction recognize any additional defenses to contract formation? If so, when should a defendant assert the defenses?

No.

Defenses to Contract Performance

16. Does your jurisdiction recognize accord and satisfaction as a defense to a breach of contract claim? If so, when should a defendant assert this defense?

Accord and satisfaction is a defense to a breach of contract claim under Illinois law. An accord and satisfaction is a contractual method of discharging debts or claims between the parties to such an agreement. To constitute an accord and satisfaction there must be:

- A genuine dispute pending between the parties.
- An unliquidated sum owed.
- Consideration.
- A shared mutual intent to compromise the claim.
- The parties’ execution or performance of the agreement.

(*MKL Pre-Press Elecs./MKL Computer Media Supplies, Inc. v. La Crosse Litho Supply, LLC*, 361 Ill. App. 3d 872, 877 (2005); *Koules v. Euro-American Arbitrage, Inc.*, 293 Ill. App. 3d 823, 829-30 (1998).)

17. Does your jurisdiction recognize ambiguity as a defense to a breach of contract claim? If so, when should a defendant assert this defense?

Ambiguity is not a formal “defense” to contract performance under Illinois law. However, a defendant may argue that the wording of a written contract is ambiguous and that the plaintiff’s interpretation of the ambiguous contract language does not match the defendant’s interpretation.

Illinois courts look to resolve ambiguities that appear on the face of the contract. The court must consider the entire agreement to clarify what the parties meant by the provision in question. (*Thompson*, 241 Ill. 2d at 442-43.) If the court cannot resolve the ambiguity by reference to the entire agreement, the court may admit parol evidence to determine the meaning by reference to the parties’ statements and conduct. As a rule of last resort, the court should construe an ambiguous term against the drafter. (*Baker*, 58 F.3d at 327 (applying Illinois law) (“This canon of construction (*contra proferentem*) is a rule of last resort, a ‘tie-breaker’ of sorts, that comes into play only when neither the extrinsic evidence nor other methods of construction can resolve the ambiguity”); *Premier Title Co.*, 328 Ill. App. 3d at 165-66.)

18. Does your jurisdiction recognize anticipatory breach as a defense to a breach of contract claim? If so, when should a defendant assert this defense?

Anticipatory breach is a defense to a breach of contract claim under Illinois law. A defendant may assert anticipatory breach where:

- The parties had a valid contract.
- Both parties had future performance obligations under the contract.
- The plaintiff unequivocally repudiated the contract, by words or deeds, before performance was due.

(*Busse v. Paul Revere Life Ins. Co.*, 341 Ill. App. 3d 589, 594-95 (2003); *Alquire v. Walker*, 154 Ill. App. 3d 438, 446 (1987).)

19. Does your jurisdiction recognize economic duress as a defense to contract performance? If so, when should a defendant assert this defense?

Economic duress, also known as business compulsion, is an affirmative defense to a contract, which releases the party signing under duress from all contractual obligations. See Question 3. Although this defense relates

specifically to contract formation, if successful, it also relieves the defendant from its performance obligations.

20. Does your jurisdiction recognize equitable estoppel as a defense to a breach of contract claim? If so, when should a defendant assert this defense?

Equitable estoppel is a defense to a breach of contract claim under Illinois law. A defendant may assert equitable estoppel where:

- The plaintiff knowingly misrepresented or concealed material facts.
- The defendant did not know of the falsity of the representations when they were made or acted on.
- The plaintiff intended or reasonably expected the representations to be acted on by the party claiming estoppel.
- In performing the contract, the defendant reasonably relied on the representations in good faith to its detriment.
- The defendant would be prejudiced by its reliance.

(*Packaging Corp. of Am., Inc. v. Croner*, 419 F. Supp. 3d 1059, 1075 (N.D. Ill. 2020) (applying Illinois law); see also *Ruiz v. Cal-Ful Condo. Ass'n*, 2019 IL App (1st) 181734, ¶ 21; *Bd. of Library Trs. of Vill. of Midlothian v. Bd. of Library Trs. of Posen Pub. Library Dist.*, 2015 IL App (1st) 130672, ¶ 40.)

Estoppel should be pleaded as an affirmative defense (735 Ill. Comp. Stat. Ann. 5/2-613(d)).

21. Does your jurisdiction recognize failure of a condition precedent as a defense to a breach of contract claim? If so, when should a defendant assert this defense?

Failure of a condition precedent is a defense to a breach of contract claim under Illinois law. A defendant may assert failure of a condition precedent if:

- The defendant is not obligated to perform under the contract until:
 - a specific event occurs; or
 - the plaintiff performs a specific act.
- The event or act did not occur.

(*Beal Bank Nev. v. Northshore Ctr. THC, LLC*, 2016 IL App (1st) 151697, ¶ 18; *Cathay Bank*, 2016 IL App (1st) 152783, ¶ 32.)

A defendant claiming that the plaintiff failed to perform a condition precedent must allege facts to show the plaintiff's failure to perform (Ill. S. Ct. R. 133(c); see *Deutsche Bank Nat'l Tr. Co. v. Roongseang*, 2019 IL App (1st) 180948, ¶¶ 22-24 (non-final opinion not yet released for publication)).

For more on asserting failure of a condition precedent as a contract formation defense, see Question 4.

22. Does your jurisdiction recognize failure of consideration as a defense to a breach of contract claim? If so, when should a defendant assert this defense?

Failure of consideration is a defense to breach of contract (and also a ground for rescission) under Illinois law. A defendant may assert failure of consideration where the plaintiff neglected, refused, or failed to either:

- Perform its contractual obligations.
- Furnish the agreed-on consideration.

(*Ahern v. Knecht*, 202 Ill. App. 3d 709, 715 (1990); *Worner Agency, Inc. v. Doyle*, 121 Ill. App. 3d 219, 222 (1984).)

Failure of consideration should be pleaded as an affirmative defense (735 Ill. Comp. Stat. Ann. 5/2-613(d)).

23. Does your jurisdiction recognize frustration of purpose as a defense to a breach of contract claim? If so, when should a defendant assert this defense?

Frustration of purpose is a defense to a breach of contract claim under Illinois law. A defendant may assert frustration of purpose where:

- The contract is rendered meaningless due to an unforeseen change in circumstances.
- The frustrating cause totally or almost totally destroys the value of the plaintiff's performance.

(*Sunshine Imp & Exp Corp. v. Luxury Car Concierge, Inc.*, 2015 WL 2193808, at *5 (N.D. Ill. May 7, 2015) (applying Illinois law); *Illinois-American Water Co. v. City of Peoria*, 332 Ill. App. 3d 1098, 1106 (2002); *Smith v. Roberts*, 54 Ill. App. 3d 910, 912-913 (1977).)

24. Does your jurisdiction recognize breach of the implied covenant of good faith and fair dealing as a defense to a breach of contract claim? If so, when should a defendant assert this defense?

Breach of the implied covenant of good faith and fair dealing is a defense to a breach of contract claim under Illinois law. A defendant may assert breach of the implied covenant of good faith and fair dealing where:

- The contract vests plaintiff with discretion.
- The plaintiff failed to exercise that discretion reasonably and with proper motive.
- The plaintiff acted:
 - arbitrarily;
 - capriciously; or
 - in a manner inconsistent with the reasonable expectations of the parties.

(*Mid-West Energy Consultants, Inc. v. Covenant Home, Inc.*, 352 Ill. App. 3d 160, 165 (2004); *Beraha v. Baxter Health Care Corp.*, 956 F.2d 1436, 1443 (7th Cir. 1992), applying Illinois law and citing *Dayan v. McDonald's Corp.*, 125 Ill. App. 3d 972, 991 (1984).)

The duty of good faith and fair dealing cannot, however, be used to overrule or modify the express terms of a contract (*Bank One, Springfield v. Roscetti*, 309 Ill. App. 3d 1048, 1059-60 (1999)).

25. Does your jurisdiction recognize impossibility of performance as a defense to a breach of contract claim? If so, when should a defendant assert this defense?

Impossibility is a defense to a breach of contract claim under Illinois law. A defendant may assert impossibility where both:

- Performing the contract became objectively impossible:
 - because the subject matter of the contract was destroyed; or
 - by operation of law.
- The event or circumstance that rendered performance impossible:
 - was not reasonably foreseeable at the time of contracting; or
 - cannot be guarded against in the contract.

(*YPI 180 N. LaSalle Owner, LLC v. 180 N. LaSalle II, LLC*, 403 Ill. App. 3d 1, 6-7 (2010).)

26. Does your jurisdiction recognize novation as a defense to a breach of contract claim? If so, when should a defendant assert this defense?

Novation is a defense to a breach of contract claim under Illinois law. A defendant may assert novation where the parties:

- Had a valid existing contract.
- Expressly or impliedly agreed to:
 - extinguish their obligations under the original contract; and
 - make a **new contract** in place of the original contract.
- Entered into a new contract supported by valid consideration.

(*Crest Hill Land Dev., LLC v. Conrad*, 2019 IL App (3d) 180213, ¶ 35.)

27. Does your jurisdiction allow the parties to modify the terms of their written contract? If so, under what circumstances may a modification vary the terms of a written contract?

Illinois law allows parties to modify a written contract in writing or orally. To modify a contract, the parties must satisfy all criteria essential for a valid contract, including:

- Offer.
- Acceptance.
- Consideration.

(*VC Mgmt., LLC v. Reliastar Life Ins. Co.*, 195 F. Supp. 3d 974, 985 (N.D. Ill. 2016) (applying Illinois law); *Nebel, Inc. v. Mid-City Nat'l Bank of Chicago*, 329 Ill. App. 3d 957, 964 (2002).)

Illinois law permits parties to a written contract to alter or modify its terms by later oral agreement, even where the written contract precludes oral modification (*R.J. O'Brien & Assocs., Inc. v. Vierstra*, 2003 WL 1627271, at *5 (N.D. Ill. Mar. 27, 2003) (applying Illinois law); *Tadros v. Kuzmak*, 277 Ill. App. 3d 301, 312 (1995); *Falcon, Ltd. v. Corr's Nat. Beverages, Inc.*, 165 Ill. App. 3d 815, 821-22 (1987)).

28. Does your jurisdiction recognize ratification as a defense to a breach of contract claim? If so, when should a defendant assert this defense?

Ratification is a defense to a breach of contract claim under Illinois law. A defendant may assert that the plaintiff ratified the defendant's breach of contract where the plaintiff clearly evinced an intent to be bound by the defendant's acts that amounted to a breach. The court may infer ratification from the circumstances of the case, including the plaintiff's long-term acquiescence in the defendant's conduct. (See *VC Mgmt., LLC*, 195 F. Supp. 3d at 994 (applying Illinois law).)

29. Does your jurisdiction recognize unclean hands as a defense to a breach of contract claim? If so, when should a defendant assert this defense?

Unclean hands is a defense to a breach of contract claim under Illinois law. A defendant may assert unclean hands where:

- The plaintiff seeks equitable relief.
- As part of the transaction, the plaintiff either:
 - engaged in misconduct;
 - committed fraud; or
 - acted in bad faith.

(*Zahl*, 365 Ill. App. 3d at 658.)

The doctrine of unclean hands **is not** a bar to a claim for money damages (*Zahl*, 365 Ill. App. 3d at 658).

30. Does your jurisdiction recognize waiver as a defense to a breach of contract claim? If so, when should a defendant assert this defense?

Waiver is a defense to a breach of contract claim under Illinois law. A defendant may assert waiver where:

- The defendant was required to perform under the contract.
- The defendant did not perform.
- The plaintiff:
 - knew that the defendant did not perform;
 - knew or should have known that it had the right to require the defendant's performance; and

- freely and intentionally gave up its right to require the defendant's performance either by express words or implied by conduct.

(*Takiff Props. Grp. Ltd. #2 v. GTI Life, Inc.*, 2018 IL App (1st) 171477, ¶ 26; *Bd. of Trs. of City of Harvey Firefighters' Pension Fund v. City of Harvey*, 2017 IL App (1st) 153074, ¶ 222; see also *N. League of Prof'l Baseball Teams v. Gozdecki, Del Giudice, Americus & Farkas, LLP*, 2018 IL App (1st) 172407, ¶ 74. (waiver is the intentional relinquishment of a known right).)

31. Does your jurisdiction recognize any additional defenses to a breach of contract claim? If so, when should a defendant assert the defenses?

No.

Defenses Related to Damages

32. How, if at all, does your jurisdiction prevent a plaintiff's double recovery for breach of contract claim?

Under Illinois law, a plaintiff may not recover damages that are duplicative of damages sought for another claim (see *Gritters v. Ocwen Loan Servicing, LLC*, 2014 WL 7451682, at *10 (N.D. Ill. Dec. 31, 2014) (applying Illinois law) (potential recovery for breach of contract and breach of fiduciary duty are duplicative and therefore must be appropriately limited); see also *Anekom, Inc. v. Estate of Demith*, 2018 IL App (3d) 160554, ¶¶ 40-45; *Otto Baum Co. v. Süd Family Ltd. P'ship*, 2020 IL App 3d 190054, ¶ 30 (non-final opinion not yet released for publication); *Douglas Theater Corp. v. Chicago Title & Tr. Co.*, 288 Ill. App. 3d 880, 886-87 (1997)).

33. Under what circumstances may a liquidated damages clause be unenforceable in your jurisdiction?

Under Illinois law, a liquidated damages clause is unenforceable as a penalty unless the court finds:

- The parties intended to agree in advance to the settlement of damages.
- The parties made a reasonable estimate that bore "some relation" to the damages that would be sustained by the breach.
- Actual damages would be:

- uncertain; and
- difficult to prove.

(See *Berggren v. Hill*, 401 Ill. App. 3d 475, 479-80 (2010); *Jameson Realty Grp. v. Kostiner*, 351 Ill. App. 3d 416, 423-24 (2004).)

In doubtful cases, Illinois courts construe the stipulated sum as an unenforceable penalty (*GK Dev., Inc. v. Iowa Malls Fin. Corp.*, 2013 IL App (1st) 112802, ¶ 47).

34. What kinds of damages, if any, does your jurisdiction prohibit a plaintiff from recovering for breach of contract claim?

Under Illinois law, a plaintiff suing for breach of contract typically may not recover:

- Punitive damages (see *Morrow v. L.A. Goldschmidt Assocs., Inc.*, 112 Ill. 2d 87, 94-95 (1986); *Bank of Ill. in Mt. Vernon v. Bill's King City Stationary, Inc.*, 198 Ill. App. 3d 434, 436 (1990); *McGrady v. Chrysler Motors Corp.*, 46 Ill. App. 3d 136, 141 (1977) (punitive damages generally not recoverable for breach of contract unless accompanied by an independent tort claim that involves fraud, malice, wantonness, or oppression)).
- Damages that are speculative or cannot be established with reasonable certainty (see *Santorini Cab Corp. v. Banco Popular N. Am.*, 2013 IL App (1st) 122070, ¶ 19; *Jones v. Melrose Park Nat'l Bank*, 228 Ill. App. 3d 249, 259 (1992) (a breach of contract plaintiff cannot recover speculative damages or damages that were not the proximate result of the breach); *Oakleaf of Ill. v. Oakleaf Assocs., Inc.*, 173 Ill. App. 3d 637, 648 (1988) (discussing whether a claim for lost profits was speculative)).
- Damages or remedies that the contract expressly precludes or limits (see *Cox v. U.S. Fitness, LLC*, 2013 IL App (1st) 122442, ¶ 14; *Hicks v. Airborne Express, Inc.*, 367 Ill. App. 3d 1005, 1011-12 (2006)).

35. What restrictions, if any, does your jurisdiction place on a plaintiff's ability to recover general compensatory damages for breach of contract claim?

Under Illinois law, a plaintiff suing for breach of contract typically may not recover general compensatory damages if they:

- Are superseded by a valid liquidated damages clause (see *Berggren*, 401 Ill. App. 3d at 479 (if a liquidated

damages clause is enforceable, a nonbreaching party may not seek more than the liquidated damages amount); *Hartford Fire Ins. Co. v. Architectural Mgmt., Inc.*, 194 Ill. App. 3d 110, 115 (1990)).

- Do not directly and naturally result from the breach (*Midland Hotel Corp. v. Reuben H. Donnelley Corp.*, 118 Ill. 2d 306, 318 (1987); *Westlake Fin. Grp., Inc. v. CDH-Delnor Health Sys.*, 2015 IL App (2d) 140589, ¶ 31).

36. What restrictions, if any, does your jurisdiction place on a plaintiff's ability to recover special or consequential damages for breach of contract claim?

Under Illinois law, a defendant can challenge the plaintiff's alleged special or consequential damages by showing that either:

- The plaintiff cannot prove that the special or consequential damages were within the contemplation of the parties at the time that it entered into the contract.
- The plaintiff injury did not arise from the defendant's breach.
- The plaintiff failed to plead the special or consequential damages with the requisite specificity.

(*1472 N. Milwaukee, Ltd. v. Feinerman*, 2013 IL App (1st) 121191, ¶ 31; *Allstate Ins. Co. v. Winnebago Cty. Fair Ass'n, Inc.*, 131 Ill. App. 3d 225, 232 (1985); *Clark v. Standard Life & Accident Ins. Co.*, 68 Ill. App. 3d 977, 986 (1979); but see *Heller Int'l Corp. v. Sharp*, 839 F. Supp. 1297, 1303 (N.D. Ill. 1993) (federal pleading standards do not require these specific allegations to support a request for consequential damages in a complaint).)

37. Does the failure to mitigate damages preclude or limit recovery for breach of contract in your jurisdiction?

Under Illinois law, contracting parties generally have a duty to mitigate their damages. A plaintiff's failure to mitigate may preclude or limit its ability to recover damages in a civil suit. A defendant should assert failure to mitigate where the plaintiff did not take reasonable and available steps to minimize injury and reduce its damages (*Pokora v. Warehouse Direct, Inc.*, 322 Ill. App. 3d 870, 880 (2001) (a breach of contract plaintiff is obligated to use all reasonable means to mitigate its damages); see, for example, *Sharon Leasing, Inc. v. Phil Terese Transp., Ltd.*, 299 Ill. App. 3d 348, 360 (1998); *Bank of Hillside v. Laurel Motors, Inc.*, 259 Ill. App. 3d 362, 366 (1994)).

38. Does your jurisdiction recognize any additional damages defenses to a breach of contract claim? If so, when should a defendant assert the defenses?

No.

Procedural Defenses

39. Does your jurisdiction recognize lack of legal capacity to sue or be sued as a defense to a breach of contract claim? If so, when should a defendant assert this defense?

Under Illinois law, a defendant may assert that a plaintiff lacks the legal capacity to sue for breach of contract where the plaintiff does not have the power to appear and bring its grievance before the court, such as where the plaintiff is:

- A natural person who is:
 - incompetent;
 - a minor; or
 - deceased.

(*A Plus Janitorial Co. v. Grp. Fox, Inc.*, 2013 IL App (1st) 120245, ¶ 15; *In re Marriage of Kutchins*, 157 Ill. App. 3d 384, 388-89 (1987) (mentally incompetent persons); *Freiders v. Dayton*, 61 Ill. App. 3d 873, 883 (1978) (same); *Klak v. Skellion*, 317 Ill. App. 3d 1092, 1094-95 (2000) (minors); *Villalobos v. Cicero School Dist. 99*, 362 Ill. App. 3d 704, 711-12 (2005) (where a parent or guardian appears for a minor, the minor is considered a ward of the court); *Volkmar v. State Farm Mut. Auto. Ins. Co.*, 104 Ill. App. 3d 149, 151 (1982) (deceased persons); *Castaneda v. Ingram*, 2018 IL App (1st) 170065, ¶ 5 n. 1 (only the administrator of a decedent's estate can bring a survival action on the decedent's behalf); 755 ILCS 5/11a-18(c) (the guardian of a disabled adult must appear for and represent the disabled adult in legal proceedings).)

- An unincorporated association (*A Plus Janitorial Co.*, 2013 IL App (1st) 120245, ¶ 15).
- A corporation that:
 - failed to pay a franchise tax, license fee, penalty, or interest;
 - is dissolved; or
 - is organized under foreign law but not authorized to do business in Illinois.

(805 ILCS 5/15.85(c); 805 ILCS 5/13.70(a); *Askew Ins. Grp., LLC v AZM Grp., Inc.*, 2020 IL App (1st) 190179, ¶ 25 (non-final opinion not yet released for publication) (a dissolved corporation cannot sue or be sued)).

(735 ILCS 5/2-619(a)(2) (motions for involuntary dismissal based on lack of capacity to sue or be sued)).

40. Does your jurisdiction recognize a plaintiff's lack of standing as a defense to a breach of contract claim? If so, when should a defendant assert this defense?

Under Illinois law, a defendant may assert that the plaintiff lacks standing to bring a breach of contract claim when the plaintiff does not have a sufficient interest in the outcome of the lawsuit (see *Greer v. Ill. Housing Dev. Auth.*, 122 Ill. 2d 462, 492-93 (1988); *Muirhead Hui L.L.C. v. Forest Pres. Dist. of Kane Cty.*, 2018 IL App (2d) 170835, ¶ 21). Illinois law recognizes both intended and incidental third-party beneficiaries, but only intended beneficiaries have rights and may sue on the contract (*Hacker v. Shelter Ins. Co.*, 388 Ill. App. 3d 386, 394 (2009)).

41. Does your jurisdiction recognize laches as a defense to a breach of contract claim? If so, when should a defendant assert this defense?

Laches is a defense to a breach of contract under Illinois law. A defendant may assert laches where:

- The plaintiff seeks equitable relief.
- The plaintiff had knowledge of the defendant's conduct giving rise to the claim.
- The plaintiff delayed in asserting its rights.
- The defendant did not know or was not on notice that the plaintiff intended to assert its rights.
- The delay induced the defendant to adversely change position.

(See *Osler Inst., Inc. v. Miller*, 2015 IL App (1st) 133899, ¶ 23; *Nancy's Home of the Stuffed Pizza, Inc. v. Cirrincione*, 144 Ill. App. 3d 934, 940-41 (1986).)

Laches is the equitable counterpart to a statute of limitations defense. Statutes of limitations generally apply to actions at law, while laches applies to equitable remedies. (*Gen. Auto Serv. Station, LLC v. Garrett*, 2016 IL App (1st) 151924, ¶ 16.)

42. What is the statute of limitations for a breach of contract action in your jurisdiction?

The limitations period for breach of contract in Illinois is:

- Ten years of the alleged breach of a **written** contract (735 ILCS 5/13-206; *Clark v. Robert W. Baird Co.*, 142 F. Supp. 2d 1065, 1075 (N.D. Ill. 2001) (applying Illinois law)).
- Five years of an alleged breach of an **oral** contract (735 ILCS 5/13-205; *Clark*, 142 F. Supp. 2d at 1075 (applying Illinois law); *Hassebrock v. Ceja Corp.*, 2015 IL App (5th) 140037, ¶31 (if parol evidence is necessary to make a contract complete, it is treated as an oral contract for purposes of the statute of limitations)).
- Four years from the time plaintiff knew or should reasonably have known of the act or omission giving rise to the claim arising from a **construction contract** (735 ILCS 5/13-214).

The limitations period starts to run from the date of the breach (*Clark*, 142 F. Supp. 2d at 1075 (applying Illinois law); *Am. Family Mut. Ins. Co. v. Krop*, 2018 IL 122556, ¶ 17).

However, the statute of limitations for contracts for the sale of goods is four years from when the cause of action accrued (810 Ill. Comp. Stat. Ann. 5/2-725).

43. Does your jurisdiction recognize any additional procedural defenses to a breach of contract claim? If so, when should a defendant assert the defenses?

No.

Equitable Defenses

44. What defenses based in equity, if any, can a defendant assert in a breach of contract action in your jurisdiction?

Under Illinois law, a defendant may assert several different equitable defenses, including:

- Equitable estoppel (see Question 20).
- *In pari delicto* (in equal fault) (see *McRaith v. BDO Seidman, LLP*, 391 Ill. App. 3d 565, 595 (2009)).
- Laches (see Question 41).
- Unclean hands (see Question 11 and Question 29).

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