4.10 BILATERAL CONTRACTS

N. AFFIRMATIVE DEFENSES (Approved 11/99)

1. Legal Defenses

a. Novation The defendant has claimed that a novation has occurred, which means that a new and different contract has been substituted for the old one. The defendant claims as follows:

NOTE TO JUDGE

State here the alleged novation.

If a new contract has been substituted for the old one, the plaintiff cannot enforce the old contract against the defendant. The plaintiff denies that a new and different contract has been substituted for the old one. You must decide whether the defendant has proved that a novation has occurred.

A novation may be broadly defined as a substitution of a new contract for an old one. When a novation occurs, the old contract is extinguished or ended.[1] Novation is, therefore, a substituted contract that includes either new agreed terms or a new party. A novation which substitutes a party involves the

[1] *See, e.g. Fusco v. City of Union City*, 261 *N.J. Super*. 332 (App. Div. 1993).

immediate discharge of an old debt or duty, or part of it, and the creation of a new one.[2]

Because of the broad reaching effect of a novation, it is necessary that there be a mutual agreement among the parties to the old and new obligation whereby a new agreement is substituted for the old one. One party cannot be relieved of obligations under a contract without the consent of the other party. In order for the defendant to prevail on this defense, therefore, there must be a clear and definite intention on the part of the old parties and the new party to substitute the new party for the old one[3] or there must be a clear and definite intention on the part of the defendant and the plaintiff to substitute a new term for an old one.

Although a novation need not be expressed, but may be implied, the burden of proving the parties' intentions rests with the defendant who is alleging that a novation took place. Remember that under a novation there is either an entirely new agreement between the existing parties or there is a substitution of parties. Thus, if you find that the defendant has proved a novation, then you cannot enforce the old contract against the defendant. If you find that the

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[2]15 *Williston on Contracts*, Section 1865 at 582-85 (3d ed. 1972).

[3]*Emerson N.Y. - N.J., Inc. v. Brookwood T.V. and Frederick M. Wood*, 122 *N.J. Super.* 288, 294 (Law Div. 1973).

Note: *See also Restatement (Second) of Contracts*, 280 at 377-378 (1981).

defendant has not proved a novation, then you can enforce the old contract against the defendant.

b. Duress If a defendant makes a contract because of duress by the plaintiff, then the contract is void and the plaintiff cannot enforce the contract against the defendant.[4] That means the plaintiff cannot make the defendant do what the contract required, or make the defendant pay money to the plaintiff because defendant did not do what the contract required.

The defendant claims that he/she made the contract with plaintiff only because of the duress by the plaintiff. The plaintiff denies this.

To prove that the contract was made because of plaintiff's duress, defendant must show that defendant was the victim of a wrongful or unlawful act or threat by the plaintiff which forced the defendant to do what defendant would not have done voluntarily.[5] Defendant claims that *[state here the alleged wrongful or unlawful acts or threats -- which may be physical or psychological*

[4]It is unclear whether a contract entered into under duress is void, or merely voidable. Compare *Shanley & Fisher, P.C. v. Sisselman*, 215 *N.J. Super.* 200, 212 (App. Div. 1987) ("Our Supreme Court has recognized that when there has been moral compulsion sufficient to overcome the will of a person otherwise competent to contract, any agreement made under the circumstances is considered to be lacking in voluntary consent and therefore invalid.") (emphasis added), with *Glenfed Fin. Corp. v. Penick Corp.*, 276 *N.J. Super.* 163, 172 (App. Div. 1994) ("Our courts recognize that an otherwise enforceable contract may be invalidated on the ground that it was entered into under 'economic duress'.") (Emphasis added.)

[5]*Continental Bank of Pa. v. Barclay Riding Acad., Inc.*, 93 *N.J.* 153, 176 (1983).

duress[6] *or economic duress*[7]*]*. As a matter of law, I will decide whether or not these acts, if proved to have occurred, are wrongful[8]. It is your job to decide

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[6]*See Zink v. Zink*, 109 *N.J. Eq.* 155, 156 (Ch. 1931) (setting aside conveyance on grounds of duress where plaintiff was physically threatened and terrorized).

[7]*See Continental Bank of Pa. v. Barclay Riding Acad., Inc., supra*, 93 *N.J.* at 175-76:

As a starting point, we refer to the following definition of economic duress set forth in *Williston*:

While there is disagreement among the courts as to what degree of coercion is necessary to a finding of economic duress, there is general agreement as to its basic elements:

1. The party alleging economic duress must show that he has been the victim of a wrongful act of threat, and

2. Such act or threat must be one which deprives the victim of his unfettered will. 13 *Williston, supra*, 1617 at 704 (footnotes omitted).

In his explanation of these elements, Williston notes that 'the party threatened must be compelled to make a disproportionate exchange of values or to give up something for nothing.' *Ibid.*

[8]Apparently, the court shall decide whether conduct is "wrongful." *See Wolf v. Marlton Corp.*, 57 *N.J. Super.* 278, 285 (App. Div. 1959). In *Wolf*, the county court, sitting without a jury, rejected the builder/defendant's defense that its non-performance was justified by the plaintiff's threats. On appeal, the Appellate Division held that the trial court's determination was not entitled to the deference accorded a fact finding.

Moreover, even if the opinion is to be construed as containing an implied determination on the issue [of duress], <u>we do not conceive that such would be a finding of fact</u>, as distinguished from the determination of a legal issue. <u>Whether duress exists in a particular transaction is generally a matter of fact, but what in given circumstances will constitute duress is a matter of law.</u>

Wolf v. Marlton Corp., 57 *N.J. Super.* 278, 285 (App. Div. 1959) (Emphasis added).

See also Kehoe, *Jury Instructions for Contract Cases* (1995) at 580 ("Deciding whether the alleged facts are sufficiently 'wrongful' is probably a matter for the court and not the jury.")

On the other hand, the jury shall decide whether the action or threat was actually made and whether the party's will was overborne.

Was the method employed by Miller sufficient under all the facts and circumstances to disprove that his was a free and willing mind when he made the payment in order to obtain the immediate return of his securities? We think this was a jury question. *Miller v. Eisele*, 111 *N.J.L.* 268, 281 (E. & A. 1933).

first, if the acts or threats were made, and second, whether they forced the defendant to do what defendant would not have done voluntarily. It does not matter whether some person other than the defendant would have been forced. You must focus on the defendant in this case; consider defendant's state of mind, age and the relationship between the defendant and the person whom the defendant claims threatened defendant.[9] Consider all the other surrounding

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However, without reference to *Wolf*, the Appellate Division apparently concluded in *Shanley & Fisher, P.C. v. Sisselman, supra*, 215 *N.J. Super.* at 214 that whether the conduct was wrongful and whether the conduct overbore defendant's will are both fact issues.

Thus, the matter must be remanded to the trial court for further proceedings to determine whether or not Sisselman's will was actually overborne ... and whether or not plaintiff's threatened withdrawal from representation was wrongful. It is only after these factual issues have been fully considered that a proper legal determination as to the validity and enforceability of the agreement may be made.

Conceivably, the Court in *Shanley & Fisher, P.C.* may not have considered whether the "wrongfulness determination" was a jury question; the trial court in that case was the Chancery Division, and perhaps the Appellate Division presumed that the fact of wrongfulness was to be determined by the court.

One may also find other broad statements that duress is a fact issue for the jury. For example, the Court in *Miller* quoted with approval an encyclopedia statement, "Thus it is for the jury to determine where the evidence is conflicting whether payment was *(sic)* made under duress was voluntary or involuntary." 111 *N.J.L.* at 281 (citation omitted). *See also Byron v. Byron, Heffernan & Co.*, 98 *N.J.L.* 127, 131 (E. & A. 1922) (A[I]t is stated above that the rule as it now exists is that the question of duress is one of fact in the particular case.") However, statements such as these can be read to apply to the issues of whether the threat was made and whether the party's will was overborne, and not to the issue of whether the conduct was sufficiently wrongful.

[9]The Supreme Court clearly stated "the test is essentially subjective." *Rubenstein v. Rubenstein*, 20 *N.J.* 359, 366-67 (1956). However, the Court in *Continental Bank of Pa. v. Barclay Riding Acad., Inc.*, 93 *N.J.* 153, 179 n. 13, reopened the issue:

In light of our holding that Continental's conduct was not wrongful, we need not reach the delicate issue of whether Barclay's response to that conduct should be analyzed from an 'objective' or a 'subjective' standard. Compare *Rubenstein v. Rubenstein*, 20 *N.J.* 359, 367 (1956) (subjective standard) with *King v. Margolis*, 133 *N.J. Eq.* 61 (Ch.) *aff'd*, 133 *N.J. Eq.* 617 (E. & A. 1943) (objective standard). We leave that doctrinal debate to another day.

circumstances. *[Choose an appropriate example or examples, such as: did defendant have legal counsel?*[10] *Did defendant have time to reflect about the transaction?*[11] *Could the defendant have resisted the threat by getting relief from the courts?*[12] *Did defendant resist such threats in the past?*[13]*]* After considering all those factors, you must decide whether defendant, in fact, was forced to do what defendant would not have done voluntarily.

1. Ratification

NOTE TO JUDGE

Use this if the plaintiff asserts ratification.

Plaintiff claims that even if there were threats that overcame defendant's will, those threats were removed and defendant could have then complained, but did not. As a result, defendant must do what the contract required, or pay money to the plaintiff because defendant did not do what the contract required.

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[10]*See Byron v. Byron Heffernan & Co.*, *supra*, 98 *N.J.L.* at 132 (rejecting claim of duress, Court states: "It would be strange indeed if duress were imposed upon the 'men directing the affairs of the company' while they were in the presence and under the protection of counsel of their choice who was advising them with reference to the transaction.")

[11]*See Hemenway v. Smith,* 104 *N.J. Eq.* 529 (E. & A. 1929) (rejecting duress claim where plaintiff "had ample time for reflection.")

[12]Whether there was a feasible, immediate remedy available to the victim of the threat is a non-decisive factor in deciding whether there was duress. *See Continental Bank of Pa. v. Barclay Riding Acad., Inc.*, *supra,* 93 *N.J.* at 176-177.

[13]*See Prudential Ins. v. Fidelity Union Trust Co.*, 128 *N.J. Eq.* 327, 328-29 (E. & A. 1940) (court concludes borrower's successful resistance to original threat of civil litigation demonstrated that his will was not overborne when the threat was repeated).

Plaintiff has the burden to show that the threats, if there were any, were removed, and that the defendant did not complain within a reasonable time.[14]

c. Interference by the Party Claiming Breach The defendant claims that the plaintiff prevented or hindered the defendant's performance of *[state the performance obligation]*. The defendant claims that the plaintiff prevented or hindered the defendant's performance as follows:

[State the alleged circumstances of the interference.]

The plaintiff denies this.

The defendant must prove that the plaintiff prevented or hindered the defendant's performance of obligation required by the contract and that the performance would have been fulfilled (or substantially completed) but for the plaintiff's prevention or hindrance. If the defendant proves that the plaintiff prevented or hindered the defendant's performance, the plaintiff cannot recover for a breach that resulted from those actions.[15]

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[14]*Ballantine v. Stadler*, 99 *N.J. Eq.* 404, 407-08 (E. & A. 1926):

When one seeks to avoid a contract on the ground of duress, the person seeking such avoidance should proceed within a reasonable time after removal of the duress, and if a person remains silent for an unreasonable length of time, he may be held or be elected to waive the duress and ratify the contract.

[15]*Atlantic City v. Farmers Supply & Products*, 96 *N.J.L.* 504, 508-508 (E. & A. 1929); *Coastal Oil v. Eastern Trailers Seaway Corp.*, 29 *N.J. Super.* 565, 577 (App. Div. 1954); *Winfield v. Middlesex Contractors*, 39 *N.J. Super.* 92, 102 (App. Div. 1950); *Abeles v. Adams Engineer Co.*, 64 *N.J. Super.* 167, *mod.* 35 *N.J.* 411 (App. Div. 1960); *see also Creek Ranch,*

d. Waiver Defendant claims that plaintiff has waived the right to insist on performance by the defendant of the *[insert stated obligation]*. To excuse his or her non-performance, the defendant must prove that the plaintiff voluntarily and knowingly gave up plaintiff's right to insist on performance of *[insert the performance obligation]*.[16] In other words, the plaintiff must have known that plaintiff had the right to insist on the completion of *[insert performance obligation]* by the defendant, but nevertheless agreed to give up this right. If defendant proves that the plaintiff actually intended to give up a known right under the contract, the defendant may be excused from performing defendant's obligation and the plaintiff can no longer enforce that part of the contract.

e. Termination The defendant claims that the parties agreed to end the contract in the following way:

[State the alleged circumstances of the termination.]

The plaintiff denies this.

Inc. v. New Jersey Turnpike Authority, 75 *N.J.* 421, 432 (1978); *Blau v. Friedman*, 26 *N.J.* 397 (1958); and *see* 5 *Williston on Contracts*, 677 (3d ed. 1957); *Restatement of Contracts* 295 (1932).

[16]*North v. Jersey Knitting Mills*, 98 *N.J.L.* 157, 159 (E. & A. 1922); *Petrillo v. Bachenberg*, 263 *N.J. Super.* 472, 480 (App. Div. 1993), *aff'd*, 139 *N.J.* 472 (1995). *Plassmeyer v. Brenta*, 24 *N.J. Super.* 322 (App. Div. 1953); *Bertrand v. Jones*, 58 *N.J. Super.* 273 (App. Div. 1959); *West Jersey Title and Guaranty Co. v. Industrial Trust Co.*, 27 *N.J.* 144, 152 (1958).

If the parties agreed to end their contract, the plaintiff cannot now enforce the contract against the defendant. In order for the defendant to prove a defense based on termination, the defendant must show that both parties agreed to end their contract.[17] In deciding whether the parties reached such an agreement, you should consider the totality of the circumstances, including what the parties said or did.[18]

f. Illegality If a contract breaks the law or violates public policy, then the plaintiff often[19] cannot enforce it. That means the plaintiff cannot make the defendant do what the contract required, or pay money for not doing what the contract required.

The defendant claims that the contract cannot be enforced because of facts that make it violate the law or public policy. The plaintiff denies this.

It is my job to decide what would make this contract illegal or against public policy so that it could not be enforced.

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[17] *Mossberg v. Standard Oil Co. of N.J.*, 98 *N.J. Super.* 393, 406-07 (Law Div. 1967).

[18] *Id.*; *See also Invengineering, Inc. v. Foregger Co*., 293 *F*. 2d 201 (3d Cir. 1961).

[19] Sometimes, an illegal provision or a term contrary to public policy may be severed if it does not defeat the purpose of the whole contract. *Jacob v. Norris, McLaughlin & Marcus*, 128 *N.J*. 10, 33 (1992). Also, an illegal contract may sometimes be enforced to avoid hurting a person intended to be protected by the law, or to avoid an unjust forfeiture. *Marx v. Jaffe*, 92 *N.J. Super*. 143, 146-47 (App. Div. 1966).

[State here the facts and circumstances which would render the contract unenforceable in whole or relevant part.]

If defendant has proven those facts do exist, then the contract will not be enforced.

g. Impossibility In some cases, if a defendant's performance of the contract becomes impossible, the plaintiff may not enforce the contract against the defendant; that is, the plaintiff may not make the defendant perform what the contract required, or make the defendant pay money damages for failing to do what the contract required.[20]

[20]*See Connell v. Parlavecchio*, 255 *N.J. Super.* 45, 49-50 (App. Div. 1992) (stating, in realty seller's suit for damages against defaulting purchaser, "impossibility or impracticability of performance are complete defenses where a fact essential to performance is assumed by the parties but does not exist at the time for performance"), *cert. denied* 130 *N.J.* 16-17 (1992); *Edwards v. Leopoldi*, 20 *N.J. Super.* 43, 52-53 (App. Div. 1952) (when performance of a contract is dependent on the continued existence of a person, thing or circumstance, there is an implied condition that impossibility of performance caused by the death of the necessary person or destruction of the required object or circumstance, without the fault of the person against whom the contract is sought to be enforced, will excuse performance of the contract), *cert. denied* 10 *N.J.* 347 (1952). The doctrine is stated generally as follows:

Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

Restatement (Second) of Contracts 261 (1981).

Specific instances of impossibility include the death of a person necessary for the performance of a personal service contract, *see Restatement (Second) of Contracts* 262, and destruction of, or the failure to come into being of, a specific thing essential for performance. *See Restatement (Second) of Contracts* 263.

The defendant claims that his/her performance of the contract became impossible because *[state the alleged facts rendering contract impossible to perform]*. The plaintiff denies this.

In order to prove a defense based on impossibility, the defendant must show four things.

First, the defendant must show that the event *[specify]* that defendant claims made performance of the contract impossible actually occurred.

Second, the defendant must show that the *[event]* made keeping his/her promise impossible. Keep in mind that the defendant's personal inability to perform is not enough.[21] You must find that the thing cannot be done, not

[21]The technicians have classified impossibility as objective, where it is due to the nature of the performance, and subjective, where it is the result of the incapacity of the promisor. Objective impossibility is ordinarily a complete defense, unless the risk is assumed by the promisor rather than the promisee and the thing to be done is not illegal. *Duff v. Trenton Beverage Co.*, 4 *N.J.* 595, 606 (1950).

See also Connell v. Parlavecchio, *supra*, 255 *N.J. Super.* at 49 (stating that impossibility is not a defense "where the difficulty is the personal inability of the promisor to perform.")

simply that the defendant cannot do it,[22] or that the defendant can only do it with great difficulty or at great expense.[23]

Third, the defendant must show that neither defendant nor the plaintiff reasonably foresaw the *[event]* when they made the contract.[24] Put another way, the defendant must show that it was beyond plaintiff's contemplation that plaintiff would be paid or that defendant would have to perform if the *[event]* happened.[25]

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[22]*Fast v. Shaner*, 183 *F.* 2d 504, 506 (3d Cir. 1950) ("If an elderly judge, for good consideration, promises to run 100 yards in 10 seconds and then fails to perform he can hardly be held to puff out the defense that he could not possibly run that fast. As the Restatement point out, there is a difference between 'the thing cannot be done' and 'I cannot do it.' Restatement, Contracts Sec. 455, Comment a."); *Seitz v. Mark-O-Lite Sign Contractors, Inc*., 210 *N.J. Super.* 646 (Law Div. 1986) (rejecting defense by contractor who claimed that illness of his sheet metal worker made performance by contractor itself impossible and, subcontracting out to another sheet metal worker would have been unprofitable).

[23]*See* 17A *Am.Jur.* 2d, *Contracts* 673 (1991) ("... impossibility of performance, if it is to release a party from the obligation to perform his contract, must be real and not a mere inconvenience.")

[24]*See Duff v. Trenton Beverage Co.*, *supra*, 4 *N.J.* at 605, quoting *Williston on Contracts*, 1937 (1936):

> The basis of the defense of impossibility is the presumed mutual assumption when the contract made that 'some fact essential to performance then exists or that it will exist when the time for performance arrives. The only evidence, however, of such mutual assumption is, generally, that the court thinks a reasonable person, that is, the court itself, would not have contemplated taking the risk of the existence of the fact in question.'

See also Model Vending, Inc. v. Stanisci, 74 *N.J. Super.* 12, 14 (Law Div. 1962) (holding that if an event that renders performance of a contract impossible was not reasonably within contemplation of the parties at the time the contract was made, the promisor is discharged from performance; and destruction by fire of the defendant's bowling alley made impossible the performance of a contract giving the plaintiff exclusive right to place vending machines in the defendant's bowling alley).

[25]For an event to trigger the defense, "it must be considered beyond the contemplation of the other party to the contract that he will be paid in such circumstances." *Directions, Inc. v.*

Fourth, the defendant must show that the event that defendant claims made performance impossible was beyond the defendant's control and was not the defendant's fault.[26]

h. Frustration of Purposes Sometimes, if the main purpose of a contract is frustrated or destroyed, the plaintiff may not enforce the contract against the defendant; that is, the plaintiff may not make the defendant perform what the contract required, or make the defendant pay money damages for failing to do what the contract required.[27]

New Prince Concrete Constr. Co., 200 *N.J. Super.* 639, 643 (App. Div. 1985) (reversing summary judgment on breach of contract claim of plaintiff-subcontractor, who was hired to direct traffic at construction site, and remanding for trial of defendant-contractor's defense that performance was made impossible by governmental edict barring traffic direction by civilians).

[26]*See Rothman Realty Corp. v. Bereck*, 73 *N.J.* 590, 601-02 (1977) (liability should not be imposed on a party who acts in good faith but is unable to consummate an agreement for reasons not related to any wrongful act or misconduct on his part). The *Rothman* Court held that a contract purchaser of realty was not liable to a real estate broker for commission lost due to defendant's failure to consummate the purchase, since an unexpected drop in the stock market beyond the defendant's control precluded the defendant from obtaining the funds necessary to complete the purchase.

[27]Simply stated, the concept is that a contract is to be considered 'subject to the implied condition that the parties shall be excused in case, before breach, the state of things constituting the fundamental basis of the contract ceases to exist without default of either of the parties.'

A-Leet Leasing Corp. v. Kingshead Corp., 150 *N.J. Super.* 384, 397 (App. Div. 1977), (reversing trial court finding that purpose of contract frustrated) *certif. denied* 75 *N.J.* 528 (1977), quoting *Edwards v. Leopoldi*, 20 *N.J. Super.* 43, 54 (App. Div. 1952), (reversing trial court on grounds that evidence did not support frustration defense) *certif. denied* 10 *N.J.* 347 (1952).

The purpose that is frustrated must be common to both parties.

To sustain a defense under the doctrine of frustration, it does not appear to be sufficient to disclose that the 'purpose' or 'desired object' of but one of the contracting parties has been

The defendant claims that the main purpose of the contract in this case was frustrated or destroyed because *[state the facts/circumstances that allegedly frustrated the defendant's purpose]*. The plaintiff denies this.

In order to prove a defense based on frustration of purpose, the defendant must first show, by clear and convincing evidence,[28] that the plaintiff and defendant implicitly agreed that their contract and their promises were conditioned on *[identify purpose alleged]*. That is a question for me to decide, and I have found the parties did implicitly agree that *[identify purpose]* was a condition or foundation of the contract.[29]

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frustrated. It is their common object that has to be frustrated, not merely the individual advantage which one party or the other might have achieved from the contract. *Edwards v. Leopoldi*, *supra*, 20 *N.J. Super.* at 55.

See Restatement (Second) of Contracts ' 265 (1981):

Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.

[28]*See A-Leet Leasing Corp. v. Kingshead Corp*., *supra*, 150 *N.J. Super.* at 397 (relief from contractual obligation based on doctrine of frustration of purpose will only be granted if the evidence presented by defendant is clear, convincing and adequate); *Edwards v. Leopoldi*, *supra*, 20 *N.J. Super.* at 57 (affirmative proof of essential condition of contract must be "quite clear and convincing.")

[29]The Appellate Division in *Edwards v. Leopoldi*, *supra*, 20 *N.J. Super.* at 57 stated that the "pivotal question [*in a frustration of purpose defense*] is in reality a compound of law and fact." The legal issue appears to be whether the contract includes an implied term. "[C]ourts under a more modern philosophy may and do exercise the power to infer from the nature and substance of the contract and the surrounding circumstances that a critical and vital condition which is not expressed constituted a foundation on which the parties contracted." *Ibid.* (emphasis deleted). The fact issue pertains to whether the condition identified by the court is "essential." "Factually the inquiry relates to the degree of dependency of the attainment of the essential object and purpose of the parties upon the continued existence of the condition.

But, that does not end the issue. Defendant must still persuade you, by clear and convincing evidence, that the condition was not merely one of several, but was the essence of the contract.[30] Defendant must also show that the *[identify event or circumstance]* occurred; that it occurred through no fault of the defendant; and that it totally destroyed the whole purpose of the contract.[31]

It is important to keep in mind that only those circumstances that the defendant could not reasonably be expected to have known will excuse the defendant's performance based on frustration of purpose. If the defendant should reasonably have been expected to be aware of the circumstances that

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Was the continued existence of the situation that constitutes the condition of the essence of the agreement?"

[30]In the evolution of an implied condition which will nullify a contract it must be evident that the state of 'the thing or things' which has been destroyed constituted such an essential and requisite element of the agreement that its destruction or cessation demolishes the attainment of the vital and fundamental purpose of the contracting parties, not merely one or a few of a variety of their purposes. *Edwards v. Leopoldi, supra*, 20 *N.J. Super.* at 55.

[31]*See Edwards v. Leopoldi, supra*, 20 *N.J. Super.* at 54 (when parties enter into a contract contemplating the continued existence of a "state of things as the foundation of their mutual obligations" and subsequently, those things cease to exist "without default of either of the parties" then the contract ceases to exist).

See Restatement (Second) of Contracts 266(2):

Where, at the time a contract is made, a party's principal purpose is substantially frustrated without his fault by a fact of which he has no reason to know and the non-existence of which is a basic assumption on which the contract is made, no duty of that party to render performance arises, unless the language or circumstances indicate the contrary.

frustrated the contract's purpose, then defendant may not be excused from defendant's obligation to perform the contract.[32]

i. Undue Influence If a defendant makes a contract because of undue influence by the plaintiff, than the contract is voidable and may not be enforced against the defendant.[33] That means that the plaintiff cannot make the defendant perform what the contract required, or make the defendant pay the plaintiff money damages for failing to do what the contract required.

The defendant claims that defendant made the contract because of the undue influence exerted by the plaintiff. *[State the alleged acts of undue influence]*. The plaintiff denies this.

When a defendant makes a contract because of undue influence, defendant does not follow defendant's own will, but instead, follows the plaintiff's will, which the plaintiff imposed on the defendant.[34]

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[32]*City of Newark v. N. Jersey Dist. Water Supply Commission*, 106 *N.J. Super.* 88 (Ch. Div. 1968), *aff'd*, 54 *N.J.* 258 (1969).

[33]*See Eisenberg v. Finston*, 18 *N.J. Super.* 458, 463 (App. Div. 1952) (a contract conveying real property or a business is voidable by the transferor if he is subordinate to the transferee and there is undue influence exerted by the dominant party), *cerift. denied*, 9 *N.J.* 609 (1952).

If a party's manifestation of assent to a contract is induced by undue influence by the other party, the contract is voidable by the victim. *Restatement (Second) of Contracts* 177 (1981).

[34]*See Haynes v. First Nat'l Bank of N.J.*, 87 *N.J.* 163, 176 (1981) (undue influence is mental, moral or physical exertion that destroys free agency and prevents a person from

In order to prove a defense based on undue influence, the defendant must prove that the plaintiff's influence prevented the defendant from deciding, based on defendant's own free will, to make the contract. The defendant must prove that the plaintiff's influence forced the defendant to do something that defendant would not otherwise have done.[35] It is important to keep in mind that not every type of influence can be characterized as undue. Honest persuasion, advice, suggestion, solicitation and even argument are not undue influence unless they

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following his own will and instead, forces him to accept the domination and influence of another) (wills case).

See also Wolf v. Palisades Trust and Guaranty Co., 121 *N.J. Eq.* 385, 388 (Ch. 1937) (wills case).

[35]*See Podkowicz v. Slowineski*, 44 *N.J. Super.* 149, 156 (App. Div. 1957) (when a dominant confidential relationship is not shown, a presumption of undue influence is not raised against the dominant party to whom a benefit inures; therefore, the burden remains on the party seeking to set aside a transfer to prove the existence of undue influence) (contract case), *certif. denied*, 25 *N.J.* 43 (1957). *See also* 13 *Williston on Contracts*, 1625 at 799-800 (Jaeger ed. 1970):

> In the absence of a relationship between the parties to a transaction which tends to give one dominance over the other, undue influence must generally be proved by the party asserting it and it will not be presumed. . . . The party alleging undue influence can, however, avoid this direct burden of proof by simply proving that he was the servient member of a confidential or fiduciary relationship.

Compare *Haynes v. First Nat'l Bank of N.J.*, *supra*, 87 *N.J.* at 176 (the burden of proving undue influence in a will case lies upon the contestant of a will unless the contestant proves both (1) the existence of a confidential relationship and (2) suspicious circumstances surrounding the making of the will). Thus, it appears that one additional element — suspicious circumstances — is required to shift the burden in a will case. Compare also 5 *Clapp, New Jersey Practice — Wills and Administration* 62 at 222 (1982) (confidential relationship without additional suspicious circumstances not enough to shift burden in wills case).

prevent the defendant from acting based on his/her own will.[36] The defendant must prove defendant's defense of undue influence by a preponderance of the evidence.[37]

1. Confidential Relationship

NOTE TO JUDGE

Use if the defendant claims confidential relationship.

The defendant claims defendant had a confidential relationship with the plaintiff. If the defendant proves the existence of a confidential relationship with the plaintiff, you as jurors must presume that the contract was made as a result of undue influence.[38] In other words, once the defendant proves that a confidential relation existed, then the defendant no longer has the burden of proving that the contract was made as a result of undue influence. Instead, the

[36]*See Gellert v. Livingston*, 5 *N.J.* 65, 73 (1950) ("Not all influence is 'undue' influence."); 5A Clapp, *New Jersey Practices — Wills and Administration* 61 at 215 (1984) ("Influence arising from kind intentions and services is in no case undue; it is not coercion.")

[37]*See Italian Fisherman, Inc. v. Commercial Union Assurance Co.*, 215 *N.J. Super.* 278, 282 (App. Div. 1986) (the preponderance of the evidence standard is the customary burden of proof in civil cases and the appropriate standard by which affirmative defenses must be proven), *certif. denied*, 107 *N.J.* 152 (1987).

[38]*See Podkowicz v. Slowineski*, *supra*, 44 *N.J. Super.* at 156, (the party seeking to set aside a contract has the burden of proving the existence of a dominant confidential relationship before the burden is shifted to the person in whom confidence is reposed and who has benefitted from the contract to prove that the contract was not assented to as a result of undue influence). *See also Blake v. Brennan*, 1 *N.J. Super.* 446, 453 (Ch. 1943) (contract case).

burden shifts to the plaintiff to prove[39] that the defendant agreed to the contract based on defendant's own free will and a clear understanding of the contract terms.[40]

By confidential relationship, I do not mean simply a relationship where people share confidences or secrets. Rather, a confidential relationship in cases of alleged undue influence is any relationship where the defendant depends on or relies on the plaintiff for any significant support, assistance or service.[41] When a person depends on another in a confidential relationship, one person holds a dominant position over the other, and the parties do not deal on equal terms.[42] As a result, the person in whom confidence is placed may take

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[39]*See Eisenberg v. Finston, supra*, 18 *N.J. Super.* at 463 (once the presumption of undue influence has been raised in a contract dispute, the party who benefits from the contract must overcome the presumption by a preponderance of the evidence). *Cf. Haynes v. First Nat'l Bank of N.J., supra*, 87 *N.J.* at 177-78 (under normal circumstances, the proponent of a will must overcome the presumption of undue influence by a preponderance of the evidence).

[40]*See Podkowicz v. Slowineski, supra*, 44 *N.J. Super.* at 155 (in a contract dispute between persons in a confidential relationship, the dominant party who acquired an advantage has the burden of proving that no deception or undue influence was practiced to induce formation of the contract).

[41]*See Podkowicz v. Slowineski, supra*, 44 *N.J. Super.* at 156 (describing a confidential relationship as any one between two parties where trust and confidence exist and where one of the parties is more or less dependent on the other) (contract case). *Cf. Haynes v. First Nat'l Bank of N.J., supra*, 87 *N.J.* at 176 (the court held that a confidential relationship existed between a testator, who was aged and debilitated, and her chief beneficiary, since the testator was dependent on the beneficiary).

[42]The test to determine whether a confidential relationship exists, giving rise to a presumption of undue influence, is whether the relationship between the parties to a contract is of such a character of trust and confidence as to render it reasonably certain that one party occupied a dominant position over the other and that consequently, they did not deal on terms of equality. *Blake v. Brennan, supra*, 1 *N.J. Super.* at 453 (contract case).

advantage of his/her dominant position to influence the other to make a contract against his or her will.

You must decide if a confidential relationship existed between the plaintiff and defendant when the contract was made. If you find that a confidential relationship existed, you must then decide whether the plaintiff has proved that the defendant nonetheless made the contract based on defendant's own will. If you find that the plaintiff has proved that the defendant made the contract based on defendant's own will, then you must reject defendant's undue influence defense.

2. Fiduciary Relationship

NOTE TO JUDGE

Use if the defendant claims fiduciary relationship.

The defendant claims that plaintiff had a fiduciary relationship with the defendant, and, as a result, exercised undue influence over the defendant. The defendant has the burden to prove that the fiduciary relationship existed. If the defendant meets that burden, then you, as jurors, must presume that the contract was made as a result of undue influence, unless the plaintiff convinces you otherwise. In other words, the defendant no longer has the burden of proving that the contract was made as a result of undue influence. Instead, the burden

shifts to the plaintiff[43] to prove by clear and convincing evidence[44] that the defendant made the contract based on defendant's own free will and a clear understanding of the contract terms.

A fiduciary is under a duty to act for or give advice for the benefit of another person on matters within the scope of their relationship.[45] A fiduciary holds a dominant position[46] and has a duty of absolute loyalty and good faith.[47]

It is your job to determine whether a fiduciary relationship existed between the plaintiff and defendant at the time the contract was made. If you find that the defendant has shown that a fiduciary relationship existed and the plaintiff has failed to prove, by clear and convincing evidence, that the defendant made the contract based on defendant's own will, then defendant may

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[43]*See In re Estate of Lehner*, 70 *N.J.* 434, 436 (1976), (existence of a fiduciary relationship between decedent and her attorney, who was the sole beneficiary of her will, was sufficient to create a presumption of undue influence). *See also* 13 *Williston on Contracts*, 1625 at 778, 805-806 (Jaeger ed. 1970) (once a party who alleges undue influence has made a case for the existence of a fiduciary relationship, any gain realized by the dominant party will be presumed to have been the result of the dominant party's abuse of such relationship and is prima facie voidable).

[44]*See Haynes v. First Nat'l Bank of N.J., supra*, 87 *N.J.* at 182 (the Court found that a presumption of undue influence was created by the existence of a fiduciary relationship between a testator and her attorney because the attorney who advised the testator and drafted her will also represented the testator's daughter, who was the principal beneficiary of the will. As such, the court held that the more stringent standard of clear and convincing evidence is required to be met when there is a presumption of undue influence involving a fiduciary).

[45]*See F.G. v. MacDonnell*, 150 *N.J.* 550, 563 (1997).

[46]*Ibid.*

[47]*Silverman v. Bresnahan*, 35 *N.J. Super.* 390, 395 (App. Div. 1955) (contract case).

Bollinger v. Ward & Co., 34 *N.J. Super.* 583, 591 (App. Div. 1955), *aff'd*, 20 *N.J.* 331 (1956) (contract/breach of fiduciary duty case).

void the contract. If you find that the plaintiff has proved, by clear and convincing evidence, that the defendant made the contract based on defendant's own will, then you must reject the defendant's undue influence defense.

3. Independent Advice

NOTE TO JUDGE

Use if plaintiff asserts independent advice.

If the defendant has shown that defendant had a confidential or fiduciary relationship with the plaintiff, you must also consider whether the defendant consulted with an impartial person not affiliated with the plaintiff about whether the contract was in the defendant's best interest.[48] If the defendant did have the benefit of advice from an impartial party, then the contract may be enforced.[49]

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[48]*See Wolf v. Palisades Trust & Guaranty Co.*, *supra*, 121 *N.J. Eq.* at 388-89 (the court extended the rule of independent advice beyond gifts to apply to all transactions where a dominant confidential relationship is shown and a resultant advantage accrues to the dominant party) (wills case).

Eisenberg v. Finston, *supra*, 18 *N.J. Super*. at 465-466 (citing *Vanderbach v. Vollinger*, 1 *N.J*. 481, 489 (1949) (contract case).

[49]*See Bensel v. Anderson*, 85 *N.J. Eq.* 391, 395 (Ch. 1915) (where one party to a contract is dependent on the other and makes an apparently improvident contract, depriving himself of his property in favor of the other, the contract cannot be sustained unless it is shown that the subordinate party had the benefit of independent advice), *modified* 87 *N.J. Eq.* 364 (E. & A. 1917).

When a confidential relationship is shown, the plaintiff has the burden to prove that the defendant received competent independent advice.[50]

4. Ratification

NOTE TO JUDGE

Use if plaintiff asserts ratification.

Even if there had been undue influence exerted on the defendant, the contract will be enforced if the undue influence was removed and the defendant could have complained but did not. The plaintiff has the burden to show that the undue influence, if there had been any, was removed, and that the defendant did not complain within a reasonable time.[51]

j. Breach of Fiduciary Duty If a defendant makes a contract with a fiduciary and the fiduciary fails to act with complete honesty and loyalty

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[50]*See Wolf v. Palisades Trust & Guaranty Co*., *supra*, 121 *N.J. Eq.* at 388-89 (when a dominant confidential relationship is proven, the burden of showing that the subordinate party received competent independent advice before making a contract or a gift falls on the dominant party who has benefited from the transaction) (wills case). *See also Bensel v. Anderson*, *supra*, 85 *N.J. Eq.* at 395.

[51]*Cf. In re Raynolds*, 132 *N.J. Eq.* 141, 159 (Prerog. 1942) (in will contest, the court held that ratification of a will obtained by undue influence removes "the bane of such influence." "Ratification may result if a testator allows such a will to remain uncanceled for any considerable length of time after its execution and after the removal of the influence which produced it, or after republication thereafter"), *aff'd*, 133 *N.J. Eq.* 344 (E. & A. 1943); *Ballantine v. Stadler*, 99 *N.J. Eq.* 404, 407-08 (E. & A. 1926) (duress case):

> When one seeks to avoid a contract on the ground of duress, the person seeking such avoidance should proceed within a reasonable time after removal of the duress, and if a person remains silent for an unreasonable length of time, he may be held or be elected to waive the duress and ratify the contract.

to the defendant, then the defendant may void the contract and the contract will not be enforced against defendant.[52] That means that the plaintiff cannot make the defendant do what the contract required or make the defendant pay money damages for failing to do what the contract required.

The defendant claims that the plaintiff was a fiduciary and that plaintiff breached plaintiff's duty by *[state alleged acts of fiduciary breach]*. The plaintiff denies this.

A fiduciary is under a duty to act for or give advice for the benefit of another person on matters within the scope of their relationship.[53] The person to whom a fiduciary has a duty is called a principal. A fiduciary has a duty of absolute loyalty and good faith to his or her principal,[54] and must disclose any information or circumstance that might affect the fiduciary's loyalty to the

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[52]In *Thompson v. Hoagland*, 100 *N.J. Super.* 478, 482-83 (App. Div. 1968), the court held that a real estate broker has a fiduciary duty of good faith and full disclosure, and if that duty is breached, then the contract between the fiduciary and the principal is voidable at the principal's option.

See Silverman v. Bresnahan, 35 *N.J. Super.* 390, 395 (App. Div. 1955) (the court held that a broker's breach of his fiduciary duty relieved the principal (vendor) from his obligation to pay the broker's commission.)

[53]*F.G. v. MacDonnell*, 150 *N.J.* 550, 563 (1997). *See also Restatement (Second) of Torts* 874 cmt. a (1979).

[54]*See Bollinger v. Ward & Co.*, 34 *N.J. Super.*, 583, 591 (App. Div. 1955), *aff'd*, 20 *N.J.* 331 (1956) ("No principle of law is more firmly established than that which forbids an agent to take an unfair personal advantage of the opportunities of his position in the use of things entrusted to him in the capacity of a fiduciary.")

principal.[55] The defendant must prove by a preponderance of the evidence that the plaintiff was in a fiduciary relationship with the defendant when the contract was made.[56]

If you find that there was a fiduciary relationship between the plaintiff and defendant when the contract was made, then the plaintiff has the burden of proving, by clear and convincing evidence, that plaintiff made full disclosure, was honest, and acted in good faith and in the defendant's best interest.[57]

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[55]In an action by a real estate broker for commission earned in producing a buyer for defendant's realty, the *Thompson* court held that a fiduciary must disclose any circumstance that might reasonably be expected to influence the fiduciary's complete loyalty to the principal. Further, the court held that the broker's failure to disclose to the vendor that he was a joint investor in real estate with the prospective buyer rendered the transaction voidable at the vendor's option. *Thompson v. Hoagland*, *supra*, 100 *N.J. Super.* at 483. Similarly, the court in *Silverman* held that a broker employed by a vendor of realty had a duty to disclose that he also represented a prospective buyer and would receive a commission from that buyer. *Silverman v. Bresnahan*, *supra*, 35 *N.J. Super.* at 395.

Attorneys who dare enter into business agreements with clients must, to satisfy their fiduciary obligations, make full and complete disclosure of all facts and must advise the client to seek independent legal advice and the client must actually get such advice. See *In re Humen*, 123 *N.J.* 289 (1991) ("It is also well established that an attorney should refrain from engaging in a business transaction with a client who has not obtained independent legal advice on the matter."); *In re Gavel*, 22 *N.J.* 248, 262 (1956) (requiring not only full and complete disclosure but also absolute independence of action by client to overcome presumption of invalidity of contract between attorney and client.) Even in some cases involving fee agreements, an attorney must suggest that the client secure independent advice of a second attorney before signing the fee agreement with the firm. *Cohen v. Radio-Electronics Officers Union*,146 *N.J.* 140, 162 (1996).

[56]*See Italian Fisherman, Inc. v. Commercial Union Assurance Co.*, 215 *N.J. Super.* 278, 282 (App. Div. 1986) (the preponderance of the evidence standard is the customary burden of proof in civil cases and the appropriate standard by which affirmative defenses must be proven).

See also State v. Cale, 19 *N.J. Super.* 397, 399 (App. Div. 1952).

[57]*See In re Gavel*, *supra*, 22 *N.J.* at 262 (clear and convincing standard). *Cf. Haynes v. First Nat'l Bank of N.J.*, *supra*, 87 *N.J.* 163, 182 (1981) (where presumption of undue

Keep in mind that if you find that a fiduciary relationship existed and that the plaintiff breached plaintiff's fiduciary duty, it does not matter whether or not the contract itself turned out to be a bad deal or an unfair deal for the defendant.[58] Defendant may still void the contract.

Plaintiff denies that plaintiff violated plaintiff's fiduciary duty. You must decide, has plaintiff proved that plaintiff was completely honest with defendant? Did plaintiff make full disclosure? Did plaintiff act honorably? If your answer is "no" to any of those questions, then the defendant may void the contract.

k. Mental Competency Many times, if a defendant was incompetent when defendant made the contract, then the contract cannot be

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influence was raised against a fiduciary, an attorney, in a will contest, the fiduciary was required to prove by clear and convincing evidence that he did not exert undue influence on the testator when she made the will).

[58]*Carluccio v. Hudson Street Holding Co.*, 141 *N.J. Eq.* 449, 455 (E. & A. 1948); *Thompson v. Hoagland, supra*, 100 *N.J. Super.* at 483 (defendant need not show that contract was unfair or caused harm.) But an attorney contracting with a client must affirmatively show that the contract was fair and equitable. *See Cohen v. Radio-Electronics Officers Union, supra*, 146 *N.J.* at 155 (1995) (fee agreement); *In re Nichols*, 95 *N.J.* 126, 131 (1984) ("It is well-settled that all transactions of an attorney with his client are subject to close scrutiny and the burden of establishing the fairness and equity of the transaction rests upon the attorney"); *In re Gavel, supra*, 22 *N.J.* at 262 (presumptive invalidity of agreement between attorney and client "can be overcome by only the clearest and most convincing evidence showing full and complete disclosure of all facts known to the attorney and absolute independence of action on the part of the client. . . .") However, the issue of whether the contract itself is fair and equitable appears to be one for the court, not the jury. *See Gray v. Joseph J. Brunetti Constr. Co.*, 159 *F.Supp.* 417, 424 (D.N.J. 1958) (issue of alleged unfairness of agreement with attorney for court to decide), *rev'd on other grounds*, 266 *F.* 2d 809 (3d Cir. 1959), *cert. denied*, 361 *U.S.* 826 (1959). The issue of the agreement's fairness appears to be an equitable, not a legal issue. *See In re Gallop*, 85 *N.J.* 317, 322 (1981) (stating that if attorney does not meet burden of showing fairness and equity of transaction "equity has regarded such transactions tainted so as to constitute a constructive fraud.")

enforced. That means the plaintiff cannot make the defendant do what the contract required, or make the defendant pay money for not doing what the contract required.

The defendant claims that defendant was incompetent when the contract was made. The plaintiff denies that.

It is your job to decide if the defendant has shown that defendant was incompetent when defendant made the contract. To show that defendant was incompetent, the defendant must show that when defendant made the contract, defendant did not have the mental capacity to understand the nature and effect of what defendant was doing.[59] You may consider the testimony of medical, psychiatric or psychological experts.[60] But remember, old age or physical or mental illness is not the same as incompetence.[61]

In deciding if defendant was incompetent, you should ask: was the defendant able to understand what defendant was doing. Sometimes, a person with plenty of intelligence and mental capacity will sign a contract without thinking about the consequences. That's not incompetence. That person could

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[59]*Wolkoff v. Villane*, 288 *N.J. Super.* 282, 287 (App. Div. 1996).

[60]*Id.* at 291-92.

[61]*See, e.g., Vincent v. Campbell*, 140 *N.J. Eq.* 140, 142 (Ch. 1947) (holding that mental incapacity not proved by evidence of illness).

understand; but simply did not bother. An incompetent person does not have the ability to understand.

[If relevant: Even if another court made a finding about a person's mental illness, for example, by committing the person to a mental hospital, that by itself does not decide that the person was incompetent to make a contract. However, you can take that into account in making your decision.[62]]

1. Defendant's Intoxication

NOTE TO JUDGE

Use if the defense of incompetence is based on the defendant's intoxication.

The defendant claims that defendant was incompetent because he was intoxicated. To prove incompetence by reason of intoxication, the defendant must show that defendant was so intoxicated that defendant's mental powers of reasoning and understanding were so impaired that defendant could not realize and appreciate the nature and consequences of what defendant was doing.[63]

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[62]*See In re Lambert*, 33 *N.J. Super.* 90 (Ch. Div. 1954) (stating that it was not inconsistent for jury to find person competent to manage her own affairs, where county court had previously adjudicated the person of unsound mind and committed the person to a mental hospital.) *Cf. Oswald v. Seidler*, 136 *N.J. Eq.* 443, 445 (E. & A. 1945) (holding that "inference inescapable" that party incompetent based on her commitment as insane and related facts and circumstances).

[63]*Seminara v. Grisman*, 137 *N.J. Eq.* 307, 313 (Ch. 1945) (holding that defense of incompetence by reason of intoxication should follow the general rules on the affirmative defense of mental incompetence.)

2. Necessaries

NOTE TO JUDGE

Use if appropriate, add charge on contract for necessaries.

Sometimes, even when a defendant was incompetent, the contract will be enforced. One of those times is when the contract was for necessaries; that is, a contract for the sale of something that the defendant could not live without.[64] That kind of contract is enforceable, even if made by an incompetent person, if the plaintiff did not know that the defendant was incompetent and did not know facts that would have led a reasonable person to conclude that the defendant was incompetent and if the contract was fair.[65] By fair, I mean, the contract did not take advantage of the defendant. The plaintiff says that the contract in this case was the kind of a contract that can be enforced; the plaintiff says that it was fair, it was for necessaries, and plaintiff did not know that the defendant was incompetent and did not know facts that would have led a reasonable person to

[64]*Bancredit, Inc. v. Bethea*, 65 *N.J. Super.* 538, 549 (App. Div. 1961) (in a case involving infancy defense, court defines necessaries as not only bodily or mental essentials, but occupational accessories that are a "link in the chain of physical survival.").

[65]*Manufacturers Trust Co. v. Podvin*, 10 *N.J.* 199, 210 (1952); *Matthiessen & Weichers Refining Co. v. McMahon's Administrator*, 38 *N.J.L.* 536, 543-44 (E. & A. 1876).

now that the defendant was incompetent. Defendant denies this. It is plaintiff's burden to show that the contract and facts were as plaintiff claims.[66]

3. Executed Contracts

NOTE TO JUDGE

If appropriate, add charge on executed contracts.

Sometimes, even when a defendant was incompetent, the contract will be enforced. One of those times is when the plaintiff has completed plaintiff's end of the bargain; and the contract was fair, in other words, the contract did not take advantage of the defendant; and the plaintiff did not know that the defendant was incompetent when he/she made the contract; and the plaintiff did not know facts that would have led a reasonable person to know that the defendant was incompetent.[67]

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[66]*Cf. Bancredit, Inc., supra*, 65 *N.J. Super.* at 550 (although defendant has the burden of proving the affirmative defense of infancy, once facts of infancy are demonstrated, plaintiff has the burden of establishing an exception to the infancy defense). Query, should the plaintiff claiming an exception to the affirmative defense of incompetency bear the burden of establishing that exception?

[67]*Matthiessen & Weichers Refining Co., supra*, 38 *N.J.L.* at 543 ("Other contracts with lunatics not strictly for necessaries, which have been fully executed, and on which a consideration of benefit to the lunatic has been given, may be within the reason of this exception, where the transaction is shown to be perfectly fair and reasonable, at least, so far as to allow the recovery back of the consideration given, or to prevent a recission by the lunatic or his representatives, without restoring the consideration, whenever a restoration is practicable.") *See also Manufacturers Trust Co., supra*, 10 N.J. at 207 ("The settled rule of law is that 'contracts with lunatics and insane persons are invalid, subject to the qualification that a contract made in good faith with a lunatic, for a full consideration, which has been executed without knowledge of the insanity, or such information as would lead a prudent

Plaintiff says that the contract in this case was the kind of contract that can be enforced even if the defendant was incompetent. Plaintiff claims that plaintiff has delivered what plaintiff promised; the contract was fair; and plaintiff did not know and could not reasonably have known that defendant was incompetent. Defendant denies this. It is plaintiff's burden to show that the contract and facts were as plaintiff claims.

l. Minority Sometimes, a contract with a minor may not be fully enforced, meaning, the adult who made the contract with the minor may not be able to force the minor to do all that the minor promised, or the adult may not be able to make the minor pay all the

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person to the belief of the incapacity, will be sustained.") (quoting *Drake v. Crowell*, 40 *N.J.L.* 58 (Sup. Ct. 1878).

There is an apparent debate over the meaning of the above stated rule in *Matthiessen & Weichers Refining Co.* and *Manufacturers Trust Co.* The Appellate Division panel in *Wolkoff* v. *Villane*, *supra*, 288 *N.J. Super.* at 287, n. 1, interpreted the rule to apply only to contracts in which the plaintiff had already performed its end of the bargain. The *Wolkoff* court interpreted the words "which have been fully executed" to mean not that the contract was signed by both sides, but that the plaintiff has fully performed. By contrast, the Appellate Division panel in *Swift & Co. v. Smigel*, 115 *N.J. Super.* 391, 399 (App. Div. 1971), *aff'd*, o.b., 60 *N.J.* 348 (1972) stated, in dictum, that a defendant may not, on the basis of incompetence, avoid a contract "with others having no knowledge of that fact and parting with valuable consideration." The *Swift & Co.* court did not add that the plaintiff must have fully performed. The *Swift & Co.* statement is *dictum* because the defendant was competent when he made a continuing guarantee, and the court held that the guarantee was therefore valid, even as to deliveries by plaintiff made after the defendant became incompetent.

money that the adult would otherwise be entitled to if the contract had been made with an adult.[68]

Defendant says that when defendant made the contract with plaintiff, defendant was under the age of eighteen -- which is the age of adulthood under New Jersey law.[69] Plaintiff denies this. Defendant has the burden to show that when defendant made the contract, defendant was under the age of eighteen.

1. Necessaries

NOTE TO JUDGE

Use if the plaintiff claims that the contract involved necessaries.

Even if the defendant was under eighteen when he/she made the contract, the plaintiff is entitled to the reasonable value of goods or services *[sold, leased, rented, etc.]* to the defendant, if the goods or services were "necessary" -- that is, if the goods or services were something that the defendant required in order to

[68]By statute, certain contracts with minors are enforceable as if they were made with an adult. *See, e.g.*, *N.J.S.A.* 9:17A-1 (medical treatment by married minor woman or pregnant minor woman); *N.J.S.A.* 9:17A-2 (repayment of educational loans); *N.J.S.A.* 9:17A-4 (medical treatment by minor claiming affliction of venereal disease or sexual assault or treatment for alcoholism or drug abuse); *N.J.S.A.* 18:72-21 (repayment of education loans); *N.J.S.A.* 17B:24-2 (life or health insurance contracts executed by minor over fifteen years of age); *N.J.S.A.* 17:13-102 (credit union account agreements.)

[69]*See N.J.S.A.* 9:17B-1 (extending to eighteen year old persons the right to contract generally.) But note that the age to purchase alcohol and to gamble at casinos is 21 years of age. *N.J.S.A.* 9:17B-1(b) and (c).

live, considering the nature of the thing sold, and the defendant's needs at the time.[70] Basic food, shelter and health care are examples of necessary things.[71]

The plaintiff says that the goods or services he *[sold, leased, rented, etc.]* under the contract were necessary. The defendant denies this. The plaintiff has the burden to prove that the goods or services were necessary.

And even if the plaintiff convinces you that the goods or services were necessary, the plaintiff is entitled only to the reasonable value of the goods or services, even if that is less than the amount in the contract. Plaintiff has the burden to prove to you that the amount in the contract was a reasonable amount.[72]

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[70]*Bancredit, Inc. v. Bethea*, 65 *N.J. Super.* 538, 547-48 (App. Div. 1961). It is unclear whether the "necessaries" exception would entitle an adult to enforce an unperformed, executory contract, subject to the limitation that the adult may recover only fair or reasonable value. *Bancredit, Inc.* involved a suit for the deficiency owed on a car loan after the car was repossessed and resold for the less than the loan amount. The note was signed by a minor and the minor's parent. On one hand, the court in *Bancredit, Inc. v. Bethea* appears to support an adult's right to enforce an executory contract, stating that the minor's right to void an agreement applies only to contracts not involving necessaries. "Our courts .. have held that where the consideration does not consist of a necessary, a promissory note given by an infant is voidable at the infant's election . . . ." 65 *N.J. Super.* at 547. However, the court implies the opposite result — that an infant may disavow or void even an agreement for necessaries, so long as he or she pays reasonable value — by observing "the common law requirements that (1) where his contract is for necessaries, a disavowing infant is liable for the reasonable price thereof." *Id.* at 548.

[71]Other items, which are occupational accessories, constitute a link in the chain of physical survival, such as a car can also be necessary. *Id.* at 547.

[72]*Id.* at 550.

2. Ratification

NOTE TO JUDGE

Use if the plaintiff claims that the defendant ratified the contract.

A person who was under eighteen when he/she made the contract may not undo the contract if he/she has already ratified it after he/she reached eighteen. A person ratifies a contract when he/she acts in a way that shows that he/she wants to keep the contract.[73] Simply waiting to disavow a contract is not enough by itself to show that the defendant ratified the contract. Plaintiff has the burden to show that the defendant ratified the contract. Plaintiff says that defendant ratified the contract. Defendant denies this. If you find that defendant has in fact ratified the contract, then plaintiff may enforce the contract, even though defendant was under eighteen when he/she first made the contract.

3. Misrepresentation of Age

NOTE TO JUDGE

Use if the plaintiff claims that the defendant misrepresented himself to be an adult.

[73]*Notaro v. Notaro, supra*, 38 *N.J. Super.* at 315 (ratification is "[a]ny conduct on the part of the former infant which evidences his decision that the transaction shall not be impeached") (citation omitted).

The plaintiff says that the defendant misrepresented his/her age when he/she made the contract. Plaintiff says that the defendant misled plaintiff into thinking that defendant was over eighteen. Plaintiff has the burden to prove that defendant misrepresented defendant's age. If you find that defendant did misrepresent defendant's age, then defendant may not undo the contract even though defendant made the contract when defendant was under eighteen, unless defendant gives back to the plaintiff any benefits defendant received under the contract.[74] If the defendant gives back any benefits defendant received, then defendant may undo the contract, even though defendant misrepresented defendant's age when he or she made the contract.

4. Emancipation

NOTE TO JUDGE

Use if the plaintiff claims emancipation.

A person who was under eighteen when he/she made the contract may not undo the contract on account of his/her age if the person was emancipated when

[74]*Mechanics Finance Co. v. Paolino*, 29 *N.J. Super*. 449, 454 (App. Div. 1954) (infant may be estopped from asserting infancy as a defense when he has falsely represented himself as an adult, but estoppel applies "only where the infant received and retained a benefit under the contract he fraudulently induced.")

he/she made the contract.[75] A minor is emancipated if he or she is living independently of his or her parents or guardian, who have given up their right to custody and have been relieved of their duty to support. This can happen when a child is married before reaching the age of majority, or it can happen when the child has simply lived on his or her own as an adult.[76] Plaintiff has the burden to prove that defendant was emancipated.

5. Value of Retained Benefits

NOTE TO JUDGE

Use if the issue is the return of retained benefits.

A person who was under eighteen when he/she made the contract, may undo a contract while he/she is under eighteen, or within *[reasonable time, up to statute of limitations]* after reaching eighteen.[77] But, even if the minor undoes

[75]*La Rosa v. Nichols*, 92 *N.J.L.* 375, 378-79 (E. & A. 1918) (stating that emancipation, "if found as a fact, would doubtless have entitled the defendant to prevail" in suit by minor seeking recovery of automobile retained by mechanic for nonpayment for repairs, where minor claimed incapacity to contract.)

[76]A rebuttable presumption against emancipation exists prior to the age of majority. *Newburgh v. Arrigo*, 88 *N.J.* 529, 543 (1982). But, if a parent has relinquished the right to custody and the obligation to support, then the child may be deemed emancipated. See *N.J. Div. of Youth & Family Serv. v. V.*, 154 *N.J. Super.* 531 (Juv. & Dom. Rel. Ct. 1977) (deeming a 17 year-old woman who had lived apart from her mother for three years an emancipated minor). A child may be deemed emancipated by reason of marriage, induction into military service, or by court order. *Newburgh v. Arrigo, supra*, 88 *N.J.* at 543.

[77]*Mechanics Finance Co. v. Paolino*, *supra*, 29 *N.J. Super.* at 449 (minor must disaffirm within a "reasonable time" after reaching age of majority); *Boyce v. Doyle*, 113 *N.J. Super.* 240, 241-42 (Law Div. 1971) (infant must void "before or a reasonable time after he obtains his majority"); *Notaro v. Notaro*, 38 *N.J. Super.* 311, 314 (Ch. Div. 1955) (time within which

the contract, the other party has a right to the return of any benefits, goods, services that were not paid for.[78] Plaintiff has the burden of proving that the defendant has received benefits, goods, services for which there was no payment, and the amount that plaintiff is entitled to recover.[79]

2. Equitable Defenses

PREFATORY NOTE TO JUDGE ON THE RIGHT TO JURY TRIAL ON EQUITABLE DEFENSES

The following charges on affirmative defenses to contract claims cover the equitable defenses of equitable estoppel and equitable fraud. The Committee notes that a question can be raised regarding whether a party has a right to trial by jury on an equitable defense. *See, e.g., Penbrook Hauling Co. v. Sovereign*

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infant may disaffirm "may extend for periods prescribed in the statute of limitations" so "mere delay for 12 years was insufficient in and of itself to either constitute a ratification . . . or . . . laches.")

[78]*Boyce v. Doyle*, *supra*, 113 *N.J. Super.* at 242 ("New Jersey follows the minority rule that an infant must restore the other party to the status quo to the extent of the benefits the infant has received...."); *Sacco v. Schallus*, 11 *N.J. Super.* 197, 201 (Ch. Div. 1950)("Generally, in connection with a purchase of a chattel, an infant may disaffirm or disavow his contract and recover back the money paid thereon, less proper offsets for diminution in the value of the chattel. As has sometimes also been stated, recovery by an infant cannot be had without a restoration to the other party of the consideration received, or an allowance from such recovery as compensation for the benefit conferred upon the infant seeking to void the contract.") However, there is authority for the proposition that the adult must assert a counterclaim for recovery of the retained value or depreciation. See *Carter v. Jays Motors, Inc*., 3 *N.J. Super.* 82, 85 (App. Div. 1949) (affirming judgment allowing minor to void purchase of automobile, return automobile, and receive back down payment and rejecting adult's claim on appeal for restitution for use of car and depreciation because defendant did not assert a counterclaim for restitution and did not offer proof on it).

[79]*Cf. Bancredit, Inc. v. Bethea*, *supra*, 65 *N.J. Super.* at 550 ("However, once the defendant effectively demonstrates his infancy at the time of contracting, the party seeking to recover for materials furnished has the burden of proving both that the articles supplied in fact constituted necessaries, and the infant was in 'actual need' of them. ... It is also the duty of the creditor to establish the reasonable value of the alleged necessaries.")

Constr. Co., 136 *N.J. Super*. 395 (App. Div. 1975) (no right to jury trial on equitable defense of equitable estoppel); *M. Schnitzer & J. Wildstein, N.J. Rules Serv*., AIV1270 (1982 reprint) ("The issue of equitable fraud, as distinguished from legal fraud . . . whether asserted as the basis for an equitable claim or in an answer to a legal claim, is exclusively of equitable cognizance. Hence, such issue is triable to a court alone.") *See also Weintraub v. Krobatsch*, 64 *N.J.* 445, 455 (1974) (factual as well as legal disputes relating to plaintiff's claim seeing recission based on equitable fraud is for the trial judge alone.)

Similarly, an affirmative defense of mistake is an equitable one. *Massari v. Einsiedler*, 6 *N.J.* 303, 311 (1951). In other words, it is a defense that would entitle a party to equitable relief from an old court of equity. *Id.* at 311-12. In a case of mistake, the equitable forms of relief potentially available are rescission and reformation. *Id.* at 311 (mutual mistake is grounds for reformation); *Bonnco Petrol Inc. v. Epstein*, 115 *N.J.* 599, 608 (1989) (contract is voidable by adversely affected party in case of mutual mistake); *Asbestos Fibres, Inc. v. Martin Lab, Inc.*, 12 *N.J.* 233, 239 (1953) (in case involving claim for contract reformation based on mutual mistake, court states that reformation is Aan issue peculiarly and solely equitable cognizance."); *Hamel v. Allstate Ins. Co.*, 233 *N.J. Super*. 502 (App. Div. 1989) (rescission available for unilateral mistake if specified conditions met). A claim of reformation on grounds of mistake is therefore triable by the court alone, even though the case may involve other issues triable as of right by a jury. *Asbestos Fibres, Inc. v. Martin Lab.*, Inc., *supra* 12 *N.J.* at 239 (stating that court shall fully dispose of all equitable issues or other issues not triable as of right by a jury, leaving only purely legal issues for determination by the jury); *Volker v. Connecticut Fire Ins. Co*., 11 *N.J. Super*. 225, 231 (App. Div. 1951).

> If this issue of equitable relief by way of reformation was properly before the court, the issue should have been decided by the court alone, even though other issues were involved in the case which were triable as of right by the jury. *Ibid.*

However, even if no jury right exists, equitable defenses may be tried by a jury with the consent of the parties and the court (*R.* 4:35-3). For ease of reference, the equitable affirmative defenses are presented separately from legal defenses.

a. Estoppel. Defendant claims that plaintiff should be forbidden from insisting upon performance of *[insert performance obligation]* due to plaintiff's statement or conduct. Defendant must prove that defendant changed defendant's position to defendant's detriment by relying upon the plaintiff's statement or conduct. The defendant must show:

1. that the plaintiff's statement or conduct amounted to a misrepresentation or a concealment of material facts;

2. that the plaintiff knew or should have known the true facts;

3. that the defendant did not know of the facts concealed or the misrepresentation at the time defendant acted upon the plaintiff's statement or conduct;

4. that the statement or conduct was said (or done) by the plaintiff with the intention that it be relied upon by the defendant;

5. that the defendant actually relied on plaintiff's conduct to defendant's detriment or harm and that such reliance was reasonable and justified.[80]

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[80]*Palatine I v. Planning Board of Montville*, 133 *N.J.* 546, 563 (1993); *Foley Machinery v. Amland Contractors*, 209 *N.J. Super.* 70, 75 (App. Div. 1986); *Malaker Corp. Stockholders Protective Committee v. First Jersey National Bank*, 163 *N.J. Super.* 463, 479 (App. Div. 1978); *New Jersey Bank v. Palladino*, 146 *N.J. Super.* 13 (App. Div. 1976), *mod. on other grounds*, 77 *N.J.* 33 (1978); *Clark v. Judge*, 84 *N.J. Super.* 35, 54 (Ch. Div. 1964), *aff'd*, 44

b. Equitable Fraud [81]

When a defendant has agreed to a contract because the plaintiff made misrepresentations [or concealed or failed to disclose information to the defendant that he/she should have disclosed], then, in some cases, the contract is

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N.J. 550 o.b., (1965), citing *Feldman v. Urban Commercial Inc.*, 70 *N.J. Super.* 463, 474 (Ch. Div. 1961); *Central Railroad Co. of New Jersey v. MacCartney*, 68 *N.J.L.* 165, 175 (Sup. Ct. 1902).

[81]It is questionable whether there is a right to trial by jury of an equitable defense of equitable fraud. *See Weintraub v. Krobatsch*, 64 *N.J.* 445, 455 (1974) (factual as well as legal disputes relating to plaintiff's claim seeking rescission based on equitable fraud is for the trial judge alone).

The issue of equitable fraud, as distinguished from legal fraud . . . whether asserted as the basis for an equitable claim or in an answer to a legal claim, is exclusively of equitable cognizance. Hence, such issue is triable to a court alone. *M. Schnitzer & J. Wildstein*, *N.J. Rules Serv.*, AIV1270 (1982 reprint).

See also W.P. Keeton, *Prosser and Keeton on The Law of Torts*, 105, at 732 n. 63 (1984) ("Thus it has been held that fraud in the factum is a legal defense, to be determined by the jury, while fraud in the inducement is equitable and hence for the court.") However, the fraud defense may be tried by the jury by consent. *See R.* 4:35-2.

Often, a defendant will plead fraud as an affirmative defense and a counterclaim. Presumably, the legal fraud counterclaim could go to a jury unless the claim was merely ancillary to equitable claims that predominated the case. *See Pridmore v. Steneck*, 122 *N.J. Eq.* 35, 37 (E. & A. 1937) (although law courts' jurisdiction was expanded to include legal fraud, the equity courts retained jurisdiction). *See* Charge 3.30E for the affirmative claim of legal fraud. Of course, if a defendant succeeds in proving legal fraud -- which includes the added elements of knowledge of the falsehood and intent that the other rely -- he/she will have also proved the elements of equitable fraud. However, a claim for rescission is nonetheless equitable for which, apparently, there is no right to a jury trial. "The equitable remedies of rescission and cancellation are intended to place the parties in status quo." *New York Life Ins. Co. v. Weiss*, 133 *N.J. Eq.* 375, 379 (E. & A. 1943)(rescinding insurance policy that was reinstated based on the fraud of policy holder) (emphasis added); *East Newark Realty Corp. v. Dolan*, 15 *N.J. Super.* 288, 292 (App. Div. 1951) ("The equitable remedy of cancellation of documents is generally based on fraud or mistake in the inception of the document...") (Emphasis added.) *But see*, *Johnson v. Jersey Cent. Power & Light Co.*, 13 *N.J. Misc.* 745, 746-47 (Sup. Ct. 1935) (without addressing right to jury trial, the court affirms trial court's jury charge on plaintiff's claim for rescission based on legal fraud).

voidable, and may not be enforced against the defendant.[82] That means that the plaintiff cannot make the defendant perform what the contract required, or make the defendant pay the plaintiff money damages for failing to do what the contract required.

The defendant in this case claims that he/she made the contract because of plaintiff's misrepresentations *[concealment or non-disclosures]*. Specifically, *[state the alleged acts of fraud]*. The plaintiff denies this.

In order to prove a defense of misrepresentation [concealment or non-disclosure] that would relieve the defendant of defendant's obligation to do what the contract required, the defendant must show four things by clear and convincing evidence:[83]

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[82]*Bonnco Petrol, Inc. v. Epstein*, 115 *N.J.* 599, 611 (1989) (rescission is remedy for equitable fraud); *Jewish Center of Sussex Cty. v. Whale*, 86 *N.J.* 619, 626 (1981) (affirming summary judgment granting rescission of contract to employ rabbi based on equitable fraud in that rabbi misrepresented his background).

[83]It appears that legal and equitable fraud must be proved by clear and convincing evidence. *See Gennari v. Weichert Co. Realtors*, 148 *N.J.* 582, 611 (1997) (affirming trial court's finding of no common law fraud where trial court applied clear and convincing standard); *Stochastic Decisions v. DiDomenico*, 236 *N.J. Super.* 388, 395-96 (App. Div. 1989) (legal fraud must be proved by clear and convincing evidence), *cert. denied*, 121 *N.J.* 607 (1990); *Berman v. Gurwicz*, 189 *N.J. Super.* 89, 102 (Ch. Div. 1981) (proof of fraud in Chancery must be by clear and convincing evidence), *aff'd*, 189 *N.J. Super.* 49 (App. Div.), *cert. denied*, 94 *N.J.* 549 (1983). *But see Lightning Lube, Inc. v. Witco Corp., 4 F.* 3d 1153, 1182-83 (3d Cir. 1993) (interpreting New Jersey law to require proof by preponderance of the evidence for legal fraud, but proof by clear and convincing evidence for equitable fraud); *Armel v. Crewick*, 71 *N.J. Super.* 213 (App. Div. 1961) (legal fraud proved by preponderance of the evidence).

1. material misrepresentation;

2. misrepresentation was of a presently existing or past fact;

3. justifiable reliance by the other party; and

4. damages to the other party.

I shall now explain each of these elements in detail. First, to prove this defense, defendant must prove that the plaintiff misrepresented an existing or past fact *[or concealed or failed to disclose an existing or past fact when plaintiff was duty bound to disclose such a fact]*.[84] A misrepresentation is any statement or

[84]The court shall determine whether plaintiff had a duty to disclose. *See Strawn v. Canuso*, 271 *N.J. Super.* 88, 100 (App. Div. 1994) ("Whether a duty exists [to disclose facts in a fraud case] is a matter of law to be decided by the court, not the jury."), *aff'd*, 140 *N.J.* 43 (1995).

See also Restatement (Second) of Torts, 551, Comment m (1977) ("Whether there is a duty to the other to disclose the fact in question is always a matter for the determination of the court.") Regarding the existence of a disclosure duty, *see Berman v. Gurwicz*, 189 *N.J. Super.* 89, 93-94 (Ch. Div. 1981) (stating that disclosure duty arises out of (1) a fiduciary relationship, (2) relationships where extra trust is expressly or implicitly a part of the relationship, or (3) relationships in which trust and confidence are needed to protect the parties), *aff'd*, 189 *N.J. Super.* 49 (App. Div.), *certif. denied*, 94 *N.J.* 549 (1983). "[S]ilence, in the face of a duty to disclose, may be a fraudulent concealment." *Berman v. Gurwicz*, *supra*, 189 *N.J. Super.* at 101.

See also Jewish Center of Sussex Cty. v. Whale, *supra*, 86 *N.J.* at 626-27 (rabbi who omitted facts about his criminal record at the time of his hiring by a synagogue misrepresented his background and in doing so, committed fraud warranting rescission of his employment contract); *Costello v. Porzelt*, 116 *N.J. Super.* 380, 383 (Ch. 1971) (affirmative false representations and the withholding of truth when it should be disclosed constitute fraud and will justify a court of equity to rescind a contract.) Mere nondisclosure is distinct from

conduct that is inconsistent with the facts -- in other words, a false statement. You must decide: did the plaintiff make the statement or representation as defendant alleges? Was it statement or representation of fact? And, if so, was the statement or representation false?

An opinion, or a statement of intent to do something in the future, is not a representation of fact. Just because an opinion turns out to be wrong does not make it false or a misrepresentation. And just because a person failed to do what he/she said he/she was going to do does not make a promise or statement of intent into a misrepresentation. However, it is a misrepresentation to falsely state one's opinion, or to falsely state one's intention.[85]

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active concealment (like the papering over a damaged wall or the hiding of papers that would otherwise be discovered during a due diligence.) "Silence as to a material fact is not necessarily equivalent to a false representation. But mere silence is quite different from concealment. Aliud est tacere, aliud celare. A suppression of the truth may amount to a suggestion of falsehood." *Johnson v. Metropolitan Ins. Co.*, 99 *N.J. Super.* 463, 472 (App. Div. 1968), *rev'd on other grounds*, 53 *N.J.* 423 (1969).

[85]Puffery is not misrepresentation. *Rodio v. Smith*, 123 *N.J.* 345, 352 (1991) ("You're in good hands with Allstate" is puffery, not a statement of fact.) Nor does misrepresentation "consist of vague and ill-defined opinions. "*Joseph J. Murphy Realty, Inc.*, 159 *N.J. Super.* 546, 551 (App. Div. 1978) (distinguishing between fact and opinion), *certif. denied*, 79 *N.J.* 487 (1979). However, opinions can form a basis for a misrepresentation when not genuine, or when they exploit a relationship of confidence.

Although ordinarily expressions of opinions may not be relied on, the rule is otherwise where the opinion is given by one who has succeeded in securing the confidence of the victim, or holds himself out as having special knowledge of the matter, or purports to be disinterested. *Judson v. Peoples Bank & Trust Co.*, 25 *N.J.* 17, 26-27 (1957).

Also, while a mere unfulfilled promise to do something in the future does not constitute actionable fraud in New Jersey, a promise that the promisor never intended to keep at the time the promise was made "may satisfy the first element of fraud as a material misrepresentation

A misrepresentation can also be the concealment or non-disclosure of information that should be disclosed. Whether the plaintiff was required to disclose *[describe information]* is a decision for the court, and I charge you that *[describe duty]*. It is your job to decide whether that duty was violated.

Second, to succeed on defendant's defense, the defendant must show that the misrepresentation [or concealment or non-disclosure] was of a fact or facts that were material. For a misrepresentation to be material, it must substantially affect a person's interests. In other words, it must be important to a reasonable person [and even if the information would not be important to the average person, if the plaintiff knew that the information was important to the defendant, then the misrepresentation must be viewed as material].[86]

Third, the defendant must show that defendant justifiably relied on the plaintiff's misrepresentation.[87] Even if the plaintiff misrepresented facts, the

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of the promisor's state of mind at the time of the promise." *Dover Shopping Center, Inc. v. Cushman's Sons, Inc*., 63 *N.J. Super.* 384, 391 (App. Div. 1960).

[86]A material fact is one that "substantially affect[s] the interests of the person alleged to be defrauded." *Trautwein v. Bozzo*, 35 *N.J. Super.* 270, 277 (Ch. Div. 1955) (stating that misrepresentation of income is material because it affects party's valuation of the subject matter of the contract), *aff'd*, o.b., 39 *N.J. Super.* 267 (App. Div. 1956). *See also Beneficial Fin. Co. v. Norton*, 76 *N.J. Super.* 577, 580 (App. Div. 1962) (finding borrower's misrepresentations material because lender would not have made the loan if it had known the truth); *Restatement (Second) of Torts*, 538(2) (1977) (stating that a representation is material if "reasonable person" would deem it important in determining choice of action, or if maker of the representation knows that recipient of representation would deem it important.)

[87] One may argue that proof of reliance is enough, whether justified or not. See *Jewish Center of Sussex Cty. v. Whale*, *supra*, 86 *N.J.* at 626, n.1 ("One who engages in fraud, however, may not urge that one's victim should have been more circumspect or astute.");

defense fails if you find that the defendant did not rely on the misrepresentation (for example, because defendant independently discovered the truth, or because the defendant did not pay attention to the misrepresentation.)[88]

Fourth, the defendant must show that as a result of the misrepresentation [concealment or non-disclosure], defendant suffered a loss. The defendant is not required to show that defendant suffered a financial loss to prove a defense of

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Bilotti v. Accurate Forming Corp., 39 *N.J.* 184, 205 (1963) ("[F]raudulent misconduct is not excused by the credulity or negligence of the victim or by the fact that he might have discovered the fraud by making his own prior investigation.") However, there still appears to be some vitality to the rule that reliance must be justifiable.

According to general decisional law, that reliance must have been justifiable, for example, when facts to the contrary were not obvious or did not provide a warning making it patently unreasonable that plaintiff did not pursue further investigation, under the circumstances that the means for such further investigation were readily apparent and, if pursued, would reveal the falsity of the representation. *Nappe v. Anschelewitz, Barr, Ansell & Bonello*, 189 *N.J. Super.* 347, 355 (App. Div. 1983) *rev'd* in part and *aff'd* in part on other grounds, 97 *N.J.* 37 (1984).

However, in assessing whether reliance is "justifiable", the fact-finder may take into account whether a relationship of good faith exists between two parties to a contract, such that the recipient of the representations is "justified" in ignoring warning signs. "[W]here a relationship of utmost good faith exists, or should exist, one who is a recipient of fraudulent misrepresentations is justified in relying upon them, even though he might have ascertained the falsity of the representations had he made an investigation." *Jewish Ctr. of Sussex Cty. v. Whale*, 165 *N.J. Super.* 84, 90 (Ch. Div. 1978), *aff'd*, 172 *N.J. Super.* 165 (App. Div. 1980), *aff'd*, 86 *N.J.* 619 (1981).

[88]*See DSK Enterprises, Inc. v. United Jersey Bank*, 189 *N.J. Super.* 242 (App. Div. 1983) (absent reasonable reliance there can be no equitable fraud) *cert. denied*, 94 *N.J.* 598 (1983); *Trautwein v. Bozzo, supra*, 35 *N.J. Super.* at 278 (stating that no fraud exists where buyer of business discovers truth about business's income before the sale.) On the general requirement of reliance, *see Jewish Ctr. of Sussex Cty. v. Whale, supra*, 86 *N.J.* at 624; *Gallagher v. New England Mutual Ins. Co. of Boston*, 19 *N.J.* 14 (1955); *Peter W. Kero, Inc. v. Terminal Constr. Corp.*, 6 *N.J.* 361 (1951).

fraud; the defendant merely has to show that defendant suffered some type of loss.[89]

It is important to note that in order to be relieved from his/her contractual obligation, the defendant does not have to prove that the plaintiff knowingly misrepresented a fact or that the plaintiff intended to deceive the defendant.[90]

[89]*See Jewish Ctr. of Sussex Cty. v. Whale*, *supra*, 86 *N.J.* at 626 ("Actual loss in the financial sense is not required before equity may act; equity looks not to the loss suffered by the victim but rather to the unfairness of allowing the perpetrator to retain a benefit unjustly conferred.")

[90]*See Jewish Ctr. of Sussex Cty. v. Whale*, *supra*, 86 *N.J.* at 625 (unlike legal fraud, the elements of scienter are not required to prove equitable fraud). However, a charge for a claim of legal fraud would have to include these elements.