

# CONTRACTS

## 700.00

### CONTRACTS

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#### INTRODUCTION

These instructions deal with a cause of action for breach of contract when the plaintiff is seeking money damages. A cause of action for breach of a construction contract and/or the concept of substantial performance will be covered by future instructions. Employment contract disputes (including Wrongful or Retaliatory Discharge; Intentional Interference with Prospective Economic Advantage; Civil Conspiracy, and Breach of Fiduciary Duty) will be covered by future instructions. Particularized areas of contract law, such as the Uniform Commercial Code, warranty, and those with equitable relief such as recession, reformation or specific performance are not specifically covered by these instructions. Modification of these instructions will be required by court and counsel to instruct the jury on those areas of contract law not intended to be covered by these instructions.

#### I. GENERAL CONTRACT LAW

A contract is a promise or set of promises between two or more competent parties, supported by legal consideration, to do or not to do a particular act and for the breach of which the law recognizes a remedy. *Steinberg v. Chicago Medical School*, 69 Ill.2d 320, 371 N.E.2d 634, 639; 13 Ill.Dec. 699 (1977); *Wagner Excello Foods v. Fearn International, Inc.*, 235 Ill.App.3d 224, 229; 601 N.E.2d 956, 176 Ill.Dec. 258 (1st Dist.1992); *White v. Village of Homewood*, 256 Ill.App.3d 354, 356-357; 628 N.E.2d 616, 618; 195 Ill.Dec. 152, 154 (1st Dist.1993).

The requirements of a valid contract are offer and acceptance, consideration, competent parties, legal purpose, and, if agreed to by the parties, a written agreement. *Lal v. Naffah*, 149 Ill.App.3d 245, 500 N.E.2d 699, 792; 102 Ill.Dec. 806 (1st Dist.1986).

A contract may be express or implied. Express contracts are those in which the terms of the contract are disclosed in the words or writings of the parties. *Bull v. Mitchell*, 114 Ill.App.3d 177, 448 N.E.2d 1016, 1023; 70 Ill.Dec. 138 (3d Dist.1983); *Lampe v. Swan Corp.*, 212 Ill.App.3d 414, 415; 571 N.E.2d 245, 246; 156 Ill.Dec. 658, 659 (5th Dist.1991). Implied contracts are those where the agreement is inferred from the acts or conduct or course of dealings of the parties. *In Re Estate of Brumshagen*, 27 Ill.App.2d 14, 169 N.E.2d 112, 116 (2d Dist.1960); *Dallis v. Don Cunningham and Associates*, 11 F.3d 713, 716 (7th Cir.1993).

Certain contracts are required by the Statute of Frauds to be in writing. [740 ILCS 80/1, 80/2-formerly Ill.Rev.Stat.1991, ch. 59, §0.01--which references: an agreement to pay the debt of

another; an agreement to sell an interest in land; an agreement made by the executor/administrator of an estate; an agreement to marry, plus an agreement that cannot be performed within one year from its making; and cf. 810 ILCS 5/2-201- that references an agreement for sale of goods for \$500.00 or more under the Uniform Commercial Code.] Although normally a question of law for the court, under certain circumstances factual issues relating to the applicability, or the satisfaction of the requirements, of the Statute of Frauds may be questions for the jury. *Gaffney v. McCarron*, 45 Ill.App.3d 944, 360 N.E.2d 508, 509; 4 Ill.Dec. 572 (1st Dist.1977); *American College of Surgeons v. Lumbermens Mutual Casualty Co.*, 142 Ill.App.3d 680, 491 N.E.2d 1179, 1191; 96 Ill.Dec. 719 (1st Dist.1986). Otherwise, an oral contract with definite and certain terms is enforceable. *Rybak v. Provenzale*, 181 Ill.App.3d 884, 537 N.E.2d 1321, 1325; 130 Ill.Dec. 852 (2d Dist.1989); *Kemp v. Bridgestone/Firestone, Inc.*, 253 Ill.App.3d 858, 865; 625 N.E.2d 905, 910; 192 Ill.Dec. 750, 755 (4th Dist.1993).

The burden of proving the existence of a contract rests on the party who seeks enforcement of the contract. *C. Iber & Sons, Inc. v. Grimmatt*, 108 Ill.App.2d 443, 248 N.E.2d 131, 133 (3d Dist.1969). The plaintiff in a breach of contract action also has the burden of proving all of the material terms of the contract. *Vandevier v. Mulay Plastics, Inc.*, 135 Ill.App.3d 787, 482 N.E.2d 377, 380, 90 Ill.Dec. 558 (1st Dist.1985); *DeHeer-Liss v. Friedman*, 227 Ill.App.3d 422, 427; 592 N.E.2d 13, 17; 169 Ill.Dec. 526, 530 (1st Dist.1991).

If there is no dispute as to the language used by the parties or the facts essential to a purported contract, the issue of the existence of a contract is a question of law to be decided by the court. *Bank of Benton v. Cogdill*, 118 Ill.App.3d 280, 454 N.E.2d 1120, 1125; 73 Ill.Dec. 871 (5th Dist.1983); *Ogle v. Hotto*, 273 Ill.App.3d 313, 320; 652 N.E.2d 815, 819; 210 Ill.Dec. 13, 17 (5th Dist.1995). If there is a dispute as to the language used or the facts essential to a purported contract, the issues of whether a contract exists, the terms of the contract, and the intent of the parties concerning the contract formation are questions of fact for the jury. *In re Estate of Kern*, 142 Ill.App.3d 506, 491 N.E.2d 1275, 1280; 96 Ill.Dec. 815 (1st Dist.1986); *Emmenegger Construction Co., Inc. v. King*, 103 Ill.App.3d 423, 431 N.E.2d 738, 742; 59 Ill.Dec. 237 (5th Dist.1982); *Mulliken v. Lewis*, 245 Ill.App.3d 512, 516; 615 N.E.2d 25, 28; 185 Ill.Dec. 730, 733 (4th Dist.1993).

## **II. CONTRACT FORMATION**

### **A. OFFER and ACCEPTANCE**

An offer is an act by one person (offeror) which gives to another (offeree) the power to accept the offer according to its terms. *McCarty v. Verson Allsteel Press Co.*, 89 Ill.App.3d 498, 411 N.E.2d 936, 942, 943; 44 Ill.Dec. 570 (1st Dist.1980); *In re Marriage of Bennett*, 225 Ill.App.3d 828, 832; 587 N.E.2d 577, 580; 167 Ill.Dec. 308, 311 (4th Dist.1992). The offer must be communicated to the offeree. *Carroll v. Preferred Risk Insurance Co.*, 34 Ill.2d 310, 215 N.E.2d 801, 803 (1966). In order to create a contract, the offer must be accepted. *Zinni v. Royal Lincoln-Mercury, Inc.*, 84 Ill.App.3d 1093, 406 N.E.2d 212, 214; 40 Ill.Dec. 511 (1st Dist.1980); *Mike Schlemmer, Inc. v. Pulizos*, 267 Ill.App.3d 393, 395; 642 N.E.2d 200, 201; 204 Ill.Dec. 738,

739 (5th Dist.1994). The acceptance must be communicated to the offeror. *Rosin v. First Bank of Oak Park*, 126 Ill.App.3d 230, 466 N.E.2d 1245, 1249; 81 Ill.Dec. 443 (1st Dist.1984); *Energy Erectors, Ltd. v. Industrial Com'n.*, 230 Ill.App.3d 158, 162; 595 N.E.2d 641, 644; 172 Ill.Dec. 280, 283 (5th Dist.1992); *Cowger v. Industrial Com'n.*, 728 N.E.2d 789, 793; 245 Ill.Dec. 707, 711 (5th Dist.2000). The acceptance must comply strictly with the terms of the offer. *Anand v. Marple*, 167 Ill.App.3d 918, 522 N.E.2d 281, 283; 118 Ill.Dec. 826 (3d Dist.1988). Mutuality of assent may be established by conduct indicating agreement with the terms of the offer, even though subjective agreement is lacking. *In re Marriage of Kloster*, 127 Ill.App.3d 583, 469 N.E.2d 381, 383; 82 Ill.Dec. 847 (2d Dist.1984). Objective manifestation of intent, when present, controls the determination of mutual assent. Only when there is no objective indicia of intent or there is ambiguity in the description of the subject matter of the bargain, must the subjective intent of the parties be considered. *Caporale v. Mar Les, Inc.*, 656 F.2d 242, 244 (7th Cir.1981); but see *Robbins v. Lynch*, 836 F.2d 330, 332 (7th Cir.1988).

In order to constitute a contract between the parties there must be mutual consent by the contracting parties on the essential terms and conditions of the subject matter of the contract. *Bank of Marion v. Robert Fritz, Inc.*, 9 Ill.App.3d 102, 291 N.E.2d 836, 839, 840 (5th Dist.1973), *aff'd*, 57 Ill.2d 120, 311 N.E.2d 138 (1974). This mutual consent may be gathered from either the language used by the parties or be as manifested by the words and acts of the parties. *Artoe v. Cap*, 140 Ill.App.3d 980, 489 N.E.2d 420, 423; 95 Ill.Dec. 199 (1st Dist.1986). The issue of whether a contract is ambiguous is a question of law, and once so determined, the trier of fact determines the intent of the parties. *A.W. Wendell & Sons, Inc. v. Qazi*, 254 Ill.App.3d 97, 105; 626 N.E.2d 280, 287; 193 Ill.Dec. 247, 254 (2d Dist.1993); *City of Northlake v. Illinois Fraternal Order of Police Labor Council, Lodge 18*, 333 Ill.App.3d 329, 336; 775 N.E.2d 1013, 1020; 266 Ill.Dec. 941, 948 (1st Dist.2002); and *Mayfair Construction Company v. Waveland Associates Phase 1 Limited Partnership*, 249 Ill.App.3d 188, 197; 619 N.E.2d 144, 151; 188 Ill.Dec. 780, 787 (1st Dist.1993).

## **B. CONSIDERATION**

Consideration is the promise or performance bargained for or given in exchange for the promise. Traditionally, any act or promise that is of benefit to one party or of detriment to another party may constitute sufficient consideration. *Libertyville Township v. Woodbury*, 121 Ill.App.3d 587, 460 N.E.2d 66, 71; 77 Ill.Dec. 270 (2d Dist.1984); *In re Marriage of Bennett*, 225 Ill.App.3d 828, 832; 587 N.E.2d 577, 580; 167 Ill.Dec. 308, 311 (4th Dist.1992). The essential element of consideration is a bargained-for exchange of promises or performances and may consist of a promise, act, forbearance, or the creation, modification, or destruction of a legal relation. *Martin v. Federal Life Insurance Co.*, 109 Ill.App.3d 596, 440 N.E.2d 998, 1002, 1003; 65 Ill.Dec. 143 (1st Dist.1982); *Aqua-Aerobic Systems, Inc. v. Ravitts*, 166 Ill.App.3d 168, 172; 520 N.E.2d 67, 70; 117 Ill.Dec. 77, 780 (2d Dist.1988). If the requirement of consideration (Illinois courts deal with consideration and refer to its "the technical meaning") is met, there is no additional requirement of a gain or benefit to the promisor, nor a loss or detriment to the promisee, nor equivalence in values exchanged, nor "mutuality of obligation." *Id.*; *Hamilton Bancshares, Inc. v. Leroy*, 131 Ill.App.3d 907, 476 N.E.2d 788, 791, 792; 87 Ill.Dec. 86 (4th

Dist.1985); *F.H. Prince & Co., Inc. v. Towers Financial Corp.*, 275 Ill.App.3d 792, 798; 656 N.E.2d 142, 147; 211 Ill.Dec. 950, 955 (1st Dist.1995). The issue of whether there is consideration is a question of law for the court. *O'Neill v. DeLaney*, 92 Ill.App.3d 292, 415 N.E.2d 1260, 1265; 47 Ill.Dec. 947 (1st Dist.1980); *Lesnik v.Estate of Lesnik*, 82 Ill.App.3d 1102, 403 N.E.2d 683, 687; 38 Ill.Dec. 452 (1st Dist.1980); *Johnson v. Johnson*, 244 Ill.App.3d 518, 528; 614 N.E.2d 348, 355; 185 Ill.Dec. 214, 221 (1st Dist.1993).

### **C. COMPETENCY**

All parties to a contract must be competent at the time the contract is made. A contract, other than for necessities, is voidable if one party lacks competency due to minority. *Iverson v. Scholl Inc.*, 136 Ill.App.3d 962, 483 N.E.2d 893, 897; 91 Ill.Dec. 407 (1st Dist.1985); *Sheller by Sheller v. Frank's Nursery & Crafts Inc.*, 957 F.Supp. 150, 153 (N.D.Ill.1997). A contract is also voidable if one party is incompetent due to insane delusions or other mental illness. *Eubanks v. Eubanks*, 360 Ill. 101; 195 N.E. 521, 526 (1935). The requirements necessary to render a party incompetent due to mental illness, include that the party must be incapable of comprehending the nature of the transaction and incapable of protecting his or her own interests plus there must be a showing of a degree of mental weakness affecting that person's ability to comprehend the nature of the transaction and to protect his or her interest. *Estate of Gruske*, 179 Ill.App.3d 675; 534 N.E.2d 692, 695; 128 Ill.Dec. 510 (3d Dist.1989). Persons of mature age are presumed to be mentally competent; their incompetence cannot be inferred merely from old age, physical illness, or defective memory. Impairment of the mind incident to old age and disease will not invalidate a transaction so long as the person in question was able to comprehend the nature of the transaction and to protect his or her interest. *Estate of Gruske*, 179 Ill.App.3d at 678, 534 N.E.2d at 695, 128 Ill.Dec. at 513.

### **D. LEGAL PURPOSE**

A contract designed to accomplish an unlawful purpose is illegal and void. *Merchandise National Bank of Chicago v. Kolber*, 50 Ill.App.3d 365, 365 N.E.2d 688, 692; 8 Ill.Dec. 450 (1st Dist.1977) (agreement to defraud); *American Buyers Club of Mt. Vernon, Illinois, Inc. v. Grayling*, 53 Ill.App.3d 611, 368 N.E.2d 1057, 1059; 11 Ill.Dec. 449 (5th Dist.1977) and *Swavely v. Freeway Ford Truck Sales, Inc.*, 298 Ill.App.3d 969, 976; 700 N.E.2d 181, 187; 233 Ill.Dec.80, 86 (1st Dist.1998) (contracts in violation of either federal or Illinois statute); *O'Sullivan v. Conrad*, 44 Ill.App.3d 752; 358 N.E.2d 926, 929; 3 Ill.Dec. 383 (5th Dist.1976) (contract in restraint of trade or profession). A contract is also void if it violates some public policy. *Laughlin v. France*, 241 Ill.App.3d 185, 607 N.E.2d 962, 971; 180 Ill.Dec. 662 (2d Dist.1993) (contract to make a will) *Corti v. Fleisher*, 93 Ill.App.3d 517, 417 N.E.2d 764, 775, 776; 49 Ill.Dec. 74 (1st Dist.1981) (agreement between attorney and former employer to transfer files without clients permission). Whether a contract is illegal or violates public policy is a question of law for the court. *Huszagh v. City of Oakbrook Terrace*, 41 Ill.2d 387, 243 N.E.2d 831, 833 (1968).

### **E. AFFIRMATIVE DEFENSES TO CONTRACT ENFORCEMENT**

Affirmative defenses such as lack of capacity, duress, fraud, misrepresentation, undue influence, and mistake of fact all relate to the issue of mutual consent and make a contract voidable. The burden of pleading and proving such defenses rests on the party asserting them. 735 ILCS 5/2-613(d) (1994); *Stoltze v. Stoltze*, 393 Ill. 433, 66 N.E.2d 424, 428 (1946).

## **1. DURESS**

Duress exists when a party is compelled to enter into a contract by the wrongful acts or threats of another under circumstances depriving that party of the exercise of his or her own free will. *First Security Bank of Glendale Heights v. Bawoll*, 120 Ill.App.3d 787, 458 N.E.2d 193, 198; 76 Ill.Dec. 54 (2d Dist.1983); *Enslin v. Village of Lombard*, 128 Ill.App.3d 531, 470 N.E.2d 1188, 1190; 83 Ill.Dec. 768 (2d Dist.1984); *Kathy O. v. Counseling and Family Services*, 107 Ill.App.3d 920, 438 N.E.2d 695, 700; 63 Ill.Dec. 764 (3d Dist.1982). Duress is a question of fact. *First Security Bank of Glendale Heights v. Bawoll*, 120 Ill.App.3d 787, 458 N.E.2d 193, 198; 76 Ill.Dec. 54 (2d Dist.1983). In certain circumstances, the duress may be exerted by one not a party to the dispute. Restatement (2d) of Contracts, §§175(2) and 177(3); *Regenold v. Baby Fold, Inc.*, 68 Ill.2d 419, 369 N.E.2d 858, 867, 868; 12 Ill.Dec. 151 (1977).

## **2. UNDUE INFLUENCE**

Undue influence exists when one person wrongfully exercises control over another so as to substitute that person's will for the will of the other. *Britton v. Esson*, 260 Ill. 273, 103 N.E. 218 (1913). In certain circumstances, the undue influence may be exerted by one not a party to the dispute. Restatement (2d) of Contracts §177(3). Undue influence cases involve the existence of a fiduciary relationship (arising as a matter of law or fact) when a special confidence is reposed in one who in equity and conscience is bound to act in good faith and with due regard to the interest of the other party. A fiduciary relationship exists as a matter of law between attorney and client, guardian and ward, principal and agent, and may exist in other cases where one party is heavily dependent upon the advice of another. *Carey Electric Contracting, Inc. v. First National Bank of Elgin*, 74 Ill.App.3d 233, 392 N.E.2d 759, 763; 30 Ill.Dec. 104 (2d Dist.1979); *Oil Exp. Nat., Inc. v. Burgstone*, 958 F.Supp. 366, 370 (N.D.Ill.1997). Once a fiduciary relationship has been established, there is a presumption that any transaction that benefits the dominant party at the expense of the other party is the result of undue influence. *Franciscan Sisters Health Care Corp. v. Dean*, 95 Ill.2d 452, 448 N.E.2d 872, 69 Ill.Dec. 960 (1983); *Brown v. Commercial National Bank of Peoria*, 42 Ill.2d 365, 247 N.E.2d 894, 896 (1969); *Turner v. Black*, 19 Ill.2d 296, 166 N.E.2d 588, 593 (1960); *Works v. McNeil*, 1 Ill.2d 47, 115 N.E.2d 320, 322 (1953).

## **3. FRAUD and MISREPRESENTATION**

Fraud may be a defense to contract enforcement at the option of the injured party. *Grane v. Grane*, 143 Ill.App.3d 979, 493 N.E.2d 1112, 1116; 98 Ill.Dec. 91 (2d Dist.1986). In order to establish fraud by clear and convincing evidence, there must be a showing of a misrepresentation of a material fact, made for the purpose of inducing the other party to act; it must be known by

the maker to be false, or be made in reckless disregard of its truth or falsity; but it must be reasonable to have believed it and it must be relied upon by the other party. *Central States Joint Board v. Continental Assurance Company*, 117 Ill.App.3d 600, 453 N.E.2d 932, 935; 73 Ill.Dec. 107 (1st Dist.1983); *Century Universal Enterprises, Inc. v. Triana Development Corp.*, 158 Ill.App.3d 182, 510 N.E.2d 1260, 1271; 110 Ill.Dec. 229 (2d Dist.1987); *Warner v. Lucas*, 185 Ill.App.3d 351, 353, 541 N.E.2d 705, 706; 133 Ill.Dec. 494, 495 (5th Dist.1989); *Regensburger v. China Adoption Consultants, Ltd.*, 138 F.3d 1201, 1207 (7th Cir. (Ill.) 1998); *Douglass v. Wones*, 120 Ill.App.3d 36, 458 N.E.2d 514, 521; 76 Ill.Dec. 114 (2d Dist.1983); *Gerill Corporation v. Jack L. Hargrove Builders*, 128 Ill.2d 179, 538 N.E.2d 530, 536; 131 Ill.Dec. 155 (1989); *City of Chicago v. Michigan Beach Housing Co-op.*, 297 Ill.App.3d 317, 323; 696 N.E.2d 804, 809; 231 Ill.Dec. 508, 513 (1st Dist.1998). *Buechin v. Ogden Chrysler-Plymouth, Inc.*, 159 Ill.App.3d 237, 511 N.E.2d 1330, 1335, 1336; 111 Ill.Dec. 35 (2d Dist.1987); *Chapman v. Hosek*, 131 Ill.App.3d 180, 475 N.E.2d 593, 598; 86 Ill.Dec. 379 (1st Dist.1985).

Usually there is no misrepresentation of a material fact when the representation relates to an expression of: (1) opinion [*Wilkinson v. Appleton*, 28 Ill.2d 184, 190 N.E.2d 727, 730 (1963)]; (2) a matter of law [*Hooker v. Midland Steel Co.*, 215 Ill. 444, 448; 74 N.E. 445 (1905)]; or (3) a statement of value [*Johnson v. Miller*, 299 Ill. 276, 132 N.E. 490, 492 (1921)].

An innocent misrepresentation of a material fact may serve as a defense to contract enforcement, provided the fact was relied upon in entering into the contract. *Puskar v. Hughes*, 179 Ill.App.3d 522, 533 N.E.2d 962, 966; 127 Ill.Dec. 880 (2d Dist.1989); *Geist v. Lehmann*, 19 Ill.App.3d 557, 312 N.E.2d 42, 45 (2d Dist.1974).

#### **4. MISTAKE**

Under certain circumstances mistake of fact can provide the basis for equitable relief, such as rescission or reformation of a contract. *Keller v. State Farm Ins. Co.*, 180 Ill.App.3d 539, 536 N.E.2d 194, 200; 129 Ill.Dec. 510 (5th Dist.1989); *Village of Oak Park v. Schwerdtner*, 288 Ill.App.3d 716, 718; 681 N.E.2d 586, 588; 224 Ill.Dec. 271, 273 (1st Dist.1997); *Wil-Fred's Inc. v. Metropolitan Sanitary Dist. of Greater Chicago*, 57 Ill.App.3d 16, 372 N.E.2d 946, 953; 14 Ill.Dec. 667 (1st Dist.1978); *People ex rel. Department of Public Works and Bldgs. v. South East Nat. Bank of Chicago*, 131 Ill.App.2d 238, 266 N.E.2d 778, 780 (1st Dist.1971).

**700.01 Breach of Contract--Terms of Contract Not in Dispute**

Plaintiff [plaintiff's name] claims [defendant's name] breached a contract between [the two parties] [them].

The terms of the contract are as follows:

[describe the contract]

[plaintiff's name] has the burden of proving [defendant's name] breached the contract in the following way(s):

[state here the plaintiff's contract claims]

[defendant's name] [denies][deny][he][she][it][they] breached the contract[.][and][claims and has the burden of proving] [he][she][it][they] did not have to perform under the contract because [he][she][it][they] has [have] the following affirmative defenses(s) which excuse(s) performance:

[identify here the affirmative defenses]

[plaintiff's name] denies [defendant's name] affirmative defense(s).

Affirmative defenses will be explained in further detail in the following instructions.

**Notes on Use**

This instruction is an introduction to the contract dispute in question. It may be given in all cases where there is no factual dispute as to the formation of a contract and no dispute as to its material terms.

The material terms to be inserted in the instruction are those terms agreed to by the parties or as construed by the court. The bracketed portions concerning defendant's affirmative defenses are only to be used when the defendant has asserted affirmative defenses. Contract cases often included multiple defendants who should all be added by name to this instruction.

The name of the affirmative defenses are inserted as they are identified in instructions 700.12 A-G as appropriate. It is not intended that those entire instructions be inserted in this instruction. The set of instructions must end with 700.18V.

**700.01V Questions for Verdict Form Breach of Contract Issues--(Contract Formation Not in Dispute)**

[--] Did [plaintiff's name] prove [he] [she] [it] performed [his] [her] [its] obligations under the contract?

YES \_\_\_ NO \_\_\_

OR

Did [plaintiff's name] prove [he][she][it] had a valid excuse for not performing the contract?

YES \_\_\_ NO \_\_\_

If your answer to question \_\_\_\_\_ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question \_\_\_\_\_ is YES, you should then answer question \_\_\_\_\_ .

[--] Did [plaintiff's name] prove [defendant's name] breached the contract by [his][her][its][their] failure to perform [his][her][its][their] obligations under the contract?

YES \_\_\_ NO \_\_\_

If your answer to question \_\_\_\_\_ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question \_\_\_\_\_ is YES, you should then answer question \_\_\_\_\_ .

[--] Did [plaintiff's name] prove [he][she][it] sustained damages resulting from the \_\_\_\_\_'s breach?

YES \_\_\_ NO \_\_\_

If your answer to question \_\_\_\_\_ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question \_\_\_\_\_ is YES, you should then answer question \_\_\_\_\_ .

[--] Did [defendant's name] prove [he][she][they][it] had an affirmative defense for not performing the contract?

YES \_\_\_ NO \_\_\_



If your answer to question \_\_\_\_\_ is YES, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question \_\_\_\_\_ is NO, you should then answer question \_\_\_\_\_ .

*Verdict Form Revised May 2016.*

### **Notes on Use**

Use this verdict form in conjunction with Instruction 700.01. It is expected that each question will have its own number and they will be arranged logically and numbered in sequence. The instruction assumes all of the itemized/numbered issues are contested, and, if an issue is not contested, it should be eliminated from this verdict form.

Question number 4 should only be used if the defendant has asserted affirmative defenses.

Each issue to be decided by the jury will have a question (found in those instructions with a "V" in the number) which must be included in the single verdict form to be constructed by Court and counsel. The logical sequence of these instructions should result in a complete general verdict. The Court may consider special interrogatories which are not in conflict with these instructions. The set of instructions must end with 700.18V. A sample case with sample instructions and verdict using these instructions can be found later in this chapter.

## 700.02 Breach of Contract Dispute as to Contract Formation

### INSTRUCTION 1

[Under Count] [plaintiff's name] claims [he] [she] [it] is entitled to recover contract damages from [defendant's name] for breach of contract. [plaintiff's name] has the burden of proving:

[1] The existence of [a] [an] [contract] [enforceable promise] between [plaintiff's name] and [defendant's name].

[2] Performance by [plaintiff's name] [.] [of] [a] [all] [the] [obligation(s)] [condition(s)].

[or the occurrence of a condition] [.] [A valid reason why [plaintiff's name] did not have to perform [a] [all] [the] condition(s)].

[3] [defendant's name]'s(s') failure to [adequately] perform [his] [her] [its] [their] obligations under the contract.

[4] Resulting damage to [plaintiff's name].

I will explain and define these legal terms elsewhere in these instructions.

If you find from your consideration of all the evidence that one or more of these elements has not been proven, you must find in favor of [defendant's name]. [If you find from your consideration of all the evidence that each of the above elements has been proven then you must find in favor of [plaintiff's name], and consider the amount of damages to be awarded.]

[If you find that each of the above elements has been proven, then you must consider [defendant's name] claim(s) of an affirmative defense(s)].

[defendant's name] [claims] [claim] and has [have] the burden of proving the following affirmative defense(s):

[identify the appropriate affirmative defenses]

[plaintiff's name] denies [defendant's name]'s affirmative defense(s).

If you find from your consideration of all the evidence that [plaintiff's name] has proven all the elements of [his] [her] [its] [their] case and [defendant's name] has not proven the affirmative defense, you must find in favor of [plaintiff's name], and consider the amount of damages to be awarded. If [defendant's name] [proves] [prove] [one of] [his] [her] [its] [their] affirmative defense(s), then [he] [she] [it] [they] [is] [are] relieved of [his] [her] [its] [their] obligations under the contract and you must find in favor of the [defendant's name].]

## Notes on Use

This is a combined issues and burden instruction. The instruction assumes all of the itemized/numbered issues are contested, and, if an issue is not contested, it should be eliminated from this instruction and the corresponding verdict form. It should be given with Instruction 700.03 and should only be used where there is a dispute as to contract formation. The bracketed material should only be used where there is evidence to support the affirmative defenses of the defendant. The affirmative defenses are inserted from instruction 700.12. The name of the affirmative defenses are inserted as they are identified in instructions 700.12 A-G as appropriate. It is not intended that those entire instructions be inserted in this instruction. If there is no affirmative defense, the instruction ends in the fourth paragraph which becomes one sentence long. Contract cases often include multiple defendants who should all be added by name to this instruction.

If this instruction is given, instructions 700.03, 700.10, 700.12 et seq. and the appropriate damages instruction should also be given.

Each issue to be decided by the jury will have a question (found in those instructions with a “V” in the number) which must be included in the single verdict form to be constructed by Court and counsel. The logical sequence of these instructions should result in a complete general verdict. The Court may consider special interrogatories which are not in conflict with these instructions. The set of instructions must end with 700.18V. A sample case with sample instructions and verdict using these instructions can be found at page 73.

**700.02V Questions for Verdict Form (to be used in conjunction with 700.02 Breach of Contract--Dispute as to Contract Formation)**

[--] Did [plaintiff's name] prove there was a contract [enforceable promise]?

YES \_\_\_ NO \_\_\_

If your answer to question \_\_\_\_\_ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question \_\_\_\_\_ is YES, you should then answer question \_\_\_\_\_.

[--] Did [plaintiff's name] prove [he][she][it] performed [his][her][its] obligations under the contract?

YES \_\_\_ NO \_\_\_

If your answer to question \_\_\_\_\_ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question \_\_\_\_\_ is YES, you should then answer question \_\_\_\_\_.

[--] Did [plaintiff's name] prove [he][she][it] had a valid excuse for not performing the contract?

YES \_\_\_ NO \_\_\_

If your answer to question \_\_\_\_\_ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question \_\_\_\_\_ is YES, you should then answer question \_\_\_\_\_.

[--] Did [plaintiff's name] prove [defendant's name] breached the contract by [his][her][its][their] failure to perform [his][her][its][their] obligations under the contract?

YES \_\_\_ NO \_\_\_

If your answer to question \_\_\_\_\_ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question \_\_\_\_\_ is YES, you should then answer \_\_\_\_\_.

[--] Did [plaintiff's name] prove [he][she][it] sustained damages resulting from the \_\_\_\_\_'s breach?

YES \_\_\_ NO \_\_\_

If your answer to question \_\_\_\_\_ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question \_\_\_\_\_ is YES, you should then answer question \_\_\_\_\_.

### **Notes on Use**

Use this in conjunction with Instruction 700.02. It is expected that each question will have its own number and they will be arranged logically and numbered in sequence. The instruction assumes all of the itemized/numbered issues are contested, and, if an issue is not contested, it should be eliminated from this verdict form.

Each issue to be decided by the jury will have a question (found in those instructions with a "V" in the number) which must be included in the single verdict form to be constructed by court and counsel. The logical sequence of these instructions should result in a complete general verdict. The court may consider special interrogatories which are not in conflict with these instructions. The set of instructions must end with 700.18V. A sample case with sample instructions and verdict using these instructions can be found later in this chapter.

### 700.03 Proof of Formation of Contract

As stated in Instruction 1, the first element of a contract claim [plaintiff's name] must prove is the existence of a contract. There is a contract if [plaintiff's name] proves there was an offer by one party, acceptance by the other party [parties] and consideration between the parties.

[plaintiff's name] claims the parties entered into a contract which had the following terms:

[state material terms of alleged contract]

To prove the existence of a contract between [among] [plaintiff's name] and [defendant's name], [plaintiff's name] has the burden of proving each of the following propositions:

First [plaintiff's name] must make or have made an offer to [name of offeree].

An “offer” is a communication of a willingness to enter into a contract. The communication must satisfy four conditions:

[1] the communication must have included a definite promise by the person making the communication, showing a willingness to make an agreement;

[2] the important and necessary terms must be definite;

[3] the terms must be communicated by words or conduct to the other party [parties]; and

[4] the communication must give the other party [parties] the power to agree to its terms.

Second [name of offeree] accepted the offer made by [name of offeror].

“Acceptance” of an offer is a communication of agreement to the terms of the offer. For the acceptance to be valid:

[1] [name of offeree] must agree to all of the material terms in the offer; and

[2] [name of offeree] must have communicated agreement to [name of offeror].

[according to the terms specified in the offer][by writing, spoken words, actions or any other conduct that would indicate agreement to a reasonable person] [performed the act(s) specified by the offer], or [performed the act(s) that the offer specified.]

Third the agreement included an exchange of promises or value, which is known as consideration. There is sufficient consideration if [plaintiff's name] can prove that something of value was bargained for by the parties and given by one party in exchange for the other's promise.

“Something of value” may consist of a promise, an act, a promise to act or not act, or any payment that was of benefit to one party or a disadvantage to the other.

You will address these issues in questions \_\_\_\_ and \_\_\_\_ on your verdict.

### **Notes on Use**

This instruction should be given when there is a dispute as the formation of the contract. The instruction assumes all of the itemized/numbered issues are contested, and, if an issue is not contested, it should be eliminated from this instruction and the corresponding verdict form. It should be given in conjunction with Instruction 700.02. The appropriate question number on the Verdict shall be filled in. Contract cases often include multiple defendants who should all be added by name to this instruction. The set of instructions must end with 700.18V.

**700.03V Questions for Verdict Form (Proof of Formation of Contract)**

[--] Did [plaintiff's name] prove there was an offer?

YES \_\_\_ NO \_\_\_

If your answer to question \_\_\_\_ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question \_\_\_\_ is YES, you should then answer question \_\_\_\_.

[--] Did [plaintiff's name] prove there was an acceptance?

YES \_\_\_ NO \_\_\_

If your answer to question \_\_\_\_ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question \_\_\_\_ is YES, you should then answer question \_\_\_\_.

[--] Did [plaintiff's name] prove there was consideration?

YES \_\_\_ NO \_\_\_

If your answer to question \_\_\_\_ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question \_\_\_\_ is YES, you should then answer question \_\_\_\_.

**Notes on Use**

Each issue to be decided by the jury will have a question (found in those instructions with a “V” in the number) which must be included in the single verdict form to be constructed by Court and counsel. The logical sequence of these instructions should result in a complete general verdict. The Court may consider special interrogatories which are not in conflict with these instructions. The set of instructions must end with 700.18V. A sample case with sample instructions and verdict using these instructions can be found at page 73.

This form may have to be modified if there are multiple defendants.

**Comment**

With these questions on the verdict, the jury makes factual findings as to whether or not the plaintiff's claims are proved. The logical sequence of these instructions should result in a complete general verdict. 75B AmJur2d, Trials, §1751,p. 518; Blacks Law Dictionary, 6th Ed., p. 1108. The verdict also satisfies, as nearly as possible, the requirement of 735 ILCS §5/2-1108 that the jury render a general verdict “unless the circumstances of the case require otherwise.” The Court may consider special interrogatories which are not in conflict with these instructions. The set of instructions must end with 700.18V.



The Illinois Supreme Court has recognized that any special verdict form which clearly indicates the finding of facts by the jury suffices as a verdict on which judgment may be entered. *Sangster v. Van Hecke*, 67 Ill.2d 96, 364 N.E.2d 79, 7 Ill.Dec. 92 (1977); *Western Springs Park Dist. v. Lawrence*, 343 Ill. 302, 175 N.E. 579 (1931).

In addition, the courts have approved verdict forms combining general and special findings as an appropriate means of reporting the jury's allocation of comparative fault. See Comment, IPI 45.07; *Hunter v. Sukkar*, 111 Ill.App.3d 169, 443 N.E.2d 774, 66 Ill.Dec. 848 (4th Dist. 1982); *Ruffiner v. Material Service Corp.*, 116 Ill.2d 53, 506 N.E.2d 581, 106 Ill.Dec. 781 (1987); *Levin v. Welsh Bros. Motor Service Inc.*, 164 Ill.App.3d 640, 518 N.E.2d 205, 115 Ill.Dec. 680 (1st Dist. 1987).

#### **700.04 Promissory Estoppel**

Plaintiff claims an enforceable promise existed between the parties because plaintiff justifiably relied on a promise made by defendant. Plaintiff has the burden of proving:

[1] [defendant's name] promised [plaintiff's name] that [he][she][it] would [insert terms alleged by plaintiff].

[2] [plaintiff's name] [state what plaintiff claims he did or refrained from doing based upon the promise].

[3] [defendant's name] expected [or reasonably should have expected] that the promise would cause [plaintiff's name] to [state what plaintiff claims he did or refrained from doing based upon the promise].

[4] [plaintiff's name] was damaged because [he][she][it] relied on [defendant's name]'s promise.

You will address these issues in questions \_\_\_\_, \_\_\_\_, \_\_\_\_, and \_\_\_\_ on your verdict.

#### **Notes on Use**

This instruction should only be given when there is a dispute as to the formation of the contract and there is no written contract. The instruction assumes all of the itemized/numbered issues are contested, and, if an issue is not contested, it should be eliminated from this instruction and the corresponding verdict forms. It should be given in conjunction with Instruction 700.02. The instruction should be used as an alternative to Instruction 700.03 in those cases in which the doctrine of promissory estoppel is used to establish an enforceable contract. If the case includes multiple defendants, they should all be added by name to this instruction, and the text of the instruction will have to be modified by Court and counsel. The set of instructions must end with 700.18V.

**700.04V Questions for Verdict Form (Promissory Estoppel)**

[--] Did [plaintiff's name] prove [defendant's name] promised [plaintiff's name] that [he][she][it] would [insert terms alleged by plaintiff]?

YES \_\_\_\_ NO \_\_\_\_

If your answer to question \_\_\_\_ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question \_\_\_\_ is YES, you should then answer question \_\_\_\_.

[--] Did [plaintiff's name] prove [state what plaintiff claims he did or refrained from doing based upon the promise] in reliance on [defendant's name]'s promise?

YES \_\_ NO \_\_

If your answer to question \_\_\_\_ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question \_\_\_\_ is YES, you should then answer question \_\_\_\_.

[--] Did [plaintiff's name] prove [defendant's name] expected [or reasonably should have expected] that the promise would cause [plaintiff's name] to [state what plaintiff claims he did or refrained from doing based upon the promise]?

YES \_\_\_\_ NO \_\_\_\_

If your answer to question \_\_\_\_ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question \_\_\_\_ is YES, you should then answer question \_\_\_\_.

[--] Did [plaintiff's name] prove [he][she][it] was damaged because [he][she][it] relied on [defendant's name]'s promise?

YES \_\_ NO \_\_

If your answer to question \_\_\_\_ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question \_\_\_\_ is YES, you should then answer question \_\_\_\_.

**Notes on Use**

Each issue to be decided by the jury will have a question (found in those instructions with a “V” in the number) which must be included in the single verdict form to be constructed by Court and counsel. The logical sequence of these instructions should result in a complete general verdict. The Court may consider special interrogatories which are not in conflict with these instructions. The set of instructions must end with 700.18V. A sample case with sample instructions and verdict using these instructions can be found at page 73.

This form may have to be modified if there are multiple defendants.

**700.05 Contract--Validity of Oral and Partly Oral Contracts**

[An oral][A partly oral and partly written] contract is as valid and enforceable as a written contract.

**Notes on Use**

This instruction may be used in all cases where there is evidence of an oral or a partly oral and partly written agreement, unless there is a factual issue for determination by the jury relevant to a defense based on the Statute of Frauds.

## **700.06 Contracts--Several Documents**

A written contract may consist of more than one document.

### **Notes on Use**

This instruction should be used only when two or more writings constitute the contract at issue in the case.

### **700.07 Performance by Plaintiff**

As stated in Instruction 1, as the second element of a contract claim, [plaintiff's name] must prove is [he][she][it] [performed all obligation(s)] [condition(s)] [the occurrence of a condition] required of [him][her][it] under the contract. To recover on [his][her][its] claim, [plaintiff's name] must prove [he][she][it] did what the contract required [him][her][it] to do or [had a valid excuse for not doing so], as follows:

[state what the plaintiff claims he/she performed under the contract or state the valid excuse for not performing]

You will address this issue in question \_\_\_\_ on your verdict.

#### **Notes on Use**

This instruction defines the second element that the plaintiff must prove in order to recover on a breach of contract claim: whether the plaintiff performed his/her/its obligations under the contract. It is inclusive of the holdings in *Thilman & Company v. Esposito*, 87 Ill.App. 289, 296; 408 N.E.2d 1014, 1020; 42 Ill.Dec. 305, 311 (1st Dist.1980) and assumes pleading compliance as contained in Illinois Supreme Court Rule 133(c). This instruction must be given in conjunction with 700.02, and the alternative 700.08 and 700.08V should be used when the evidence supports same. If the case includes multiple defendants they should all be added by name to this instruction, and the text of the instruction will have to be modified by court and Counsel. The set of instructions must end with 700.18V.

## **B700.07 Contract--Excuse of Performance--Prior Material Breach**

[party's name] failure to keep [his][her][its] promise is excused, if [opposing party's name] committed a prior, material breach of contract.

When I use the phrase “material breach,” I mean the failure to perform a contractual duty that is of such importance that the parties would not have entered into the contract without it. The test is whether the breach is so substantial and fundamental as to defeat the objectives of the parties in making the agreement, or whether the failure to perform renders performance of the rest of the contract different in substance from the original agreement. The breach must be so important as to justify the injured party in treating the whole transaction as ended.

To excuse [party's name] failure to perform, [party's name] must prove that [opposing party's name] committed a prior material breach of contract in one or more of the following respects:

[State what the party claims was a material breach of the contract by opposing party]

You will address this issue in question \_\_\_\_\_ on your verdict.

*Instruction, Notes, and Comment approved October 2007.*

### **Notes on Use**

This instruction should be given when a party claims that a prior material breach of contract excused his performance. It is given with IPI 700.02, since the contract at issue may be previously materially breached, and is given as an alternative to IPI 700.07 on Plaintiff's performance. Contract cases often include multiple defendants who should all be added by name to this instruction. The set of instructions must end with IPI 700.18V.

### **Comment**

The determination of whether a breach is material depends upon consideration of several factors, including the intent of the parties with respect to the disputed provision and the equitable factors and circumstances surrounding the breach of the provision. *Maywood Proviso St. Bank & Trust Co.*, 252 Ill. App. 3d 164, 192 Ill. Dec. 123 (1st Dist. 1993); *Restatement (Second) of Contracts* §241 (1981); *see Arnhold v. Ocean Atlantic Woodland Corp.*, 284 F.3d 693 (7th Cir. 2002).

“A breach is material where the covenant breached is one of such importance that the contract would not have been entered into without it.” *Wolfram P'ship, Ltd. v. LaSalle Nat'l Bank*, 328 Ill.App.3d 207 (1st Dist. 2002). “Regardless of the language used by the parties, a breach, to justify a premature termination or forfeiture of a lease agreement, must have been

material or substantial.” The question of “whether a breach is material, thereby discharging the other party's duty to perform, is based on the inherent justice of the matter. The determination of ‘materiality’ is a complicated question of fact, involving an inquiry into such matters as whether the breach worked to defeat the bargained-for objective of the parties or caused disproportionate prejudice to the non-breaching party, whether custom and usage considers such a breach to be material, and whether the allowance of reciprocal nonperformance by the non-breaching party will result in his accrual of the unreasonable or unfair advantage.” *Kel-Keef Enters. Inc. v. Quality Components Corp.*, 316 Ill.App.3d 998, 250 Ill.Dec. 308 (1st Dist. 2000).

Intent of the parties is determined by the language used and the circumstances surrounding the agreement. *Anest v. Bailey*, 198 Ill.App.3d 740, 144 Ill.Dec. 813 (2nd Dist. 1990). The totality of the circumstances should include a determination of the proportionality of prejudice and comparison of the relative burdens that each side would suffer if the contract were terminated. *McBride v. Pennant Supply Corp.*, 253 Ill.App.3d 363, 191 Ill.Dec. 457 (5th Dist. 1993); *Chariot Holdings Ltd. v. Eastmet Corp.*, 153 Ill.App. 3d 50, 163 Ill.Dec. 285 (1st Dist. 1987).

A party is excused from performing his promises and may terminate or rescind a contract if the other party has committed a prior, material breach of contract. *Stanley Gudyka Sales Co. v. Lacy Forest Prods. Co.*, 915 F. 2d 273 (7th Cir. 1990); *Borys v. Rudd*, 207 Ill.App.3d 610, 566 N.E.2d 310, 152 Ill.Dec. 623 (1st Dist. 1990). For a party to terminate or rescind a contract, the non-performance or breach by the other party must be substantial or material. The test is whether the breach is so substantial and fundamental as to defeat the objectives of the parties in making the agreement, or whether the failure to perform renders performance of the rest of the contract different in substance from the original agreement. *Wright v. Douglas Furniture Corp.*, 98 Ill. App. 2d 137, 143, 240 N.E.2d 259, 262 (1968). The breach must be so material and important as to justify the injured party in treating the whole transaction as at an end. *C. G. Caster Co. v. Regan*, 88 Ill. App. 3d 280, 285, 410 N.E.2d 422, 426 (1980), quoting *A. Corbin, Contracts* §946, at 925 (1952); *First Nat'l Bank of Evergreen Park v. Chrysler Realty Corp.*, 168 Ill. App. 3d 784, 522 N.E.2d 1298, 119 Ill. Dec. 439 (1988); *Susman v. Cypress Venture*, 187 Ill. App. 3d 312, 316, 543 N.E.2d 184, 187, 134 Ill. Dec. 901 (1989). A failure to perform is a material breach where the covenant not performed is of such importance that the contract would not have been made without it. *Haisma v. Edgar*, 218 Ill. App. 3d 78, 86, 578 N.E.2d 163, 168, 161 Ill. Dec. 36 (1991). The Illinois Supreme Court has applied the doctrine to commercial leases. *Univ. Club v Deakin*, 265 Ill. 257, 260-61, 106 N.E. 790, 791 (1914). “Under the material breach doctrine, ‘a party to a contract is discharged from duty to perform where there is a material breach of the contract by the other party.’” *U.S. Fid. & Guar. Co. v. Old Orchard Ltd. P'ship*, 284 Ill. App. 3d 765, 220 Ill. Dec. 59 (1st Dist. 1996).



**700.07V Question for Verdict Form (Performance by Plaintiff)**

[--] Did [plaintiff's name] prove [he][she][it] performed [his][her][its] obligations under the contract?

YES \_\_ NO \_\_

If your answer to question \_\_\_\_ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question \_\_\_\_ is YES, you should then answer question \_\_\_\_.

**Notes on Use**

Each issue to be decided by the jury will have a question (found in those instructions with a “V” in the number) which must be included in the single verdict form to be constructed by Court and counsel. The logical sequence of these instructions should result in a complete general verdict. The Court may consider special interrogatories which are not in conflict with these instructions. The set of instructions must end with 700.18V. A sample case with sample instructions and verdict using these instructions can be found at page 73.

This form may have to be modified if there are multiple defendants.

**B700.07V Question for Verdict Form (Excuse of Performance--Prior Material Breach)**

[--] Did [defendant's name] prove that [plaintiff's name] committed a prior material breach of contract?

YES \_\_\_ NO \_\_\_

If your answer to question \_\_\_\_\_ is YES, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict Form B at the end of this verdict and sign it. If your answer to question \_\_\_\_\_ is NO, you should then answer question \_\_\_\_\_.

**Issue Raised by Plaintiff in Defense to Counterclaim**

[--] Did [plaintiff's name] prove that [defendant's name] committed a prior material breach of contract?

YES \_\_\_ NO \_\_\_

If your answer to question \_\_\_\_\_ is YES, then your deliberations on the counterclaim are complete. You should disregard the remaining numbered questions, and go to Verdict Form \_\_\_\_\_ at the end of this verdict and sign it. If your answer to question \_\_\_\_\_ is NO, you should then answer question \_\_\_\_\_.

*Verdict Form, Notes on Use and Comment Revised May, 2016.*

**Notes on Use**

Use this verdict form if one party claims it is excused from performing its obligations under the contract due to the other party's prior material breach of contract, or where it is claimed the other party is prevented from enforcing the terms of the contract due to that party's prior material breach. This verdict form should be given with B700.07.

It is expected that each question will have its own number and they will be arranged logically and numbered in sequence. Each issue to be decided by the jury will have a question (found in those instructions with a "V" in the number) which must be included in the single verdict form to be constructed by court and counsel. The logical sequence of these instructions should result in a complete general verdict. The set of instructions must end with IPI 700.18V.

**Comment**

In *Goldstein v. Lustig*, 154 Ill. App. 3d 595, 507 N.E.2d 164, 168, 107 Ill. Dec. 500, 504 (1<sup>st</sup> Dist. 1987), the court held that a party who materially breaches a contract cannot take advantage of the terms of the contract that benefit that party, nor can that party recover damages

from the other party to the contract, citing *Robinhorne Constr. Corp. v. Snyder*, 113 Ill. App. 2d 288, 297, 251 N.E.2d 641, 645 (4<sup>th</sup> Dist. 1969) *affirmed* 47 Ill.2d 349, 265 N.E.2d 670 (1970). Subsequent appellate court decisions have applied this doctrine. *James v. Lifeline Mobile Medics*, 341 Ill. App. 3d 451, 792 N.E.2d 461, 275 Ill. Dec.230 (4<sup>th</sup> Dist. 2003), *Dubey v. Public Storage, Inc.*, 395 Ill. App. 342, 918 N.E.2d 265, 335 Ill. Dec. 181 (1<sup>st</sup> Dist. 2009) and *MHM Services, Inc. v. Assurance Co. of America*, 2012 IL App. (1<sup>st</sup>) 112171, 975 N.E.2d 1139, 363 Ill. Dec. 830.

In certain factual settings, each party may claim that the other party has committed a material breach of contract. If the jury finds that both parties are in default under the contract, neither can recover. *Ross v. Danter Associates, Inc.*, 102 Ill. App. 2d 354, 242 N.E.2d 330, 333 (3d Dist. 1968), citing *Cincinnati, Indianapolis & Western Ry. Co. v. Baker*, 130 Ill. App. 414 and 17 Am. Jr. 2d Contracts, Sec. 358, p. 797.

## **700.08 Anticipatory Breach of Contract by Repudiation**

[plaintiff's name] failure to keep [his][her][its] promise is excused, if [defendant's name] indicated by [a] definite and unequivocal statement(s) or conduct before the performance was due [he][she][it] would not keep [his][her][its] promise when it became time to do so.

[plaintiff's name] claims [he] [she] [it] had a valid excuse and did not have to [pay, perform, etc.] because [defendant's name] indicated that [he] [she] [it] [they] would not keep [his][her][its][their] promise.

To excuse [plaintiff's name] failure to perform, [plaintiff's name] must prove [defendant's name]'s indication that [he][she][it][they] would not keep [his][her][its][their] promise before the time the performance was due was definite and unequivocal either from [defendant's name] statements or conduct.

You will address these issues in question \_\_\_\_ on your verdict.

### **Notes on Use**

This instruction should be given when a party claims an anticipatory breach of contract as a valid excuse to his performance. It is given with 700.02, since the contract at issue may be anticipatorily breached, and is given as an alternative to 700.07 on Plaintiff's performance. Contract cases often include multiple defendants who should all be added by name to this instruction, and Court and counsel will need to further modify the text if the defendant claims the plaintiff repudiated. The set of instructions must end with 700.18V.

### **700.08V Questions for Verdict Form (Anticipatory Breach of Contract by Repudiation)**

[--] Did [plaintiff's name] prove [defendant's name] indicated to [plaintiff's name] in [a] definite and unequivocal statement(s) or conduct [he] [she] [it][they] would not keep [his][her][its][their] promise before [defendant's name]'s performance was due?

YES \_\_\_ NO \_\_\_

If your answer to question \_\_\_\_ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question \_\_\_\_ is YES, you should then answer question \_\_\_\_.

#### **Notes on Use**

It is expected that each question will have its own number and they will be arranged logically and numbered in sequence. Each issue to be decided by the jury will have a question (found in those instructions with a "V" in the number) which must be included in the single verdict form to be constructed by Court and counsel. The logical sequence of these instructions should result in a complete general verdict. The Court may consider special interrogatories which are not in conflict with these instructions. The set of instructions must end with 700.18V. A sample case with sample instructions and verdict using these instructions can be found at page 73.

This form may have to be modified if there are multiple defendants, and will need modification if the defendant claims the plaintiff repudiated.

### **700.09 Existence &/or Failure of Condition Precedent--Conditional Promises**

As stated in Instruction 1, the third element [plaintiff's name] must prove is [defendant's name] failure to perform the obligations under the contract. In this case [defendant's name] claims [claim] the parties agreed that [defendant's name] did not have to keep [his][her][its][their] promise unless [insert condition].

[plaintiff's name] has the burden of proving this condition was not part of the contract.

If you find this condition was part of the contract, you must then decide whether the [insert condition] occurred. If [insert condition] did not occur, then [plaintiff's name] cannot recover.

OR

[In order to recover, [plaintiff's name] claims and has the burden to prove both that the condition occurred and [defendant's name] did not do what the contract required [him] [her] [it] [them] to do.]

You will address these issues on questions \_\_\_\_, \_\_\_\_ on your verdict.

#### **Notes on Use**

This instruction should be given whenever the existence and/or failure of a condition precedent is at issue. The instruction assumes all of the itemized/numbered issues are contested, and, if an issue is not contested, it should be eliminated from this instruction and the corresponding verdict form. It is inclusive of the holdings in *Thilman & Company v. Esposito*, 87 Ill.App. 289, 296; 408 N.E.2d 1014, 1020; 42 Ill.Dec. 305, 311 (1st Dist. 1980) and assumes pleading compliance as contained in Illinois Supreme Court Rule 133(c). It should be used in conjunction with Instruction 700.10. It may be an issue in conjunction with Instructions 700.02. Contract cases often include multiple defendants who should all be added by name to this instruction.

**700.09V Questions for Verdict Form (Existence and/or Failure of Condition Precedent)**

[--] Did [plaintiff's name] prove the condition claimed by [defendant's name] was not a part of the contract?

YES \_\_\_ NO \_\_\_

If your answer to question \_\_\_\_ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question \_\_\_\_ is YES, you should then answer question \_\_\_\_.

[--] Did [plaintiff's name] prove the condition to the contract occurred?

YES \_\_\_ NO \_\_\_

If your answer to question \_\_\_\_ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question \_\_\_\_ is YES, you should then answer question \_\_\_\_.

**Notes on Use**

The instruction assumes all of the itemized/numbered issues are contested, and, if an issue is not contested, it should be eliminated from this instruction and the corresponding verdict form. Each issue to be decided by the jury will have a question (found in those instructions with a “V” in the number) which must be included in the single verdict form to be constructed by Court and counsel. The logical sequence of these instructions should result in a complete general verdict. The Court may consider special interrogatories which are not in conflict with these instructions. The set of instructions must end with 700.18V. A sample case with sample instructions and verdict using these instructions can be found at page 73.

## **700.10 Breach of Contract--No Dispute as to Contract Formation**

Generally, if a party fails to perform its obligations according to the terms of the contract, the party has breached the contract. You must decide whether [defendant's name] failed to do what [he][she][it][they] was [were] required to do under the contract.

As stated in Instruction 1, the third element of a contract claim which [plaintiff's name] must prove is [defendant's name] breach of the contract. To recover on [his][her][its] claim, [plaintiff's name] has the burden to prove the defendant(s) failed to do something the contract required [him][her][it][them] to do. [plaintiff's name] claims and has the burden of proving that under the contract [defendant's name] was [were] required to do [or not do] the following:

[state what the plaintiff claims to be the defendant's breach]

[[defendant's name] claims [claim] [he][she][it][they] did not breach the contract because the parties agreed [defendant's name] did not have to keep [his][her][its][their] promise unless [insert condition][or state obligation]. [defendant's name] also claims [claim] [plaintiff's name] failed to [insert condition] [or state obligation]. The law regarding conditions will be explained in detail in a later instruction.]

You will address these issues in question \_\_\_\_ on your verdict.

### **Notes on Use**

This instruction defines the third element that the plaintiff must prove in order to recover on a breach of contract claim--whether the defendant breached the contract by its failure to perform his/her/its/their obligations under the contract. The instruction assumes all of the itemized/numbered issues are contested, and, if an issue is not contested it should be eliminated from this instruction and the corresponding verdict form. This instruction must be given in conjunction with 700.01. Contract cases often include multiple defendants who should all be added by name to this instruction.

The next to last paragraph regarding conditions precedent must be given where a defendant claims the existence and failure of a condition precedent. If this is used, instruction 700.09 must also be given.



**700.10V Questions for Verdict Form (Breach of Contract)**

[--] Did [plaintiff's name] prove [defendant's name] was [were] required to [state relevant contract term] under the contract?

YES \_\_ NO \_\_

If your answer to question \_\_\_\_ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question \_\_\_\_ is YES, you should then answer question \_\_\_\_.

[--] Did [plaintiff's name] prove there was no failure of a condition?

YES \_\_ NO \_\_

If your answer to question \_\_\_\_ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question \_\_\_\_ is YES, you should then answer question \_\_\_\_.

[--] Did [plaintiff's name] prove [defendant's name] breached the contract by failing to [state plaintiff's allegations]?

YES \_\_ NO \_\_

If your answer to question \_\_\_\_ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question \_\_\_\_ is YES, you should then answer question \_\_\_\_.

**Notes on Use**

The instruction assumes all of the itemized/numbered issues are contested, and, if an issue is not contested, it should be eliminated from this verdict form. These questions for the verdict form should be used in conjunction with other questions found in 700.30VA or 700.30VB, whichever is appropriate. The set of instructions must end with 700.18V.

### **700.11 Damages to Plaintiff as a Result of Defendant's Breach**

You must decide whether [plaintiff's name] sustained damages as a result of [defendant's name] breach of the contract.

As stated in Instruction 1, the fourth element of a contract claim is damages. [plaintiff's name] must prove [he][she][it] sustained damage resulting from [defendant's name]'s breach. To recover on [his][her][its] claim, [plaintiff's name] must prove that because of [defendant's name] failure to perform the contract, [he][she][it] has [been damaged][not received] the (benefits) (payment) (performance) to which [he][she][it] is entitled under the contract.

[defendant's name] denies [deny] [plaintiff's name] sustained damage [to the extent claimed.]

You will address the issues in question \_\_\_\_ on your verdict.

#### **Notes on Use**

This instruction defines the fourth element that the plaintiff must prove in order to recover on a breach of contract claim--that the defendant's breach caused damage to the plaintiff. This instruction must be given in conjunction with 700.02. Contract cases often include multiple defendants who should all be added by name to this instruction. The set of instructions must end with 700.18V.

**700.11V Question for Verdict Form (for 700.11 Damages to Plaintiff as a Result of Defendant's Breach)**

1. Did [plaintiff's name] prove [he][she][it] sustained damage as a result of [defendant's name]'s (s') breach of the contract?

YES \_\_ NO \_\_

If your answer to question \_\_\_\_ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question \_\_\_\_ is YES, you should then answer question \_\_\_\_.

**Notes on Use**

These questions for the verdict form should be used in conjunction with other questions found in form 700.01V, whichever is appropriate.

The set of instructions must end with 700.18V.

## **700.12 Affirmative Defenses to Contract Enforcement**

The law recognizes that sometimes, even though [plaintiff's name] has met [his][her][its] burden of proving that a contract exists, facts or circumstances may exist which would excuse [defendant's name] from being liable to [plaintiff's name]. These facts or circumstances are called affirmative defenses.

In this lawsuit, [defendant's name] has [have] raised and has [have] the burden to prove the following affirmative defense(s):

[insert whichever affirmative defense(s) 700.12A-700.12G is applicable]

**700.12A [1] Incompetence:**

The law provides if [defendant's name] is not competent because [he][she][they][is][are] a minor(s) or because [he][she][they] [is] [are] mentally ill or has insane delusions, then the contract cannot be enforced against [him][her][them].

[defendant's name] [claims] [claim] and [has] [have] the burden of proving at the time [he][she][they] entered into the contract, [he][she][they] did not have the mental competence or capacity to understand the nature and consequences of the agreement.

In order to be excused from performing the contract, [defendant's name] [has][have]the burden of proving one of the following:

at the time the contract was made [defendant's name] was under 18 years old.

OR

at the time the contract was made, [defendant's name] lacked the mental competence or capacity to understand the nature and consequences of the agreement and was unable to protect [his][her][their] own interests.

Plaintiff denies defendant's claim of incompetence.

You will address these issues in question \_\_\_\_ on your verdict.

**700.12B [2] Duress:**

The law provides that if one party forces another party to enter into a contract by wrongful acts or threats that deprive the other party of his own free will, the contract cannot be enforced against the forced party.

[defendant's name] [claims] [claim] and [has] [have] the burden of proving [he][she][it][they] was [were] compelled to enter into the contract by a wrongful act or threat that deprived [him][her][it][them] of the exercise of free will in entering into the contract.

Duress is intentional action by [plaintiff's name] [or a third party] presenting such a serious threat of loss or injury to [defendant's name] that [defendant's name] felt that [he][she][it][they] had no reasonable alternative or choice but to enter the contract.

[defendant's name] [claims][claim] and [has][have] the burden of proving that [he][she][it][they] entered into the contract only because [plaintiff's name] [third party] subjected [him][her][it] [them] to duress as follows:

[state the alleged incidents of duress]

In order to prove a defense based upon duress, [defendant's name] must prove both of the following by clear and convincing evidence:

[1] [he][she][it][they] entered into the contract only because [plaintiff's name] [third party] subjected [him][her][it][them] to the circumstances listed above; and

[2] the circumstances left [him][her][it][them] with no reasonable choice but to enter the contract.

Plaintiff denies defendant's claim of duress.

You will address these issues in question \_\_\_\_ on your verdict.

**700.12C [3] Misrepresentation:**

[WITHDRAWN]

IPI 700.12C is withdrawn. If fraudulent misrepresentation is an issue in the case, use IPI 700.12D.

[4] Fraud.

*Instruction withdrawn April 2016.*

**700.12D [4] Fraud:**

**Alternative 1 - Clear and Convincing Evidence Only as to Certain Elements**

Generally, the law provides if one party fraudulently by misrepresentation of a material fact convinced another to enter into a contract, then that party cannot enforce that contract against the other.

\_\_\_\_\_[Defendant's name]\_\_\_\_\_ [claims] [claim] and [has] [have] the burden of proving each of the following propositions of fraud by clear and convincing evidence:

First, [plaintiff's name]\_\_\_\_\_ made the following statement[s]:

*[Here insert or paraphrase the allegedly fraudulent statement or statements that the plaintiff is claimed to have made.]*

Second, the statement[s] [was a] [were] false statement[s] of material fact[s].

Third, [the plaintiff [knew [or] [believed] the statement[s] [was] [were] false] [or] [the plaintiff made the statement[s] in reckless disregard of whether [it was] [they were] true or false].

The defendant has the burden of proving that each of the following propositions is more probably true than not true.

Fourth, the plaintiff made the statement[s] with the intent to induce the defendant to enter into the contract;

Fifth, the defendant reasonably believed the statement[s] and [acted] in justifiable reliance on the truth of the statement[s];

Sixth, the defendant entered into the contract based upon the defendant's reliance on the statements made by the plaintiff.

Plaintiff denies defendant's claim of fraud.

You will address these issues in question \_\_\_\_\_ on your verdict.

**Alternative 2 - Clear and Convincing Evidence on all Elements**

Generally, the law provides if one party fraudulently by misrepresentation of material facts convinced another to enter into the contract, then that party cannot enforce the contract against the other.

\_\_[defendant's name]\_\_\_\_\_ [claims] [claim] and [has] [have] the burden of proving each of the following propositions of fraud by clear and convincing evidence:

First, \_\_[plaintiff's name]\_\_\_\_\_ made the following statement[s]:



*[Here insert or paraphrase the allegedly fraudulent statement or statements that the plaintiff is claimed to have made.]*

Second, the statement[s] [was a] [were] false statement[s] of material fact[s].

Third, [the plaintiff [knew] [or] [believed] the statement[s] [was] [were] false [or] [the plaintiff made the statement[s] in reckless disregard of whether [it was] [they were] true or false].

Fourth, the plaintiff made the statement[s] with the intent to induce the defendant to enter into the contract;

Fifth, the defendant reasonably believed the statement[s] and [acted] in justifiable reliance on the truth of the statement[s];

Sixth, the defendant entered into the contract based upon the defendant's reliance on the statements made by the plaintiff.

Plaintiff denies defendant's claim of fraud.

You will address these issues in question \_\_\_\_\_ on your verdict.

*Instruction revised April 2016. Notes on Use and Comment created April 2016.*

### **Notes on Use**

Either Alternative 1 or Alternative 2 should be given when the defendant has raised fraud as an affirmative defense.

### **Comment**

See the comment to IPI 800.02A and the cases cited there. Alternative 1 should be used in those cases where the trial court rules that only the first, second and third proposition of IPI 700.12D must be proved by clear and convincing evidence and the remaining elements require only proof by a preponderance of the evidence.

Alternative 2 should be used in those cases where the trial court rules that each element of this affirmative defense of fraud must be proved by clear and convincing evidence.

**700.12E [5] Frustration of Purpose; Impossibility of Performance:**

The law excuses [defendant's name] ability to keep [his] [her] [its] [their] promise [if the purpose of the contract was frustrated] [if the promise was impossible to perform].

[defendant's name] [claims] [claim] and [has] [have] the burden of proving [his] [her] [its] [their] failure to keep [his] [her] [its] [their] promise was excused because [it was “impossible” to perform] [it was frustrated by a change in circumstances that destroyed the reason for the contract]

[defendant's name] [claims] [claim] and [has] [have] the burden to prove that [his] [her] [its] [their] performance [became impossible as follows: (state alleged circumstances of impossibility)] [was frustrated as follows (state how the value was frustrated)]. [plaintiff's name] denies this.

In order to prove a defense based upon [frustration of purpose] [impossibility of performance], [defendant's name] [has] [have] the burden of proving all three of the following facts:

- [1] The circumstances described above occurred;
- [2] The parties reasonably did not foresee the circumstances when they made the contract;
- [3] [The circumstances made it impossible for [defendant's name] to keep [his] [her] [its] [their] promise [or] [the circumstances totally or nearly totally destroyed the benefits which [defendant's name] expected to receive from the contract.]

Plaintiff denies defendant's claim of [impossibility of performance] [or] [frustration of purpose].

You will address these issues in question \_\_\_\_ on your verdict.

## 700.12F [6] Undue Influence--Fiduciary Relationship Claimed:

The law provides if [defendant's name] entered into the contract only because a party subjected [defendant's name] to undue influence, the [plaintiff's name] cannot enforce the contract against [defendant's name].

[defendant's name] [claims][claim] and [has][have] the burden of proving by clear and convincing evidence there was a fiduciary relationship between the parties and the agreement upon which [plaintiff's name] relies is void because of undue influence by [plaintiff's name] [and][or][a third party].

In order to show a fiduciary relationship, [defendant's name] [has][have] the burden of proving [he][she][it][they] placed such trust and confidence in [plaintiff's name] that [plaintiff's name] opinion could overcome [defendant's name]'s own free will. To show a fiduciary relationship, [defendant's name] [has][have] the burden of proving by clear and convincing evidence all three of the of the following:

1. [defendant's name] placed trust and confidence in [plaintiff's name] [or third party]
2. [plaintiff's name] [or third party] actually or impliedly agreed to exercise [his][her][its] judgment on behalf of [defendant's name]
3. [plaintiff's name] [or third party] gained influence and superiority over [defendant's name]

If [defendant's name] proves [prove] a fiduciary relationship, [plaintiff's name] has the burden of proving the following by clear and convincing evidence in order to enforce the contract:

- (1) the contract was fair; and
- (2) the contract did not result from any undue influence over [defendant's name]; and
- (3) [defendant's name] had independent advice.

Undue influence is more than just advice or persuasion or an appeal to [defendant's name]'s(s') own reasoning. In deciding whether there was undue influence, you may consider whether, before the contract was made, there was full disclosure to [defendant's name] of all the material circumstances surrounding the contract, whether the contract was fair, and whether [defendant's name] had the opportunity to obtain independent advice.

Plaintiff denies [that there was a fiduciary relationship present][and][denies that there was any undue influence exerted upon the defendant].

You will address these issues in question \_\_\_\_ on your verdict.

## **700.12G [7] Undue Influence--Fiduciary Relationship Arising Under Law:**

The law provides, if [defendant's name] entered into the contract only because a party subjected [defendant's name] to undue influence, the [plaintiff's name] cannot enforce the contract against [defendant's name]. This court has decided [plaintiff's name] is a fiduciary.

[plaintiff's name] claims and has the burden of proving the following by clear and convincing evidence in order to enforce the contract:

- (1) the contract was fair;
- (2) the contract did not result from any undue influence over the defendant(s); and
- (3) [defendant's name] had independent advice.

The law is that undue influence exists where one person wrongfully exercises control over another so as to substitute that person's will for the will of the other.

Undue influence is more than just advice or persuasion or an appeal to [defendant's name]'s(s)' own reasoning. In deciding whether there was undue influence, you may consider whether, before the contract was made, there was full disclosure to [defendant's name] of all the material circumstances surrounding the contract, whether the contract was fair and whether [defendant's name] had the opportunity to obtain independent advice.

Plaintiff denies that there was any undue influence exerted upon defendant.

You will address these issues in question \_\_\_\_ on your verdict.

*Instruction revised August 2016.*

### **Notes on Use**

The claimed affirmative defenses from these instructions must be inserted into Instruction 700.02. The instructions on Affirmative Defenses assume all of the itemized/numbered issues are contested, and, if an issue is not contested, it should be eliminated from this instruction and the corresponding questions on the Verdict forms. Contract cases often include multiple defendants who should all be added by name to this instruction.

*Notes on use specific to 700.12F:* This instruction should be used where the fiduciary relationship does not arise as a matter of law, and therefore must be proved by the plaintiff. If the relationship between the plaintiff and the defendant is such that the fiduciary relationship arises as a matter of law (e.g., attorney and client), use Instruction 700.12G instead.

In the rare case in which the undue influence is claimed to have been exerted by a third person, use proper names in the instruction wherever appropriate. The set of instructions must end with 700.18V.

*Notes on use specific to 700.12G:* This instruction should be used in cases where the fiduciary relationship arises as a matter of law (e.g., attorney and client). If the relationship between the

plaintiff and the defendant is such that the fiduciary relationship must be proved by evidence, use Instruction 700.12F instead.

### Comment

Undue influence exists where one person wrongfully exercises control over another so as to substitute that person's will for the will of the other. *Britton v. Esson*, 260 Ill. 273, 103 N.E. 218 (1913). Undue influence cases involve the existence of a fiduciary relationship (arising as a matter of law or fact) where a special confidence is reposed in one who in equity and conscience is bound to act in good faith and with due regard to the interest of the other party. A fiduciary relationship exists as a matter of law between attorney and client, guardian and ward, and principal and agent, and may exist in other cases where one party is heavily dependent upon the advice of another. *Carey Elec. Contracting, Inc. v. First Nat'l Bank*, 74 Ill.App.3d 233, 392 N.E.2d 759, 30 Ill.Dec. 104 (2d Dist. 1979). The existence of a fiduciary relationship that does not exist as a matter of law must be proven by clear and convincing evidence in order to establish a constructive trust. *Ray v. Winter*, 67 Ill.2d 296, 367 N.E.2d 678, 10 Ill.Dec. 225 (1977); *Cunningham v. Cunningham*, 20 Ill.2d 500, 170 N.E.2d 547 (1960); *Kester v. Crilly*, 405 Ill. 425, 91 N.E.2d 419 (1950). There are no cases, however, discussing the burden of proof of establishing a fiduciary relationship in the context of these instructions. Once a fiduciary relationship has been established, there is a presumption that any transaction that benefits the dominant party at the expense of the other party is the result of undue influence. The burden is then on the fiduciary to prove by clear and convincing evidence that the transaction was not the result of undue influence. *Franciscan Sisters Health Care Corp. v. Dean*, 95 Ill.2d 452, 448 N.E.2d 872, 69 Ill.Dec. 960 (1983); *Brown v. Commercial Nat'l Bank*, 42 Ill.2d 365, 247 N.E.2d 894 (1969); *Turner v. Black*, 19 Ill.2d 296, 166 N.E.2d 588 (1960); *Works v. McNeil*, 1 Ill.2d 47, 155 N.E.2d 320 (1953).

**700.12V(A-D) Questions for Verdict Form (for 700.12, et seq. Affirmative Defenses to Contract Enforcement)**

**700.12VA Incompetence Questions:**

[-] Did [defendant's name] prove [he][she][they][was][were] under the age of 18 when the contract was made?

YES \_\_ NO \_\_

OR

[-] Did [defendant's name] prove that [he][she][they] lacked the mental competence or capacity to understand the nature and consequences of the agreement at the time the contract was made?

YES \_\_ NO \_\_

If your answer to question \_\_\_\_ is YES, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question \_\_\_\_ is NO, you should then answer question \_\_\_\_.

*Verdict Form revised September 14, 2012.*

**700.12VB Duress Questions:**

[-] Did [defendant's name] prove [plaintiff's name] [third party] \_\_\_\_\_ subjected [defendant's name] to duress as stated in these instructions?

YES \_\_ NO \_\_

If your answer to question \_\_\_\_\_ is YES, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question \_\_\_\_\_ is NO, you should then answer question \_\_\_\_\_.

*Questions for Verdict Form revised April 2016.*



**700.12V C & D Fraud and Misrepresentation Questions:**

[WITHDRAWN]

IPI 700.12V C&D is withdrawn.

*Instruction withdrawn April 2016.*

**700.12 V D Fraud Questions:**

[-] Did [defendant's name] prove [plaintiff's name] committed fraud as stated in these instructions?

YES\_\_\_\_\_ NO \_\_\_\_\_

If your answer to question \_\_\_\_\_ is YES, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If you answer to question \_\_\_\_\_ is NO, you should then answer question \_\_\_\_\_.

*Questions for Verdict Form created April 2016.*

**700.12VE Frustration of Purpose/Impossibility of Performance Questions:**

[-] Did [defendant's name] prove [impossibility of performance] [frustration of purpose] as stated in these instructions?

YES \_\_\_ NO \_\_\_

If your answer to question \_\_\_\_ is YES, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question \_\_\_\_ is NO, you should then answer question \_\_\_\_.

*Questions for Verdict Form revised April 2016.*

**700.12VF Undue Influence Questions (fiduciary relationship claimed)**

1. Did [defendant's name] prove that [he][she][it] [they] \_\_\_\_\_ placed trust and confidence in the [plaintiff's name] [or third party]?  
YES \_\_ NO \_\_

If your answer to question \_\_\_\_\_ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question \_\_\_\_\_ is YES, you should then answer question \_\_\_\_\_.

2. Did [defendant's name] prove [plaintiff's name] [or third party] actually or impliedly agreed to exercise [his][her][its][their] judgement on behalf of [defendant's name]?  
YES \_\_ NO \_\_

If your answer to question \_\_\_\_\_ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question \_\_\_\_\_ is YES, you should then answer question \_\_\_\_\_.

3. Did [defendant's name] prove [plaintiff's name] [or third party] gained influence and superiority over [defendant's name]?  
YES \_\_ NO \_\_

If your answer to question \_\_\_\_\_ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question \_\_\_\_\_ is YES, you should then answer question \_\_\_\_\_.

4. Did [plaintiff's name] prove by clear and convincing evidence the contract was fair?  
YES \_\_ NO \_\_

If your answer to question \_\_\_\_\_ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question \_\_\_\_\_ is YES, you should then answer question \_\_\_\_\_.

5. Did [plaintiff's name] prove by clear and convincing evidence [defendant's name] obtained independent advice?  
YES \_\_ NO \_\_

If your answer to question \_\_\_\_\_ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question \_\_\_\_\_ is YES, you should then answer question \_\_\_\_\_.

6. Did [plaintiff's name] prove by clear and convincing evidence the contract did not result from undue influence over [defendant's name]?  
YES \_\_ NO \_\_

If your answer to question \_\_\_\_ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question \_\_\_\_ is YES, you should then answer question \_\_\_\_.

**700.12VG Undue Influence Questions (fiduciary relationship arising under law)**

1. Did [plaintiff's name] prove by clear and convincing evidence the contract was fair?

YES \_\_\_ NO \_\_\_

If your answer to question \_\_\_\_ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question \_\_\_\_ is YES, you should then answer question \_\_\_\_.

2. Did [plaintiff's name] prove by clear and convincing evidence the contract did not result from undue influence over [defendant's name]?

YES \_\_\_ NO \_\_\_

If your answer to question \_\_\_\_ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question \_\_\_\_ is YES, you should then answer question \_\_\_\_.

3. Did [plaintiff's name] prove by clear and convincing evidence [defendant's name] obtained independent advice?

YES \_\_\_ NO \_\_\_

If your answer to question \_\_\_\_ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question \_\_\_\_ is YES, you should then answer question \_\_\_\_.

*Questions for Verdict Form revised August2016.*

**Notes on Use**

The Affirmative defense verdict forms should be used in conjunction with the same numbered affirmative defense instructions. When necessary, Court and counsel should use IPI 200.03.05 as a guide to prepare an instruction to inform the jury on the burden of proof by clear and convincing evidence. The set of instructions must end with 700.18V.

## 700.13 Damages

If you find in favor of [plaintiff's name], you must then decide how much money, if any, would fairly compensate [plaintiff's name] for the [defendant's name]'s (s') breach of contract. [plaintiff's name] has the burden of proving each element of damages claimed and that they occurred as a direct and natural result of [defendant's name]'s (s') breach. In calculating [plaintiff's name]'s damages, you should determine that sum of money that will put [plaintiff's name] in as good a position as [he][she][it] would have been in if [both][the] [plaintiff's name] and [defendant's name] had performed all of their promises under the contract.

The [plaintiff's name] seeks an award of several different categories of contract damages.

[1] Direct damages for:

(Here insert the element of direct damages which have a basis in the evidence.)

“Direct Damages” are the amount of gain [plaintiff's name] would have received if [both][the] parties had fully performed the contract. You calculate the amount of this gain by determining the value of the contract benefits [plaintiff's name] did not receive because of [defendant's name]'s breach and then subtracting from that value, the amount you calculate the value of whatever expenses [plaintiff's name] saved because of the breach.

[2] *Special damages* for:

(Here insert the element of direct damages which have a basis in the evidence.)

Special damages are different from direct damages.

[plaintiff's name] must prove these damages were reasonably foreseeable by the parties when they entered into the contract.

[3] Incidental damages for:

(Here insert the element of incidental damages which have a basis in the evidence.)

Incidental damages are different from direct and special damages.

“Incidental Damages” are costs that were reasonably spent either in responding to [defendant's name]'s(s') breach of the contract or in securing the benefits [defendant's name] was [were] to have provided.

You will address these issues in questions \_\_\_\_\_, \_\_\_\_\_, (etc.) on your verdict.

### **Notes on Use**

This general damages instruction should be given in all contract cases where none of the specific damages instructions, numbered 700.14 thru 700.16, are applicable. The instruction assumes all of the itemized/numbered issues are contested, and, if an issue is not contested, it should be eliminated from this instruction and the corresponding verdict forms. Instruction 700.17 on mitigation of damages may be given with this instruction if appropriate. The verdict form relating to this instruction provides the clear steps for the determination of a dollar amount to be awarded if applicable. Contract cases often include multiple defendants who should all be added by name to this instruction.



**700.13V Questions for Verdict Form (For Damages--General)**

[-] Did [plaintiff's name] prove [he][she][it] sustained damages?

YES \_\_ NO \_\_

If your answer to question \_\_ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question \_\_ is YES, you should then answer question \_\_.

[-] Did [plaintiff's name] prove these damages were caused by [defendant's name]'s breach of the contract?

YES \_\_ NO \_\_

If your answer to question \_\_ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question \_\_ is YES, you should then answer question \_\_.

[-] Did [plaintiff's name] present evidence from which you can determine the fair and reasonable value of the loss?

YES \_\_ NO \_\_

If your answer to question \_\_ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question \_\_ is YES, you should then answer question \_\_.

[-] *To determine Direct Damages:*

[a] the value of the contract benefits [plaintiff's name] proved [he][she][it] should have received:

[a] = \$\_\_\_\_\_

[b] the expenses [plaintiff's name] saved because of the the breach:

OR

the amount of money [plaintiff's name] has actually received from [defendant's name]:

[b] = \$\_\_\_\_\_

[5 or -] [plaintiff's name]'s Total Direct Damages (a minus b):

[-] = \$\_\_\_\_\_

[6 or -] *Special Damages:* the amount of special damages [plaintiff's name] proved were reasonably foreseeable the contract was made:

[-] = \$ \_\_\_\_\_

[7 or -] *Incidental Damages*: the amount [plaintiff's name] proved were reasonably spent [responding to [defendant's name]'s breach of the contract] [securing the benefits [defendant's name] was to have provided.

[-] = \$ \_\_\_\_\_

[8 or -] TOTAL DAMAGES = [5] + [6] + [7]

[-] = \$ \_\_\_\_\_

WE, THE JURY, AWARD \_\_\_\_\_ \$ \_\_\_\_\_

### Notes on Use

This general damages verdict form should be given whenever the related instruction 700.13 is read. It is expected that each question will have its own number and they will be arranged logically and numbered in sequence. The instruction assumes all of the itemized/numbered issues are contested, and, if an issue is not contested, it should be eliminated from this verdict form. Questions for the verdict form found at 700.17V on mitigation of damages may be given with this instruction if appropriate.

The set of instructions must end with 700.18V.

## 700.14 Damages: Measure for Buyer's Breach

If you find in favor of [plaintiff's name], you must decide how much money, if any, would fairly compensate [plaintiff's name] for the [defendant's name]'s(s') breach of contract. [plaintiff's name] has the burden of proving each element of damages claimed and that they occurred as a direct and natural result of [defendant's name]'s(s') breach. In calculating [plaintiff's name] damages, you should determine that sum of money that will put [plaintiff's name] in as good a position as [he][she][it] would have in if [plaintiff's name] and [defendant's name] had performed all of their promises under the contract.

[plaintiff's name] seeks an award of several different categories of contract damages [insert whichever appropriate]:

[1] *Direct damages* for:

(Here insert the element of direct damages which have a basis in the evidence.)

“Direct Damages” are the amount of gain [plaintiff's name] would have received if [both][the] parties had fully performed the contract.

The measure of *direct damages* in this case is the contract price minus the fair market value of the property at the time of the breach, minus any payments [defendant's name] already made.

The fair market value of the property is the amount a willing seller and buyer would agree upon for the property if both were fully informed about the property and neither of them was under any particular pressure to buy or sell.

[2] *Special damages* for:

(Here insert the element of special damages which have a basis in the evidence.)

Special damages are different from direct damages.

[plaintiff's name] must prove these damages were reasonably foreseeable by the parties when they entered into the contract.

[3] *Incidental damages* for:

(Here insert the element of incidental damages which have a basis in the evidence.)

Incidental damages are different from direct and special damages.

“Incidental Damages” are costs that were reasonably spent either in responding to [defendant's name]'s(s') of the contract or in securing the benefits [defendant's name] was [were] to have provided.

The measure of *direct damages* in this case is the contract price minus the fair market value of the property at the time of the breach, minus any payments [defendant's name] already made.

The fair market value of the property is the amount a willing seller and buyer would agree upon for the property if both were fully informed about the property and neither of them was under any particular pressure to buy or sell.

You will address these issues in questions \_\_\_\_, \_\_\_\_, (etc.) on your verdict.

#### **Notes on Use**

This instruction should only be used where the defendant is a buyer who has breached a contract to purchase property from plaintiff-seller. The instruction assumes all of the itemized/numbered issues are contested, and, if an issue is not contested, it should be eliminated from this instruction and the corresponding verdict forms. This instruction may be given in conjunction with Instruction 700.17, mitigation of damages, but cannot be used in conjunction with any other damages instruction. Contract cases often include multiple defendants who should all be added by name to this instruction. The set of instructions must end with 700.18V.

**700.14V Questions for Verdict Form (For Damages--Buyer's Breach)**

[-] Did [plaintiff's name] prove [he] [she] [it] sustained damages?

YES \_\_\_ NO \_\_\_

If your answer to question \_\_\_ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question \_\_\_ is YES, you should then answer question \_\_\_.

[-] Did [plaintiff's name] prove these damages were caused by [defendant's name]'s breach of the contract?

YES \_\_\_ NO \_\_\_

If your answer to question \_\_\_ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question \_\_\_ is YES, you should then answer question \_\_\_.

[-] Did [plaintiff's name] present evidence from which you can determine the fair and reasonable value of the loss?

YES \_\_\_ NO \_\_\_

If your answer to question \_\_\_ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question \_\_\_ is YES, you should then answer question \_\_\_.

[-] *To determine Direct Damages:*

[a] the contract price [plaintiff's name] proved:

[a] = \$\_\_\_\_\_

[b] the fair market value of the property at the time of defendant's breach

PLUS

the amount of money [plaintiff's name] has actually received from [defendant's name]:

[b] = \$\_\_\_\_\_

[5 or -] [plaintiff's name]'s Total Direct Damages (a minus b):

[-] = \$\_\_\_\_\_

[6 or -] *Special Damages*: the amount of special damages [plaintiff's name] proved were reasonably foreseeable the contract was made:

[ - ] = \$ \_\_\_\_\_

[7 or -] *Incidental Damages*: the amount [plaintiff's name] proved were reasonably spent [responding to [defendant's name]'s breach of the contract] [securing the benefits [defendant's name] was to have provided].

[ - ] = \$ \_\_\_\_\_

[8] TOTAL DAMAGES = [5] + [6] + [7]

[ - ] = \$ \_\_\_\_\_

WE, THE JURY, AWARD \_\_\_\_\_ \$ \_\_\_\_\_

**Notes on Use**

This general damages verdict form should be given whenever the related instruction 700.13 is read. It is expected that each question will have its own number and they will be arranged logically and numbered in sequence. The instruction assumes all of the itemized/numbered issues are contested, and, if an issue is not contested, it should be eliminated from this verdict form. Questions for the verdict form found at 700.17V on mitigation of damages may be given with this instruction if appropriate.

The set of instructions must end with 700.18V.

## 700.15 Damages: Measure for Seller's Breach

If you find in favor of [plaintiff's name], you must decide how much money, if any, would fairly compensate [plaintiff's name] for the [defendant's name]'s(s') breach of contract. [plaintiff's name] has the burden of proving each element of damages claimed and that they occurred as a direct and natural result of [defendant's name]'s(s') breach. In calculating [plaintiff's name] damages, you should determine that sum of money that will put [plaintiff's name] in as good a position as [he][she][it] would have in if [plaintiff's name] and [defendant's name] had performed all of their promises under the contract.

[plaintiff's name] seeks an award of several different categories of contract damages [insert whichever appropriate]:

[1] *Direct damages* for:

(Here insert the element of direct damages which have a basis in the evidence.)

“Direct Damages” are the amount of gain [plaintiff's name] would have received if [both][the] parties had fully performed the contract.

The measure of *direct damages* in this case is the contract price minus the fair market value of the property at the time [plaintiff's name] was supposed to get the property, minus the contract price minus the unpaid portion of the contract price.

The fair market value of the property is the amount a willing seller and buyer would agree upon for the property if both were fully informed about the property and neither of them was under any particular pressure to buy or sell.

[2] *Special damages* for:

(Here insert the element of special damages which have a basis in the evidence.)

Special damages are different from direct damages.

[plaintiff's name] must prove these damages were reasonably foreseeable by the parties when they entered into the contract.

[3] *Incidental damages* for:

(Here insert the element of incidental damages which have a basis in the evidence.)

Incidental damages are different from direct and special damages.

“Incidental Damages” are costs that were reasonably spent either in responding to [defendant's name]'s(s') of the contract or in securing the benefits [defendant's name] was [were] to have provided.

The measure of *direct damages* in this case is the contract price minus the fair market value of the property at the time [plaintiff's name] was supposed to get the property, minus the contract price minus the unpaid portion of the contract price.

The fair market value of the property is the amount a willing seller and buyer would agree upon for the property if both were fully informed about the property and neither of them was under any particular pressure to buy or sell.

You will address these issues in questions \_\_\_\_, \_\_\_\_, (etc.) on your verdict.

#### **Notes on Use**

This instruction should only be used where the defendant is a buyer who has breached a contract to purchase property from plaintiff-seller. The instruction assumes all of the itemized/numbered issues are contested, and, if an issue is not contested, it should be eliminated from this instruction and the corresponding verdict forms. This instruction may be given in conjunction with Instruction 700.17, mitigation of damages, but cannot be used in conjunction with any other damages instruction. Contract cases often include multiple defendants who should all be added by name to this instruction. The set of instructions must end with 700.18V.



**700.15V Questions for Verdict Form (Seller's Breach)**

[-] Did [plaintiff's name] prove [he] [she] [it] sustained damages?

YES \_\_\_ NO \_\_\_

If your answer to question \_\_\_ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question \_\_\_ is YES, you should then answer question \_\_\_.

[-] Did [plaintiff's name] prove these damages were caused by [defendant's name]'s breach of the contract?

YES \_\_\_ NO \_\_\_

If your answer to question \_\_\_ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question \_\_\_ is YES, you should then answer question \_\_\_.

[-] Did [plaintiff's name] show evidence from which you can determine the fair and reasonable value of the loss?

YES \_\_\_ NO \_\_\_

If your answer to question \_\_\_ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question \_\_\_ is YES, you should then answer question \_\_\_.

[-] *To determine Direct Damages:*

[a] the fair market value of the property at the time of defendant's breach:

[a] = \$\_\_\_\_\_

[b] the contract price:

PLUS

the amount of money [plaintiff's name] has actually received from [defendant's name]:

[b] = \$\_\_\_\_\_

[5 or -] [plaintiff's name]'s Total Direct Damages (a minus b):

[-] = \$\_\_\_\_\_

[6 or -] *Special Damages:* the amount of special damages [plaintiff's name] proved were reasonably foreseeable the contract was made:

[-] = \$\_\_\_\_\_

[7 or -] *Incidental Damages*: the amount [plaintiff's name] proved were reasonably spent [responding to [defendant's name]'s breach of the contract] [securing the benefits [defendant's name] was to have provided.

[ - ] = \$ \_\_\_\_\_

[8] TOTAL DAMAGES = [5] + [6] + [7]

[ - ] = \$ \_\_\_\_\_

WE, THE JURY, AWARD \_\_\_\_\_ \$ \_\_\_\_\_

### Notes on Use

It is expected that each question will have its own number and they will be arranged logically and numbered in sequence. This general damages verdict form should be given whenever the related instruction 700.14 is read. The instruction assumes all of the itemized/numbered issues are contested, and, if an issue is not contested, it should be eliminated from this verdict form. Questions for the verdict form found at 700.17V on mitigation of damages may be given with this instruction if appropriate.

The set of instructions must end with 700.18V.

**700.16 Damages: Measure When Regulated by Contract**

In their contract, the parties agreed to the following:

[state here the contract terms regulating damages]

This agreement is binding, and in the course of applying these instructions, you must abide by this agreement in determining the amount of damages, if any, in this case.

You will address these issues in question \_\_\_\_ on your verdict.

**Notes on Use**

This instruction should be given where the contract at issue contains a provision-setting forth damages for breach of the contract. When this instruction is given, no other instruction on damages can be given. Each verdict must end with 700.18V.

**700.16V Question for Verdict Form (Measure When Regulated by Contract)**

[-] What amount of damages does the contract state [plaintiff's name] is entitled to?

\$\_\_\_\_\_

Continue on with your verdict, and [answer question [ ] ] or sign Verdict for A at the end of this Verdict.

**Notes on Use**

This should be used in connection with 700.16 when the evidence supports it. The set of instructions must end with 700.18V.

### **700.17 Determination of Damages--Mitigation of Damages**

The law provides a party cannot recover damages [he][she][it][they] could have prevented by exercising ordinary care and diligence when [he][she][it][they] learned or should have learned of the breach.

The burden is on [defendant's name] to prove [plaintiff's name] failed to minimize [his][her][its] damages and that the damages should be reduced by a particular amount as a result.

In this case, [defendant's name] claim(s) and has the burden of proving that, with reasonable efforts and ordinary care, [plaintiff's name] could have avoided some losses in whole or in part, even though [his][her][its] losses originally resulted from the [defendant's name]'s(s') failure to keep [his][her][its] promise.

If [defendant's name] proves [prove] that [plaintiff's name] could have avoided some losses in whole or in part with reasonable efforts and ordinary care, you may not require [defendant's name] to pay the amount [plaintiff's name] could reasonably have avoided and you must subtract any such amount from the amount of damages you have found.

If you find [plaintiff's name] incurred costs in making a reasonable effort to avoid such losses, you must make an award to [plaintiff's name] for such costs.

You will address these issues in questions \_\_\_\_\_, \_\_\_\_\_ on your verdict.

#### **Notes on Use**

This damage instruction, when the evidence supports it use, may be given in conjunction with Instructions 700.13, 700.14, and 700.15. The set of instructions must end with 700.18V.

**700.17V Questions for Verdict Form (Mitigation of Damages)**

[-] How much money did [plaintiff's name] lose because of [defendant's name] breach of contract?

\$\_\_\_\_\_

[-] Could [plaintiff's name] have avoided losing some of his money with reasonable effort and ordinary care?

YES \_\_\_ NO \_\_\_

If the answer to question [-] above is NO, the amount named in the first question above is the amount of damages that you should award to [plaintiff's name]. If the answer to question [-] above is YES, you should then answer question [-].

[-] How much money could [plaintiff's name] have saved if [he][she][it] had exercised reasonable effort and ordinary care?

\$\_\_\_\_\_

[-] (-) minus (-) = amount of damages to be awarded [plaintiff's name].

\$\_\_\_\_\_

WE, THE JURY, AWARD [plaintiff's name] \$\_\_\_\_\_

**Notes on Use**

This should be used in connection with 700.17 when the evidence supports it. The set of instructions must end with 700.18V.

**700.18V Concluding Question for Verdict Form**

Continue on with your verdict and sign Verdict A at the end of this verdict.

Either Verdict A or Verdict B must be signed by each juror.

**VERDICT A**

WE, THE JURY, FIND FOR [plaintiff's name] AND AGAINST [defendant's name].

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

**VERDICT B**

WE, THE JURY, FIND FOR [defendant's name] AND AGAINST [plaintiff's name].

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

**SAMPLE CONTRACT INSTRUCTIONS**

These new contract instructions require the Court and counsel to construct a verdict form which contains all issues that could be the subject of a special interrogatory and provide a jury verdict on which the Court can enter judgment for the prevailing party. The set of instructions must end with IPI 700.18V. This example shows the proper use of these instructions along with the proper completed verdict form.

**FACTS OF CASE**

[These are modified and taken from <us>Fields v. Franklin Life Inc.</us>, 115 Ill.App.3d 954, 71 Ill.Dec. 776, 451 N.E.2d 950 (5th Dist. 1983)].

Plaintiff (hereinafter "P") is the wife and named as a beneficiary by her husband (hereinafter "H"), who applied to Defendant Life Insurance Company (hereinafter "D") for \$100,000.00 life insurance and was issued a conditional premium receipt. The jury heard the following evidence:

Nov. 1976 --H begins to lose weight which continues over the next 18 months--during which time, H sees a Dr. Z on 2 occasions, who notices his goiter condition and advises H to get medical attention;

4-3-78 --H completes an application for life insurance and pays the requested premium and receives a “conditional premium receipt”;

From --D tries on 3 separate occasions to set up physical examinations of H;  
4-4-78  
till 5-18-78

5-18-78 --Dr. W treats H with radioactive iodine;

5-20-78 --H is rushed to hospital and dies;

5-26-78 --D's letter to P says H's application is incomplete, denies a policy and tenders return of premium.

D alleges no insurance coverage because:

- 1) H did not submit to physical exam within 60 days after 4-3-78 as required by receipt;
- 2) H made a material misrepresentation when he failed to disclose his pre-existing medical condition on the application and if known to D, it would not have insured him; and
- 3) insurance agent advised H on 4-3-78 that physical exam of H was necessary before policy would issue.

### **INSTRUCTIONS USED**

700.02, 700.03, 700.05, 700.06, 700.07, 700.09, 700.12, 700.12C, 700.16

### **VERDICT FORM A COMBINATION OF**

700.09V, 700.07V, 700.3V, 700.16V, 700.12VC, and 700.18V

### **INSTRUCTION #1**

P claims she is entitled to recover contract damages from D for breach of contract. P has the burden of proving:

- [1] The existence of a contract between H and D.
- [2] Performance by H of all conditions.
- [3] D's failure to adequately perform its obligations under the contract.
- [4] Resulting damage to P.

I will explain and define these legal terms elsewhere in these instructions.



If you find from your consideration of all the evidence that one or more of these elements has not been proved, you must find in favor of D.

If you find that each of the above elements has been proved, then you must consider

D's claim of an affirmative defense.

D claims and has the burden of proving the following affirmative defense:

H misrepresented his health history on the application.

P denies D's affirmative defense.

If you find from your consideration of all the evidence that P has proven all the elements of her case and D has not proved the affirmative defense, you must find in favor of P and consider the amount of damages to be awarded. If D proves its affirmative defense, then it is relieved of its obligations under the contract and you must find in favor of D.

IPI 700.02

Pltf's #1

As stated in Instruction 1, the first element of a contract claim P must prove is the existence of a contract. There is a contract if P proves there was an offer by one party, acceptance by the other party and consideration between the parties. P claims the parties entered into a contract which had the following terms:

H's life was insured against death for \$100,000.00.

To prove the existence of a contract between H and D, P has the burden of proving each of the following propositions:

First D made an offer to H. An "offer" is a communication of a willingness to enter into a contract. The communication must satisfy four conditions:

[1] the communication must have included a definite promise by the person making the communication, showing a willingness to make an agreement;

[2] the important and necessary terms must be definite;

[3] the terms must be communicated by words or conduct to the other party; and

[4] the communication must give the other party the power to agree to its terms.

Second H accepted the offer made by D.

“Acceptance” of an offer is a communication of agreement to the terms of the offer. For the acceptance to be valid:

[1] H must agree to all of the material terms in the offer; and

[2] H must have communicated agreement to D according to the terms specified in the offer by writing, spoken words, actions or any other conduct that would indicate agreement to a reasonable person.

Third the agreement included an exchange of promises or value, which is known as consideration. There is sufficient consideration if P can prove that something of value was bargained for by the parties and given by one party in exchange for the other's promise. “Something of value” may consist of a promise, an act, a promise to act or not act, or any payment, that was of benefit to one party or disadvantage to the other.

You will address these issues in Questions [1], [2], [3] on your Verdict.

IPI 700.03

Pltf's #2

A partly oral and partly written contract is as valid and enforceable as a written contract.

IPI 700.05

Pltf's #3

A written contract may consist of more than one document.

IPI 700.06

Pltf's #4

As stated in instruction #1, the second element of a contract claim P must prove is H performed all obligations required of him under the contract. To recover on her claim, P has the burden to prove H did what the conditional premium receipt required him to do.

You will address this issue in Question [6] on your Verdict.

IPI 700.07

Pltf's #5

As stated in Instruction 1, the third element P must prove is D's failure to perform the obligations under the contract. In this case, D claims the parties agreed that D did not have to keep its promise unless H submitted to a physical exam by a physician chosen by D.

P has the burden of proving the condition was not a part of the contract.

If you find this condition was part of the contract, you must then decide whether the physical exam occurred. If the physical exam did not occur, then P cannot recover.

You will address these issues in Question [4] & [5] on your Verdict.

IPI 700.09

Pltf's #6

The law recognizes that sometimes, even though P has met her burden of proving that a contract exists, facts or circumstances may exist which would excuse D from being liable to P. These facts or circumstances are called affirmative defenses.

In this lawsuit, D has raised and has the burden to prove the following affirmative defenses:

H misrepresented his health history on the application.

The law provides if one party fraudulently by misrepresentation of material facts convinced another to enter into the contract, then that party cannot enforce the contract against the other. The law also provides there is no misrepresentation of material fact when the representation relates to an expression of opinion, a matter of law, or a statement of value.

D claims and has the burden of proving it reasonably relied to its detriment on a false representation created by words or conduct of H regarding a material fact, and if D had known the truth, it would not have entered into the contract.

D claims and has the burden of proving it was fraudulently convinced to enter into the contract as follows:

H failed to state on the application that he had a weight loss over an eighteen month period and had been told by a doctor to consult a doctor for treatment.

P denies D's claim.

You will address these issues in Questions [7], [8], [9], [10], [11], & [12] on your Verdict.

IPI 700.12 & 700.12C

Pltf's #7

In their contract, the parties agreed to the following:

the amount of the death benefit is \$100,000.00

This agreement is binding, and in the course of applying these instructions, you must abide by this agreement in determining the amount of damages, if any, in this case.

You will address this issue in Question [13] on the Verdict Form.

IPI 700.16

Pltf's #8

### VERDICT

Please answer the questions in the order they are numbered, starting with Question 1, and then follow the instructions appearing after your answer.

[1] Did P prove there was an offer?  
YES \_\_\_ NO \_\_\_

If your answer to question 1 is NO, then your deliberations are complete. You should disregard the remaining numbered questions and, go to Verdict B at the end of this verdict and sign it. If your answer to question 1 is YES, you should then answer question 2.

[2] Did P prove there was an acceptance?  
YES \_\_\_ NO \_\_\_

If your answer to question 2 is NO, then your deliberations are complete. You should disregard the remaining numbered questions and, go to Verdict B at the end of this verdict and sign it. If your answer to question 2 is YES, you should then answer question 3.

[3] Did P prove there was consideration?  
YES \_\_\_ NO \_\_\_

If your answer to question 3 is NO, then your deliberations are complete. You should disregard the remaining numbered questions and, go to Verdict B at the end of this verdict and sign it. If your answer to question 3 is YES, you should then answer question 4.

[4] Did P prove the condition claimed by D was not a part of the contract?  
YES \_\_\_ NO \_\_\_

If your answer to question 4 is NO, then your deliberations are complete. You should disregard the remaining numbered questions and, go to Verdict B at the end of this verdict and sign it. If your answer to question 4 is YES, you should then answer question 5.

[5] Did P prove the condition to the contract occurred?  
YES \_\_\_ NO \_\_\_

If your answer to question 5 is NO, then your deliberations are complete. You should disregard the remaining numbered questions and, go to Verdict B at the end of this verdict and sign it. If your answer to question 5 is YES, you should then answer question 6.

[6] Did P prove H performed his obligations under the contract?

YES \_\_\_ NO \_\_\_

If your answer to question 6 is NO, then your deliberations are complete. You should disregard the remaining numbered questions and, go to Verdict B at the end of this verdict and sign it. If your answer to question 6 is YES, you should then answer question 7.

[7] Did D prove a false statement of material fact was made by H to D?

YES \_\_\_ NO \_\_\_

If your answer to question 7 is NO, you should answer question 12 and skip questions 8, 9, 10 and 11. If your answer to question 7 is YES, you should then answer question 8.

[8] Did D prove H knew the statement was false?

YES \_\_\_ NO \_\_\_

If your answer to question 8 is NO, you should answer question 12 and skip questions 9, 10 and 11. If your answer to question 8 is YES, you should then answer question 9.

[9] Did D prove the statement was made to induce it to enter into the contract?

YES \_\_\_ NO \_\_\_

If your answer to question 9 is NO, you should answer question 12 and skip questions 10 and 11. If your answer to question 9 is YES, you should then answer question 10.

[10] Did D prove it reasonably relied on the false statement?

YES \_\_\_ NO \_\_\_

If your answer to question 10 is NO, you should answer question 12 and skip question 11. If your answer to question 10 is YES, you should then answer question 11.

[11] Did D prove this false statement resulted in a contract?

YES \_\_\_ NO \_\_\_

If your answer to question 11 is NO, you should then answer question 12. If your answer to question 11 is YES then your deliberations are complete. You should disregard the remaining question and go to Verdict B at the end of this service and sign it.

[12] What amount of damages does the contract state P is entitled to?

\$\_\_\_\_\_.

Continue on with your verdict and sign Verdict A at the end of this verdict.

Having answered the preceding questions, and signed either Verdict A or B, you have completed your verdict.

**VERDICT A**

We, the jury, find for P and against the D.

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**VERDICT B**

We the jury, find for D and against P.

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700.3V, 700.09V, 700.07V, 700.012VC, 700.16V, 700.12VD, & 700.18V

\*The Committee believes this should be filled in by Court and counsel if there is no dispute in the evidence as to the terms of the contract regarding damages, as in this Sample Case. Sample Verdict revised November 2010.