

CONTRACT INSTRUCTIONS

Introduction

The Contract Instructions in RAJI (CIVIL) 6TH do not reflect significant substantive changes from the previous versions of these recommended instructions. Nor have any instructions been added. The 2005 changes made by the Committee were intended to simplify and clarify the language of the instructions, for the benefit of jurors. An example can be found in Contract 19 (Damages for Lost Profits), where the elements a plaintiff must prove to recover lost profits were more clearly explained. In a few instances, changes were made to more closely reflect the holdings or language of cases relating to the particular legal issue. For example, in Contract 15 (Third-Party Beneficiary) was revised to reflect that a person may be a third-party beneficiary of a contract if he or she is within a “class of persons” identified as a beneficiary of the contract. In the 5th edition, the Committee amended Contract 2 to include a reference to damage and Contract 3 to include reference to obligations created by a contract.

As in previous versions of these recommended jury instructions, these instructions are not exhaustive. For example, there are no recommended instructions addressing unique or modified rules that may apply to cases governed by the Uniform Commercial Code (UCC), particularly Article 2. Litigants are encouraged to adapt these recommended instructions as necessary for such cases and to consult the UCC or other applicable statutes for necessary changes.

Because of the wide variety of possible legal issues in contract litigation, these instructions may require modification in a particular case. In addition, there still remain issues on which Arizona law is not well settled. Therefore, it is highly recommended that practitioners review the comments, footnotes, use notes, and caveats included in these instructions for possible modifications and developing areas of law.

In recent years, several states have developed recommended or model contract jury instructions. Historically, the Committee has found the VIRGINIA MODEL JURY INSTRUCTIONS helpful in drafting the initial version of Arizona’s recommended contract instructions. The materials included in these recommended contract instructions are designed as much to assist the bench and bar in finding and reaching a common understanding of the applicable principles of law as they are for the instruction of a particular jury. Therefore, although the Contract Instructions are drafted succinctly, the comments, use notes, and other commentary are intended to be expansive.

The Committee hopes that these revised materials will continue to be a useful reference work for the bench and bar, providing correct legal instructions and helpful and informative discussions of the applicable authorities and unresolved issues.

CONTRACT 1
Burden of Proof
(More Probably True)

The party making a claim has the burden of proof on that claim. A party who has the burden of proof must persuade you by the evidence that the claim is more probably true than not true. This means the evidence that favors that party outweighs the opposing evidence. In determining whether a party has met this burden you will consider all the evidence, whether presented by [*name of plaintiff*] or [*name of defendant*].

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SOURCE: RAJI (CIVIL) 6TH Standard 2.

USE NOTE: A Burden of Proof instruction should be given at some point in all cases. If there are claims that require proof by clear and convincing evidence, use RAJI (CIVIL) 6TH Standard 3 as well as RAJI (CIVIL) 6TH Contract 1, and identify each claim to which the clear and convincing standard applies by so stating in the instructions defining that claim.

COMMENT: The Contract 1 Instruction begins with: “The party making a claim has the burden of proof on that claim.” This general statement is provided here so that each instruction that follows does not have to identify who has the burden of proof on a claim. Scrutinize each claim, however, to make sure that the general statement here is correct for all claims in the case. When an instruction deals with a contention that is not clearly a “claim,” it should contain its own burden of proof discussion. *See, e.g.*, RAJI (CIVIL) 6TH Contract 9 (Failure of Consideration) and Contract 10 (Substantial Performance).

CONTRACT INSTRUCTIONS

CONTRACT 2

Claims and Elements

I will give you detailed instructions of law later in these instructions. But I will now give you a statement of each claim in the case, and a statement of what has to be proved on each claim.

[*Name of plaintiff*] claims that [*name of defendant*] breached a contract. On this claim, [*name of plaintiff*] must prove there was a contract with [*name of defendant*]. [*Name of defendant*] breached the contract, and that breach resulted in damage to [*name of plaintiff*].

[[*Name of defendant*] claims (insert affirmative defense[s]). [*Name of defendant*] must prove these defenses.]

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SOURCE: *Graham v. Asbury*, 112 Ariz. 184, 185, 540 P.2d 656, 657 (1975).

USE NOTE: Use the bracketed language in those cases in which the defendant asserts affirmative defenses.

CONTRACT 3

Definition and Formation of Contract

A contract is an agreement between two or more persons or entities. For a contract to exist, there must be an offer, acceptance of the offer, consideration, and terms sufficiently specific so that the obligation[s] created by the contract can be determined.

[To find that the parties had a contract, you must find that they each intended to be bound by the agreement, and that they made that intention known to the other party.]

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SOURCE: *Savoca Masonry Co. v. Homes & Son Constr. Co.*, 112 Ariz. 392, 394, 542 P.2d 817, 819 (1975); *K-Line Builders, Inc. v. First Fed. Sav. & Loan Ass'n*, 139 Ariz. 209, 212, 677 P.2d 1317, 1320 (App. 1983); RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981); VIRGINIA MODEL JURY INSTRUCTIONS—CIVIL, 45.010 (1993).

USE NOTE: 1. Use this instruction when formation of a contract is at issue. Particular cases may require the accompanying use of instructions on Offer (Contract 4), Acceptance (Contract 6), or Consideration (Contract 7).

2. Use the bracketed sentence if there is an issue of mutual assent in the case. If one party contends that it did not intend to be bound or a party failed to communicate or manifest such intent, then the bracketed text may be appropriate. See *Schade v. Diethrich*, 158 Ariz. 1, 9, 760 P.2d 1050, 1058 (1988) (“ultimate element of contract formation . . . [is the parties’] manifested assent or intent to be bound.”). Decisions on the “making, meaning and enforcement of contracts should hinge on the manifest intent of the parties.” *Schade*, 158 Ariz. at 8, n.8, 760 P.2d at 1057, n. 8; see also *Hill-Schafer P’ship v. Chilson Family Trust*, 165 Ariz. 469, 473, 799 P.2d 810, 814 (1990) (“A distinct intent common to both parties must exist without doubt or difference, and until all understand alike, there can be no assent”).

3. A promise may be enforceable even without the existence and formation of a binding contract between the parties, if the elements of promissory estoppel are met. If there is a claim of promissory estoppel, use RAJI (CIVIL) 6TH Contract 28 (Promissory Estoppel).

4. Some cases may present the issue of a claimed revocation before acceptance. In those cases, use RAJI (CIVIL) 6TH Contract 5 (Revocation of Offer) or some variation.

COMMENT: 1. Other Requirements: There may be other requirements of a contract in individual cases. For example, the parties to the contract must be competent. The contract must be for a legal purpose. There must be a sufficient specification of terms so that the obligations involved can be ascertained. Depending on the facts involved, these issues could be a question for either the judge or jury. If these issues are present, they should be included and elaborated on in other instructions.

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CONTRACT INSTRUCTIONS

CONTRACT 3

Definition and Formation of Contract

Continued

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2. Certainty of Terms: If one or more terms of the claimed contract are uncertain or left for later resolution, then the court or jury must determine whether the parties intended to be bound. In *Savoca Masonry Co. v. Homes & Son Constr. Co.*, 112 Ariz. at 395, 542 P.2d at 820, the Arizona Supreme Court held that a contract did not exist where “such essentials as manner of payment, time for completion, . . . penalty provisions, bonding, etc.” were not set forth in the agreement. *See also Pyeatte v. Pyeatte*, 135 Ariz. 346, 350-51, 661 P.2d 196, 200-01 (App. 1982) (contract does not exist if the “material requirements” or “essential terms” are uncertain). *But see Arok Constr. Co. v. Indian Constr. Servs.*, 174 Ariz. 291, 295, 298, 848 P.2d 870, 874, 877 (App. 1993) relying on RESTATEMENT (SECOND) OF CONTRACTS §§ 33 cmt. a, 204, suggesting that the Arizona Supreme Court would decide *Savoca Masonry* “differently today,” and holding that, unless a contract is so uncertain that obligations cannot be determined, courts will supply essential terms).

In *Schade*, 158 Ariz. at 9, 760 P.2d at 1058, the Arizona Supreme Court wrote in part as follows: “We believe that the requirement of certainty is not so much a contractual validator as a factor relevant to determining the ultimate element of contract formation—the question whether the parties manifested assent or intent to be bound.” *See also Rogus v. Lords*, 166 Ariz. 600, 603, 805 P.2d 133, 136 (App. 1991) (emphasis on intent of parties). The Arizona Supreme Court has not, however, expressly overruled *Savoca Masonry*.

CONTRACT 4

Offer

An offer is a proposal to enter into a contract on the terms contained in the offer.

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SOURCE: VIRGINIA MODEL JURY INSTRUCTIONS—CIVIL, 45.020 (1993); *K-Line Builders, Inc. v. First Fed. Sav. & Loan Ass'n*, 139 Ariz. 209, 212, 677 P.2d 1317, 1320 (App. 1983); RESTATEMENT (SECOND) OF CONTRACTS § 24 (1981).

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CONTRACT 5

Revocation of Offer

The person making the offer¹ may revoke the offer at any time before the communication of acceptance by the person to whom the offer is made. [This is so even though the offer is stated to be good or irrevocable for a specified period, unless there is valid consideration for the promise to keep the offer open.]²

An offer is revoked:

1. [By the person who made the offer, by giving notice of revocation³ to the person to whom the offer has been made] [; or]
2. [By the lapse of the time set forth in the offer for the acceptance, [or if no time is set forth, the lapse of a reasonable time without communication of the acceptance]] [; or]
3. [By the failure of the person accepting the offer to fulfill a requirement for acceptance] [; or]
4. [By the [death] [mental incompetence] of the person making the offer.]⁴

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SOURCE: *Richards v. Simpson*, 111 Ariz. 415, 418, 531 P.2d 538, 541 (1975); *Mack v. Coker*, 22 Ariz. App. 105, 108, 523 P.2d 1342, 1345 (1974).

USE NOTE: Use the bracketed language appropriate to the case.

¹ See RAJI (CIVIL) 6TH Contract 4 (Offer).

² A binding and continuing offer (i.e., an option) cannot be revoked until the time fixed for expiration. *Mack v. Coker*, 22 Ariz. App. 105, 108, 523 P.2d 1342, 1345 (1974).

³ Notice need not comply with all of the formal requirements for acceptance as long as the notice of revocation is received by the offeree prior to acceptance. Notice can be constructive (i.e., the knowledge of the person to whom the offer was made that the property is already sold constitutes notice.) See *Butler v. Wehrley*, 5 Ariz. App. 228, 232, 425 P.2d 130, 134 (1967); *Allen R. Krauss Co. v. Fox*, 132 Ariz. 125, 126, 644 P.2d 279, 280 (App. 1982).

⁴ If some other claimed means of revocation raises an issue of fact whether there was a revocation, the court should supply appropriate language.

CONTRACT 6

Acceptance

An acceptance is an expression of agreement to the terms of the offer by the person to whom the offer was made.

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SOURCE: *Contempo Constr. v. Mt. States T & T Co.*, 153 Ariz. 279, 281, 736 P.2d 13, 15 (App. 1987); *K-Line Builders, Inc. v. First Fed. Sav. & Loan Ass'n*, 139 Ariz. 209, 212, 677 P.2d 1317, 1320 (App. 1983); RESTATEMENT (SECOND) OF CONTRACTS § 50 (1981).

COMMENT: Custom and usage cannot be used to prove acceptance. *Contempo Constr.*, 153 Ariz. at 282, 736 P.2d at 16; *Corbin-Dykes Elec. Co. v. Burr*, 18 Ariz. App. 101, 103, 500 P.2d 632, 634 (1972).

CONTRACT INSTRUCTIONS

CONTRACT 7

Consideration

Consideration is a benefit received, or something given up or exchanged, as agreed upon between the parties.

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SOURCE: *Federal Rubber Co. v. Pruett*, 55 Ariz. 76, 80, 98 P.2d 849, 850 (1940); *Muchesko v. Muchesko*, 191 Ariz. 265, 269, 955 P.2d 21, 25 (App. 1997); *K-Line Builders, Inc. v. First Fed. Sav. & Loan Ass'n*, 139 Ariz. 209, 212, 677 P.2d 1317, 1320 (App. 1983); *Gill v. Kreutzberg*, 24 Ariz. App. 207, 209, 537 P.2d 44, 46 (1975).

COMMENT: Additional instructions may be necessary. For example, consideration is adequate if it was agreed upon between the parties, and a promise or agreement to perform an act is adequate legal consideration. *Knack v. Industrial Comm'n*, 108 Ariz. 545, 548, 503 P.2d 373, 376 (1972); *Tucson Fed. Sav. & Loan Ass'n v. Aetna Inv. Corp.*, 74 Ariz. 163, 169, 245 P.2d 423, 427 (1952); *Lessner Dental Laboratories, Inc. v. Kidney*, 16 Ariz. App. 159, 160, 492 P.2d 39, 40 (1971).

An instruction also may be appropriate as to burden of proof in the case of a written contract. A.R.S. § 44-121 provides: "Every contract in writing imports a consideration." It appears that the statute creates a rebuttable presumption that written contracts are based upon valid consideration, with the burden of proof on the party contending there was not consideration. *See Dunlap v. Fort Mohave Farms, Inc.*, 89 Ariz. 387, 393, 363 P.2d 194, 198 (1961) (burden of showing lack of consideration for written contract on party attacking it).

CONTRACT 8

Contract Modification

[Name of party] claims the parties changed the terms of the contract. After parties enter into a contract, they may agree to change it. The party claiming there has been a change must prove there was an offer to change the contract, acceptance of that offer, and consideration for the change.

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SOURCE: *Yeazell v. Copins*, 98 Ariz. 109, 115-16, 402 P.2d 541, 545 (1965) (parties may substitute a new contract for the old one, by mutual consent); *Pleasant v. Arizona Storage & Distributing Co.*, 34 Ariz. 68, 76, 267 P. 794, 797 (1928); *Angus Med. Co. v. Digital Equip. Corp.*, 173 Ariz. 159, 840 P.2d 1024 (App. 1992); *Ansell v. Union Station Assocs.*, 166 Ariz. 457, 460, 803 P.2d 450, 453 (App. 1990).

USE NOTE: 1. For the definitions of offer, acceptance, and consideration, see RAJI (CIVIL) 6TH Contract 4, 6, and 7.

2. The rule may be different in employment law cases. In those cases, see Employment Law Instructions.

3. This instruction does not address the issue of when a written contract, with or without an integration clause, can be orally modified.

COMMENT: As is the case for any contract, mutual assent is necessary; a party may not unilaterally modify contract terms. *Angus Med. Co. v. Digital Equip. Corp.*, 173 Ariz. 159, 164, 840 P.2d 1024, 1029 (App. 1992) (unilateral modification ineffective); *Coronado Co., Inc. v. Jacome's Dep't Store, Inc.*, 129 Ariz. 137, 629 P.2d 553 (App. 1981).

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CONTRACT 9

Failure of Consideration (Material Breach)

[[*Name of plaintiff*]] contends that there has been a material breach of the contract by [*name of defendant*]. A breach of contract occurs when a party fails to perform an obligation under the contract. Not every breach of a contract is a material breach. A material breach occurs when a party fails to perform a substantial part of the contract or one or more of its essential terms or conditions.

[*Name of same plaintiff*] has the burden of proving that any breach was material.

A material breach by one party excuses performance by the other party to the contract.

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SOURCE: *Ry-Tan Const., Inc. v. Washington Elem. Sch. Dist. No. 6*, 208 Ariz. 379, 401, 93 P.3d 1095, 1117 (App. 2004) *vacated on other grounds by* 210 Ariz. 419, 111 P.3d 1019 (2005); *Amos Flight Operations, Inc. v. Thunderbird Bank*, 112 Ariz. 263, 267, 540 P.2d 1244, 1248 (1975); *Mahurin v. Schmeck*, 95 Ariz. 333, 339, 390 P.2d 576, 580 (1964); *Zancanaro v. Cross*, 85 Ariz. 394, 400, 339 P.2d 746, 750 (1959).

USE NOTE: Depending on the facts and circumstances of the case, the court may also want to instruct the jury on some or all of the factors in the RESTATEMENT (SECOND) OF CONTRACTS § 237 (1981). The Restatement cites the following circumstances:

A material breach is failure to perform in a manner that substantially defeats the purpose of the contract.

The *Restatement* cites the following circumstances to determine whether a material breach has occurred:

- a. the extent to which the injured party will be deprived of the benefit reasonably expected;
- b. the extent to which the injured party can be adequately compensated for the part of that benefit which will be deprived;
- c. the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
- d. the likelihood that the party failing to perform or to offer to perform will cure the failure, taking account of all the circumstances including any reasonable assurances;
- e. the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

RESTATEMENT (SECOND) OF CONTRACTS § 241 (1981). Material breach excuses performance by the nonbreaching party. Nonmaterial breach does not excuse performance by the other party, but may permit a claim for damages. *See* Contract 10, Substantial Performance.

CONTRACT 10

Substantial Performance

[*Name of party*] claims that [*name of other party*] has not performed according to their agreement. [*Name of other party*] claims that he should not have to perform because [*name of party*] did not fully perform. [*Name of party*] claims that he did substantially perform, thus making [*name of other party*]'s performance due.

Substantial performance means that [*name of party*] has performed all that is required by the contract, except for slight defects¹ that can easily be cured.

To determine whether [*name of party*] has substantially performed his obligations under the contract, you should consider the nature of the promised performance, the purpose of the contract, and the extent to which any defects in performance have defeated that purpose.

[*Name of party*] must prove substantial performance.

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SOURCE: RESTATEMENT (SECOND) OF CONTRACTS § 237 cmt. d (1981); *Matador Drilling Co., Inc. v. Post*, 662 F.2d 1190, 1195 (5th Cir. 1981); *Material Movers, Inc. v. Hill*, 316 N.W.2d 13, 18 (Minn. 1982); *Alaska State Hous. Auth. v. Walsh & Co., Inc.*, 625 P.2d 831, 835 (Alaska 1980); *Mathis v. Thunderbird Village, Inc.*, 389 P.2d 343, 351 (Or. 1964).

USE NOTE: As to damages, if the party claiming substantial performance has proved it, that party is entitled to recover the contract price, less recoupment or set-off. Recoupment should be measured either by the cost of correcting the deficiency or, if this would involve unreasonable economic waste, the difference in value between what was contracted for and what was actually received.

¹ Other terms or phrases such as “deficiencies in performance” may be substituted for “defects,” as appropriate.

COMMENT: 1. Shifting Burden of Proof: The burden of proving substantial performance is on the party claiming it. If the evidence establishes substantial performance, the burden shifts to the other party to prove that certain defects in performance merit recoupment or set-off.

2. Substantial Completion: Much of the case law in this area seems to arise out of construction law situations where “substantial completion” is the issue. One court has indicated that the terms “substantial performance” and “substantial completion” are interchangeable. *Ramada Dev. Co. v. Rauch*, 644 F.2d 1097, 1105-06 (5th Cir. 1981). RESTATEMENT (SECOND) OF CONTRACTS § 237 cmt. d, however, discusses the relationship between substantial and full performance and explains that “if there has been substantial although not full performance, the building contractor has a claim for the unpaid balance and the owner has a claim only for damages.”

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CONTRACT INSTRUCTIONS

CONTRACT 10

Substantial Performance

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3a. Intentional Defects, Dicta: One Arizona case supports, at least in *dicta*, the principle that intentional and deliberate defects in performance will defeat a substantial performance claim. *Economy v. Frohme*, 13 Ariz. App. 117, 118, 474 P.2d 836, 837 (1970). The *Economy* court relied on *Cassino v. Yacevich*, 261 App. Div. 685, 27 N.Y.S.2d 95 (1941), in which the court rejected a claim for substantial performance after concluding that the plaintiff had not performed in good faith.

According to 3A CORBIN ON CONTRACTS, § 707 (1960), pp. 328-329, most courts that cite the principle that intentional, albeit slight, defects in performance will bar recovery under a substantial performance claim, do so merely in *dicta*.

3b. Intentional Defects and Express Conditions: The principle that intentional defects, even seemingly insignificant ones, will bar recovery for substantial performance seems to apply more readily to express conditions than to performance. Express contractual conditions require strict and literal, rather than substantial, performance. *Ram Dev. Corp. v. Siuslaw Enter., Inc.*, 580 P.2d 552, 555 (Or. 1978). In an Oregon Supreme Court decision, recovery for substantial performance was allowed even though a contractor willfully failed to build a cover over a compressor because the other party refused to pay him. *Mathis v. Thunderbird Village, Inc.*, 389 P.2d at 350-51 (Or. 1964). The court reasoned that willfully refusing to perform a minor portion of the contract after breach by the other party should not defeat recovery for substantial performance. *Id.* The *Mathis* court cited a case where a substantial performance claim was rejected because the contract required the contractor to provide receipt vouchers for all labor and materials, but instead he willfully produced canceled checks. *Camp & DuPuy v. Lauterman*, 152 P. 288 (Or. 1915). The *Camp* court did not mention willfulness, but rejected the claim on the ground that the deviation was not trivial. Thus, because the deviation was not trivial, the performance was not “substantial.” The voucher provision, however, appears to have been an express condition to payment.

3c. Intentional Defects: Summary: The issue of trivial but intentional defects is unresolved in Arizona. Perhaps the better rule is that intentional defects in performance will not absolutely preclude success on a substantial performance claim unless they are made in order to defeat the purpose of the contract, are in themselves substantial deviations, or are conscious decisions to not perform express conditions. Although intent is not normally an element of breach of an express condition, it is possible that unintentional and good faith deviations from express conditions will not defeat a claim for substantial performance, but will merely reduce the recovery in the same way that minor deviations in other contractual terms will reduce recovery. On the other hand, intentional deviations from express conditions may bar recovery, even though the contract has been, in all other respects, substantially performed.

CONTRACT 11

Failure of Condition

[*Name of party*] claims that the contract is conditional and that the condition did not occur. A condition is an event, not certain to occur, that must occur before performance under the contract becomes due.

Where performance of a contract depends upon a condition, and that condition does not occur, the contract will not be enforced.

[*Name of party*] has the burden of proving that the condition did not occur.

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SOURCE: *Connor v. Cal-Az Properties, Inc.*, 137 Ariz. 53, 54-55, 668 P.2d 896, 897-98 (App. 1983); *Arizona Land Title & Trust Co. v. Safeway Stores, Inc.*, 6 Ariz. App. 52, 59-60, 429 P.2d 686, 693-94 (1967); RESTATEMENT (SECOND) OF CONTRACTS §§ 224 and 225 (1981).

COMMENT: “[S]trict and literal, rather than “substantial,” compliance is required of express conditions.” *Ram Dev. Corp. v. Siuslaw Enter., Inc.*, 580 P.2d 552, 555 (Or. 1978).

A condition may be excused by the party who would benefit from it. One way in which nonoccurrence of a condition may be excused is by waiver. *See* RAJI (CIVIL), 6TH Contract 12 (Waiver of Condition).

CONTRACT INSTRUCTIONS

CONTRACT 12

Waiver of Condition

[*Name of party*] claims that [*name of other party*] waived a condition of the contract. A condition may be waived by a party if the condition is intended solely for that party's benefit.

Waiver is either the express, voluntary, and intentional relinquishment of a known right, or it is conduct that is inconsistent with an intent to assert the right.

[*Name of party claiming waiver*] has the burden of proving waiver.

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SOURCE: *American Continental Life Ins. Co. v. Ranier Constr. Co., Inc.*, 125 Ariz. 53, 55, 607 P.2d 372, 374 (1980); *Pruitt v. Pavelin*, 141 Ariz. 195, 685 P.2d 1347, 1356 (App. 1984).

USE NOTE: The nonoccurrence of a condition may make a contract unenforceable. If, however, the party for whose exclusive benefit the condition is intended waives the nonoccurrence, the other party is still obligated to perform, and the nonoccurrence of the condition is not a defense.

For a conditional contract to be enforceable, in absence of the condition having been met, its performance must be waived by all parties it is intended to benefit.

The party for whose sole benefit the condition is intended may not be held to the contract if the condition does not occur.

COMMENT: "The waiver of one right under a contract does not necessarily waive other rights under the contract." *American Continental Life Ins. Co. v. Ranier Constr. Co., Inc.* 125 Ariz. 53, 55, 607 P.2d 372, 374 (1980).

CONTRACT 13

Waiver

A party to a contract may waive the other party's duty to perform. "Performance" refers to what a party agreed to do as his part of the contract.

Waiver is either the express, voluntary, and intentional relinquishment of a known right, or it is conduct that is inconsistent with an intent to assert the right.

By accepting performance known to be deficient, a party has waived the right to reject the contract on the basis of that performance.

If [name of plaintiff] has waived a promised performance, then [name of defendant] is no longer bound to perform on that promise and [name of plaintiff] is not entitled to [damages/rescission] for that particular non-performance.

[Name of defendant] has the burden of proving waiver.

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SOURCE: VIRGINIA MODEL JURY INSTRUCTIONS—CIVIL, 45.410 (1993); MODEL JURY INSTRUCTIONS FOR BUSINESS TORT LITIGATION § 87.07 (2d ed. 1988); *American Continental Life Ins. Co. v. Ranier Constr. Co.*, 125 Ariz. 53, 55, 607 P.2d 372, 374 (1980); *Trimble v. American Sav. Life Ins. Co.*, 152 Ariz. 548, 554, 733 P.2d 1131, 1137 (App. 1986); *Pruitt v. Pavelin*, 141 Ariz. 195, 685 P.2d 1347, 1356 (App. 1984).

COMMENT: 1. Defective Performance: Waiver of defective performance addresses the quality of actions by the other party, and waiver avoids a claim of breach for defective performance.

Waiver of a "condition" (as covered in Contract 12, Waiver of Condition) does not deal with quality of performance or breach, but with whether a conditional contract is enforceable.

2. Limited Waiver: "The waiver of one right or of one performance under a contract is not necessarily a waiver of all rights or all performances under the contract." *American Continental Life Ins. Co. v. Ranier Constr. Co.*, 125 Ariz. 53, 55, 607 P.2d 372, 374 (1980).

CONTRACT INSTRUCTIONS

CONTRACT 14

Anticipatory Breach

[Name of plaintiff] claims that there was an anticipatory breach of contract by [name of defendant]. To recover on this claim, [name of plaintiff] must prove:

1. [Name of defendant] stated or showed a clear intent not to perform as promised; and
2. [Name of plaintiff] was ready, willing and offered to perform [the party's] duties under the contract if [name of defendant] had not refused to perform.

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SOURCE: *Snow v. Western Sav. & Loan Ass'n*, 152 Ariz. 27, 33, 730 P.2d 204, 210 (1986); *Kammert Bros. Enter., Inc. v. Tanque Verde Plaza Co.*, 102 Ariz. 301, 306, 428 P.2d 678, 684 (1967); *United Cal. Bank v. Prudential Ins. Co.*, 140 Ariz. 238, 277, 681 P.2d 390, 429 (App. 1983); RESTATEMENT (SECOND) OF CONTRACTS § 253 and § 250, cmt. b (1981).

COMMENT: 1. Some Specific Examples: Anticipatory repudiation is a species of breach of contract. *Diamos v. Hirsch*, 91 Ariz. 304, 307, 372 P.2d 76, 78 (1962). A statement that merely implies that performance will not be forthcoming is not the equivalent of a “positive and unequivocal refusal to perform.” *McMahon v. Fiberglass Fabricators, Inc.*, 17 Ariz. App. 190, 192, 496 P.2d 616, 618 (1972). However, the insistence upon the performance of terms that are not contained in the contract constitutes an anticipatory repudiation of the contract. *Snow*, 152 Ariz. at 33, 730 P.2d at 210.

2. Manifestation: Some Arizona cases state that an anticipatory repudiation occurs when a party unequivocally communicates that it will not perform and treats the contract as if it were terminated. The better rule, however, appears to be that an unequivocal manifestation of an intention not to perform will be viewed as an anticipatory breach because the nonbreaching party may justifiably rely on that manifestation, even if the breaching party has not treated the contract as terminated. This seems to be the rule in *Snow*, 152 Ariz. at 33, 730 P.2d at 210.

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CONTRACT 14
Anticipatory Breach

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3. Ready, Willing and Offered to Perform: The party claiming an anticipatory breach must be ready, willing and offer to perform the contract. *Kammert Bros.*, 102 Ariz. at 306, 428 P.2d at 683 (“It was sufficient that the buyer was ready, willing, and offered to perform.”); *Lee v. Nichols*, 81 Ariz. 106, 111-12, 301 P.2d 1022, 1025 (1956) (where clear breaching party never intended to recognize contract, no tender of performance is necessary and “[i]t is sufficient if plaintiff is ready, willing and offers to perform”). *See also* CORBIN ON CONTRACTS § 978 (1951), pp. 924-25. The offer to perform can occur either before or after the anticipatory breach. If the offer occurs before the anticipatory breach, there is no need to re-offer after the breach.

4. Good Faith: The fact that a repudiation is made in good faith, but based upon a mistake in contract interpretation is irrelevant. The impact of the breach on the innocent party is the same. *Arizona Prop. & Cas. Ins. Guar. Fund v. Helme*, 153 Ariz. 129, 137, 735 P.2d 451, 459 (1987); *Snow*, 152 Ariz. at 33-34, 730 P.2d at 210-211; *United Cal. Bank v. Prudential Ins. Co.*, 140 Ariz. 238, 681 P.2d 390 (App. 1983).

5. Insurance Case: For anticipatory breach claims against an insurance company by the insured, *see generally Arizona Prop. & Cas. Ins. Guar. Fund v. Helme*, 153 Ariz. 129, 137, 735 P.2d 451, 459 (1987).

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CONTRACT 15

Third-Party Beneficiary

[*Name of third party*] claims to be a beneficiary of the contract between [*name*] and [*name*]. To recover, [*name of third party*] must prove:

1. The parties intended that [*name of third party*]¹ directly benefit from the contract;
2. The parties intended to recognize [*name of third party*] as the primary party in interest; and
3. The contract itself indicated an intent to benefit [*name of third party*] or a class of persons including [*name of third party*].⁰

SOURCE: *Norton v. First Fed. Sav.*, 128 Ariz. 176, 178, 624 P.2d 854, 856 (1981); *Sherman v. First American Title Ins. Co.*, 201 Ariz. 564, 567, 38 P.3d 1229, 1232 (App. 2002); *Nabom v. Blue Cross & Blue Shield*, 180 Ariz. 548, 552-53, 885 P.2d 1113, 1117-18 (App. 1994); *Gonzales v. Palo Verde Mental Health Servs.*, 162 Ariz. 387, 389, 783 P.2d 833, 835 (App. 1989); *Franko v. Mitchell*, 158 Ariz. 391, 398, 762 P.2d 1345, 1353 (App. 1988).

USE NOTE: 1. This instruction should be used in conjunction with other contract instructions necessary to establish a right to recovery, as supported by the evidence. For example, instructions will normally be needed to establish the existence of a contract, breach, causation, and damages.

2. This instruction should not be used as to claims sounding in tort. *See Professional Sports, Inc. v. Gillette Security, Inc.*, 159 Ariz. 218, 221-22, 766 P.2d 91, 94-95 (App. 1988) (contract gave rise to duty of due care toward third parties).

3. It is possible to be a third-party beneficiary of one term of a contract, even though the contracting party is the primary beneficiary of the other terms. In that case, the provisions of this instruction may need to be revised to refer to the particular term(s) or provision(s) for which third-party beneficiary status is claimed. *Nabom*, 180 Ariz. at 552-53, 885 P.2d at 1117-18.

¹There may be cases where it will be appropriate to insert “[a class of persons of which [Third Party] is a member]” in place of “[Third Party].” It is sufficient for third-party status to show that the beneficiary is a member of a class of beneficiaries intended by the parties; in that situation, the third-party beneficiary need not be identified by name. *Nabom*, 180 Ariz. at 552-53, 885 at 1117-18; *Tanner Cos. v. Insurance Mktg. Servs.*, 154 Ariz. 442, 743 P.2d 951 (App. 1987) (third-party beneficiary need not be identified by name; third-party beneficiary entitled to recover if agreement guarantees payment to person in position of third-party beneficiary); *Lake Havasu Resort, Inc. v. Commercial Loan Ins. Corp.*, 139 Ariz. 369, 375, 678 P.2d 950, 956 (App. 1983).

CONTRACT 16

Good Faith and Fair Dealing

A party to a contract has a duty to act fairly and in good faith. This duty is implied by law and need not be in writing.

This duty requires that neither party do anything that prevents the other party from receiving the benefits of their agreement.

If you find that [name of defendant] has breached the duty of good faith and fair dealing, [name of plaintiff] is entitled to recover damages proved by the evidence to have resulted naturally and directly from the breach [and to recover consequential damages].

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SOURCE: *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 156, 854 P.2d 1134, 1142 (1993); *Rawlings v. Apodaca*, 151 Ariz. 149, 153-54, 726 P.2d 565, 569-70 (1986); *Wagenseller v. Scottsdale Memorial Hosp.*, 147 Ariz. 370, 383, 710 P.2d 1025, 1038 (1985); *Miel v. State Farm Mut. Auto. Ins. Co.*, 185 Ariz. 104, 109, 912 P.2d 1333, 1338 (App. 1995); *Nelson v. Phoenix Resort Corp.*, 181 Ariz. 188, 197, 888 P.2d 1375, 1384 (App. 1994); *Southwest Sav. & Loan Ass'n v. SunAmp Systems*, 172 Ariz. 553, 557, 838 P.2d 1314, 1318 (App. 1992); *Oldenburger v. Del E. Webb Dev. Co.*, 159 Ariz. 129, 132, 765 P.2d 531, 534 (App. 1988).

COMMENT: The duty of good faith and fair dealing is implied in every contract. *Rawlings*, 151 Ariz. at 153, 726 P.2d at 569. In *Rawlings*, the court analyzed the types of contractual relationships in which the breach of the duty of good faith and fair dealing would give rise to a cause of action in tort. 151 Ariz. at 158-61, 726 P.2d at 574-77. Since *Rawlings*, the Arizona appellate courts have analyzed whether tort damages would be available for the breach of the duty of good faith and fair dealing in other contexts. Thus, in *Oldenburger*, 159 Ariz. at 132, 765 P.2d at 534, the court concluded that tort damages were not available for a breach of the duty of good faith and fair dealing arising out of a real estate contract. In *Dodge v. Fidelity & Deposit Co. of Maryland*, 161 Ariz. 344, 346-47, 778 P.2d 1240, 1242-43 (1989), the court concluded that tort damages were available in a bad faith action against a surety on a contractor's performance bond. In *Burkons v. Ticor Title Ins. Co.*, 168 Ariz. 345, 356, 813 P.2d 710, 721 (1991), the court affirmed the dismissal of a bad faith case against an escrow agent based upon the facts presented, but declined to decide whether given proper facts, tort damages might be available in a bad faith case against an escrow agent. Finally, in *Nelson*, 181 Ariz. at 198, 888 P.2d at 1385, the court held that tort damages were not generally available in a bad faith action by an employee against an employer.

RAJI (CIVIL) 6TH Contract Instruction 16 is intended for use in cases in which the court has concluded that only contract damages are available for the breach of the duty of good faith and fair dealing. In a case in which the court concludes that tort damages are available, a different instruction will need to be drafted. See RAJI (CIVIL) 6TH Bad Faith 1 (insurance bad faith instruction; see also RAJI (CIVIL) 6TH Employment Law 3 (Bad Faith Instruction for use in employment cases).

CONTRACT INSTRUCTIONS

CONTRACT 17

Measure of Direct Damages (Breach of Contract)

If you find that [name of defendant] is liable to [name of plaintiff] for breach of contract, you must then decide the full amount of money that will reasonably and fairly compensate [name of plaintiff] for the damages proved by the evidence to have resulted naturally and directly from the breach of contract. The damages you award for breach of contract must be the amount of money that will place [name of plaintiff] in the position [name of plaintiff] would have been in if the contract had been performed. To determine those damages, you should consider the following:

[The profit that [name of plaintiff] would have received had the contract been performed;]¹

[The return of the value of the things or services that [name of plaintiff] provided to the [name of defendant;]]¹

[The value of things or services expended by [name of plaintiff] in preparing to perform his part of the contract or in preparing to accept the benefits of [name of defendant]'s expected performance;]¹

[Whether [name of plaintiff], by not having to perform his part of the contract, has avoided any cost [or loss] which should be deducted from his damages.]¹

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SOURCE: *A.R.A. Mfg. Co. v. Pierce*, 86 Ariz. 136, 141, 341 P.2d 928, 932 (1959); *Northern Ariz. Gas Serv., Inc. v. Petrolane Transp., Inc.*, 145 Ariz. 467, 478-79, 702 P.2d 696, 707-08 (App. 1984); *Southern Ariz. School for Boys, Inc. v. Chery*, 119 Ariz. 277, 280, 580 P.2d 738, 741 (App. 1978); RESTATEMENT (SECOND) OF CONTRACTS §§ 347, 351 (1981); DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 12.1 (1973).

USE NOTE: ¹ **Bracketed Alternatives:** This instruction should be modified as appropriate to the facts and claims being presented. Select from the bracketed elements as appropriate to the case.

Ordinarily, a plaintiff may recover on only one of the theories stated in the first three of the bracketed options. Be careful not to create the possibility of a double recovery of some elements of damage. For example, if damages for breach of contract cannot be proven with the requisite degree of proof, as an alternative, the injured party has a right to damages based on his reliance, including expenditures made in preparation for performance or in performance of the contract, less any loss that the party in breach can prove with reasonable certainty that the injured party would have suffered had the contract been performed. RESTATEMENT (SECOND) OF CONTRACTS § 349 (1981).

Continued

CONTRACT 17
Measure of Direct Damages
(Breach of Contract)

Continued

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In some cases, items of direct damages other than those provided as options in the instruction may be applicable.

COMMENT: 1. Indirect Damages: *See* RAJI (CIVIL) 6TH Contract 18 (Consequential Damages).

2. Reasonable certainty as to amount of damages: 5 CORBIN ON CONTRACTS § 1021 (1964), p. 127; *Coury Bros. Ranches v. Ellsworth*, 103 Ariz. 515, 521, 446 P.2d 458, 464 (1968) (where testimony was speculative and conjectural, lost profits were not established with reasonable certainty); *Gilmore v. Cohen*, 95 Ariz. 34, 36-37, 386 P.2d 81, 83 (1963) (concluding that damages had not been established with reasonable certainty where all evidence relating to damages was in the form of testimony by plaintiffs, without any accounts or other cost records introduced, and where testimony itself was ambiguous and confused); *Grummel v. Hollenstein*, 90 Ariz. 356, 367 P.2d 960, 963 (1962) (upheld trial court's award of damages for breach of agreement to convey land although exact damages would be difficult, if not impossible, to calculate mathematically); *Rancho Pescado, supra* 140 Ariz. at 184-86, 680 P.2d at 1245-47 (plaintiff must provide "some reasonable method," and a "reasonable basis in the evidence for the trier of fact to fix computation when a dollar loss is claimed"); *Broadway Realty & Trust v. Gould*, 136 Ariz. 236, 238, 665 P.2d 580, 582 (App. 1983) (where trial court made specific findings of fact that were well within the range of the expert testimony presented regarding loss of profits, there was reasonable basis for damages and uncertainty as to the amount of damages would not preclude recovery); *Hercules Drayage Co. v. Chanco Leasing Corp.*, 24 Ariz. App. 598, 601, 540 P.2d 724, 727 (1975) (damages could be recovered for lost profits shown with as much mathematical precision as the nature of the claim could provide, and certainty as to the amount of damages was not essential to recovery when the fact of damages was proven); One case indirectly discusses the meaning of the term "reasonable certainty" in the context of determining jury instructions to adequately inform the jury of the appropriate burden of proof regarding future lost wages. *Lewis v. N.J. Riebe Enter., Inc.*, 170 Ariz. 384, 397, 825 P.2d 5, 18 (1992) ("assuming . . . that the amount of future lost wages must be established with reasonable certainty," the then-existing RAJI instructions on burden of proof, measure of damages, and defining burden of proof were, as a whole, adequate).

3. Nominal damages: When the fact of damage has been established, but the amount of damages has not been proven with reasonable certainty, nominal damages may be awarded. *See Gilmore v. Cohen*, 95 Ariz. 34, 36, 386 P.2d 81, 82 (1963) (affirming award of nominal damages); RESTATEMENT (SECOND) OF CONTRACTS § 352, ill. 1-2 (1981).

CONTRACT INSTRUCTIONS

CONTRACT 18 Consequential Damages

[*Name of plaintiff*] also seeks to recover damages for [specify items of damage determined by the court to be consequential in nature rather than direct].

To recover for these alleged damages, [*name of plaintiff*] must prove:

1. It was foreseeable to the parties when they entered into the contract that these damages would probably result if the contract was breached;
2. These damages were in fact caused by [*name of defendant*]'s breach of contract; and
3. The amount of the damages.⁰

SOURCE: *Seekings v. Jimmy GMC of Tucson, Inc.*, 130 Ariz. 596, 601, 638 P.2d 210, 215 (1981); *Cole v. Atkins*, 69 Ariz. 81, 209 P.2d 859, 861-62 (1949); *Miscione v. Bishop*, 130 Ariz. 371, 374, 636 P.2d 149, 152 (App. 1981).

COMMENT: A party may recover both “direct” and “consequential” damages. Direct damages are those which, in the ordinary course of human experience, can be expected to result directly from a breach. Consequential damages do not flow directly from a breach but arise because of special circumstances.

Whether damages are direct or consequential in nature is a question of law. An instruction on consequential damages should only be given when the court has decided that the damages claimed are consequential in nature. Whether the damages were foreseeable, and the amount of such damages, however, are generally questions of fact for the jury. *Richmond Med. Supply Co. v. Clifton*, 369 S.E.2d 407, 409 (Va. 1988).

Generally, consequential damages are those that may reasonably be within the contemplation of the parties at the time the contract was made. If a jury is asked to decide whether an item of damage was “within the contemplation of the parties,” the jury may conclude that unless the damage was actually contemplated, it is not recoverable. However, that is not the law. *See* 22 AM. JUR. 2d *Damages* § 456. The “contemplation of the parties” requirement is but one formulation of the principle of foreseeability. *Id.* § 455. This instruction uses the term “foreseeable” in the belief that it will be more comprehensible to jurors and less likely to suggest that the parties must actually have contemplated the damage.

What must be foreseeable is that the item of damage would be a probable result of the breach, and not merely a possible one. *Id.* § 456; *see also Cole*, 69 Ariz. at 85-87, 209 P.2d at 862-63.

CONTRACT 19

Damages for Lost Profits

[*Name of plaintiff*] [also] seeks to recover damages for lost profits. To recover damages for present or future lost profits, [*name of plaintiff*] must prove:

1. That it is reasonably probable that the profits would have been earned except for the breach;
2. That the loss of profits is the direct and natural consequence of the breach; and
3. The amount of lost profits can be shown with reasonable certainty.

If future lost profits are reasonably certain, any reasonable basis for determining the amount of the probable profits lost is acceptable. However, the amount of lost profits cannot be based on conjecture or speculation.

In determining whether and to what extent [*name of plaintiff*] proved lost profits, you must subtract the costs and expenses [*name of plaintiff*] would have incurred from the gross revenue [*name of plaintiff*] would have received if the contract had not been breached.

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SOURCE: RESTATEMENT (SECOND) OF CONTRACTS § 351, cmt. (b) (1979) (foreseeability of lost profits in general); JUDICIAL COUNCIL OF CALIFORNIA CIVIL JURY INSTRUCTIONS (2003-04), CACI No. 352; FEDERAL JURY PRACTICE AND INSTRUCTIONS—CIVIL §§ 86.04 and 86.05 (1987).

USE NOTE: 1. Lost profits are pre-tax net profits: KNAPP, 1 COMMERCIAL DAMAGES § 5.01 *et seq.* (1994); A.R.S. § 47-2708 (U.C.C. § 2-708); *Campbell v. Westdahl*, 148 Ariz. 432, 439, 715 P.2d 288, 295 (App. 1985) (lost profits equal contract price the party would have received less inventory retained and expenses avoided); *Morton v. Rogers*, 20 Ariz. App. 581, 586, 514 P.2d 752, 757 (1973) (profits are the difference between cost of materials and sales receipts).

2. Foreseeability of lost profits; Breach as proximate cause of the loss: *Short v. Riley*, 150 Ariz. 583, 585, 724 P.2d 1252, 1254 (App. 1986). As to damages relating to the sale of goods, *see generally* A.R.S. § 47-2715 (U.C.C. § 2-715).

3. Certainty of fact of damages: *Isenberg v. Lemon*, 84 Ariz. 340, 345-46, 327 P.2d 1016, 1019-20 (remanding for new trial on damages), *modified on other grounds*, 84 Ariz. 364, 329 P.2d 882 (1958) (reversing trial court's \$31,800 award to plaintiff for lost profits, where plaintiff produced no definitive evidence as to actual anticipated profits); *Farr v. Transamerica Occidental Life Ins. Co.*, 145 Ariz. 1, 6, 699 P.2d 376, 381 (App. 1984) (plaintiff could not recover damages for loss of credit reputation where nothing in the evidence, except speculation, suggested that they actually suffered any damage to their credit); *Rancho Pescado v. Northwestern Mut. Life Ins.*, 140 Ariz. 174, 184-86, 680 P.2d 1235, 1245-47 (App. 1984) (no reasonable basis for award of lost profits where there was no conclusive evidence that plaintiff could have successfully raised and marketed large quantities of catfish, and the evidence as a whole amounted to nothing more than conjecture and speculation); *Linninger v. Dine Out Corp.*, 131 Ariz. 160, 162-63, 639 P.2d 350 352-53 (App. 1981)

CONTRACT INSTRUCTIONS

CONTRACT 19

Damages for Lost Profits

Continued

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(lost profits due to defendant's omission of plaintiff from annual coupon book for two-for-one dinners); *Earle M. Jorgensen Co. v. Tesmer Mfg. Co.*, 10 Ariz. App. 445, 450, 459 P.2d 533, 538 (1969) (plaintiff must first prove, with certainty, that he has in fact been damaged by defendants);

4. Reasonable certainty as to amount of damages: 5 CORBIN ON CONTRACTS § 1021 (1964), p. 127; *Coury Bros. Ranches v. Ellsworth*, 103 Ariz. 515, 521, 446 P.2d 458, 464 (1968) (where testimony was speculative and conjectural, lost profits were not established with reasonable certainty); *Gilmore v. Gilmore*, 95 Ariz. 34, 36-37, 386 P.2d 81, 83 (1963) (concluding that damages had not been established with reasonable certainty where all evidence relating to damages was in the form of testimony by plaintiffs, without any accounts or other cost records introduced, and where testimony itself was ambiguous and confused); *Grummel v. Hollenstein*, 90 Ariz. 356, 359, 367 P.2d 960, 963 (1962) (upheld trial court's award of damages for breach of agreement to convey land although exact damages would be difficult, if not impossible, to calculate mathematically); *Rancho Pescado*, 140 Ariz. at 184-86, 680 P.2d at 1245-47 (plaintiff must provide "some reasonable method," and a "reasonable basis in the evidence for the trier of fact to fix computation when a dollar loss is claimed"); *Broadway Realty & Trust v. Gould*, 136 Ariz. 236, 238, 665 P.2d 580, 582 (App. 1983) (where trial court made specific findings of fact that were well within the range of the expert testimony presented regarding loss of profits, there was reasonable basis for damages and uncertainty as to the amount of damages would not preclude recovery); *Hercules Drayage Co. v. Chanco Leasing Corp.*, 24 Ariz. App. 598, 601, 540 P.2d 724, 727 (1975) (damages could be recovered for lost profits shown with as much mathematical precision as the nature of the claim could provide, and certainty as to the amount of damages was not essential to recovery when the fact of damages was proven). One case indirectly discusses the meaning of the term "reasonable certainty" in the context of determining jury instructions to adequately inform the jury of the appropriate burden of proof regarding future lost wages. *Lewis v. N.J. Riebe Enter., Inc.*, 170 Ariz. 384, 397, 825 P.2d 5, 18 (1992) ("assuming . . . that the amount of future lost wages must be established with reasonable certainty," the then-existing RAJI instructions on burden of proof, measure of damages, and defining burden of proof were, as a whole, adequate).

COMMENT: 1. Double Recovery: As a general proposition, it has long been the law that a double recovery is not permitted. *E.g., The Warren Co. v. Hanson*, 17 Ariz. 252, 261, 150 P. 238, 241 (1915) (remanding for new trial because jury instruction permitted double recovery). Contract terms that preclude double recovery will be enforced. *E.g., Schultz v. Farmers Ins. Group*, 167 Ariz. 148, 151, 805 P.2d 381, 384 (1991). No Arizona appellate decision has addressed the issue of a double recovery in the context of lost profits. But the law seems clear that such a recovery is not allowed. *Renner v. Kehl*, 150 Ariz. 94, 97-98, 722 P.2d 262, 265-66 (1986) (allowing rescission of contract on basis of mutual mistake of fact, but disallowing consequential damages); *Seekings v. Jimmy GMC Inc.*, 130 Ariz. 596, 601, 638 P.2d 210, 215 (1981) (allowing plaintiffs who returned defective vehicle to recover purchase price, but not damages for breach of warranty); *Adams v. Dion*, 109 Ariz. 308, 309, 509 P.2d 201, 202 (1973) (amount received from one joint tortfeasor must be credited on judgment against other joint tortfeasor); *USLife Title Co. v. Gutkin*,

CONTRACT 19
Damages for Lost Profits

Continued

152 Ariz. 349, 355, 732 P.2d 579, 585 (App. 1986) (having obtained a quit claim deed, recovery for unjust enrichment not permitted).

Courts faced with the double recovery issues have universally condemned the practice of including calculations for both lost profits and lost business value. *E.g.*, *American Anodco, Inc. v. Reynolds Metals Co.*, 743 F.2d 417, 423-24 (6th Cir. 1984) (“[w]here the loss of profits and loss of value are intertwined, as they are here, and the loss of value is based on loss of future profits, to allow both would be to permit a double recovery”); *C.A. May Marine Supply Co. v. Brunswick Corp.*, 649 F.2d 1049, 1053 (5th Cir.), *cert. denied*, 454 U.S. 1125 (1981) (“Both business goodwill and future profits are computed into the going concern value loss. Hence, damage awards which include recovery for lost future profits and going concern value are impermissibly duplicitous.”); *R.E.B., Inc. v. Ralston Purina Co.*, 525 F.2d 749, 753-55 (10th Cir. 1975) (“Since this property loss included harm to, and deaths of, the swineherd as well as loss resulting [sic] from diminution of good will and going value of the business as a whole, it necessarily embraced loss of profits for the entire period.”); *Bush v. National School Studio*, 389 N.W.2d 49, 53 (Wis. Ct. App. 1986) (“[L]ost business value focuses on the reduction in value of the business. Both good will and future profits are computed into lost business value. Therefore, damages awards that include lost profits and lost business value are impermissibly duplicitous.”).

The only cases where the measure of damages may include components for lost business value and lost profits are those involving businesses which were sold or otherwise terminated. Even then, the lost profits measure must be limited to the period during which the defendant’s wrongful or unlawful activity continued. *See R.E.B., Inc. v. Ralston Purina Co.*, 525 F.2d at 753-55.

2. Factors for Determining Future Lost Profits: The Committee has concluded that factors for the jury to consider when determining whether plaintiff is entitled to future lost profits should not be included in the jury instructions; rather, they are best left to argument. These factors include: (1) the uncertainty which makes the success of a new business problematical [if applicable], (2) plaintiff’s experience in the business, (3) the competition in the relevant geographical area, and (4) the general market conditions in that area.

CONTRACT INSTRUCTIONS

CONTRACT 20

Measure of Damages (Sale of Land)

If you find that [name of defendant] breached an agreement to sell real estate to [name of plaintiff], then you must decide the full amount of money that will reasonably and fairly compensate [name of plaintiff] for each of the following elements of damages proved by the evidence to have resulted from [name of defendant]'s breach:

1. The amounts paid by [name of plaintiff] to [name of defendant] for the purchase of the property;
2. The difference between the sales price and the fair market value of the real estate at the time of the breach; and
3. Any consequential damages suffered by [name of plaintiff].

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SOURCE: RESTATEMENT (SECOND) OF CONTRACTS § 347 (1981) (measure of contract damages in general); *see also* RAJI (CIVIL) 6TH Contract 17 (Measure of Direct Damages—Breach of Contract); JUDICIAL COUNCIL OF CALIFORNIA CIVIL JURY INSTRUCTIONS (2003-04), CACI No. 356.

USE NOTE: 1. Date for Measurement of Damages: Under the general rule, the rights of the parties are fixed at the time of the breach of contract and damages are measured as of that time. *Fairway Builders, Inc. v. Malouf Towers Rental Co.*, 124 Ariz. 242, 254-55, 603 P.2d 513, 525-26 (App. 1979) (adopting the general rule in Arizona). However, the trial court need not apply the general rule in all situations. *Fairway Builders*, 124 Ariz. at 255, 603 P.2d at 526. The *Fairway Builders* court declined to adopt a rule specifying a definite point in time for measurement of damages in every case. The determination of the proper time for measurement of damages “is a matter within the sound discretion of the trial court.” *Id.* The *Fairway Builders* court upheld the trial court’s measurement of damages as of the time of trial. *Id.* (inflation would have unfairly diminished award of cost to repair construction defect).

2. Consequential Damages: The court should give this portion of the instruction if the evidence includes, for example, expenses related to the sale such as the buyer’s costs in examining the title or preparing the sale papers. Consequential damages ordinarily are those additional necessary expenses that are the natural consequence of the breach. *McAlister v. Citibank* 171 Ariz. 207, 211, 829 P.2d 1253, 1257 (App. 1992). *See also* RAJI (CIVIL) 6TH Contract 18.

3. Scope of Instruction: This instruction does not apply to either the breach of an option to buy property (*see* RAJI (CIVIL) 6TH Contract 31 (Definition of an Option)) or breach of a lease (*see* RAJI (CIVIL) 6TH Contract 33).

Continued

4. Award of Interest: Interest should run from the time that plaintiff’s claim was liquidated,

CONTRACT 20
Measure of Damages
(Sale of Land)

Continued

which may differ from the time of the breach. If interest at a certain rate was due upon a breach, and the date of breach, if any, can be determined as a matter of law, then the interest computation need not be submitted to the jury. *Northern Ariz. Gas Serv. v. Petrolane Transp., Inc.*, 145 Ariz. 467, 479, 702 P.2d 696, 708 (App. 1984) (interest on liquidated claim). The court should undertake that computation if plaintiff prevails. A.R.S. § 44-1201(A) sets forth the interest rate due “on any loan, indebtedness, judgment or other obligation[.]”

CONTRACT INSTRUCTIONS

CONTRACT 21

Measure of Damages (Purchase of Land)

If you find that [name of defendant] breached an agreement to buy real estate, then you must decide the full amount of money that will reasonably and fairly compensate [name of plaintiff] for each of the following elements of damages proved by the evidence to have resulted from [name of defendant]’s breach:

1. The amount that would have been due [name of plaintiff] under the contract, less the fair market value of the real estate at the time of the breach; and
2. Consequential damages suffered by [name of plaintiff].

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SOURCE: RESTATEMENT (SECOND) OF CONTRACTS § 347 (1981) (measure of contract damages in general); *see also* RAJI (CIVIL) 6TH Contract 17 (Measure of Direct Damages—Breach of Contract); JUDICIAL COUNCIL OF CALIFORNIA CIVIL JURY INSTRUCTIONS (2003-04), CACI No. 357.

USE NOTE: 1. Date for Measurement of Damages: Under the general rule, the rights of the parties are fixed at the time of the breach of contract and damages are measured as of that time. *Fairway Builders, Inc. v. Malouf Towers Rental Co.*, 124 Ariz. 242, 254-55, 603 P.2d 513, 525-26 (App. 1979) (adopting the general rule in Arizona). However, the trial court need not apply the general rule in all situations. *Fairway Builders*, 124 Ariz. at 255, 603 P.2d at 526. The *Fairway Builders* court declined to adopt a rule specifying a definite point in time for measurement of damages in every case. The determination of the proper time for measurement of damages “is a matter within the sound discretion of the trial court.” *Id.* The *Fairway Builders* court upheld the trial court’s measurement of damages as of the time of trial. *Id.* (inflation would have unfairly diminished award of cost to repair construction defect).

2. Consequential Damages: The court should give this portion of the instruction if the evidence includes, for example, expenses related to the sale. Consequential damages ordinarily are those additional necessary expenses that are the natural consequence of the breach. *McAlister v. Citibank*, 171 Ariz. 207, 211, 829 P.2d 1253, 1257 (App. 1992). *See also* RAJI (CIVIL) 6TH Contract 18.

3. Scope of Instruction: This instruction does not apply to either breach of an option to buy property (*see* RAJI (CIVIL) 6TH Contract 31 (Definition of an Option)) or breach of a lease (*see* RAJI (CIVIL) 6TH Contract 34).

4. Cash Basis of Award: Loss-of-bargain damages should be calculated on an all-cash-to-seller basis. Thus, for example, any promissory note must be converted to present cash value. *See, e.g., Abrams v. Motter*, 3 Cal. App. 3d 828, 841, 83 Cal. Rptr. 855, 864 (1970).

Continued

CONTRACT 21
Measure of Damages
(Purchase of Land)

Continued

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5. Liquidated Damages: The contract may provide that one party shall pay funds to the other party, whether in the form of earnest money or otherwise. Enforceability of those provisions should be measured against the standards for liquidated damages. *See Pima Sav. & Loan Ass'n v. Rampello*, 168 Ariz. 297, 299-300, 812 P.2d 1115, 1117-18 (App. 1991).

6. Award of Interest: The evidence may indicate that the date of the breach differs from the date when damages were liquidated and prejudgment interest begins to run. If interest at a certain rate was due upon a breach, and the date of breach, if any, can be determined as a matter of law, then the interest computation need not be submitted to the jury. The court may undertake that computation if plaintiff prevails. *Northern Ariz. Gas Serv. v. Petrolane Transp., Inc.*, 145 Ariz. 467, 479, 702 P.2d 696, 708 (App. 1984) (interest on liquidated claim). A.R.S. § 44-1201(A) sets forth the interest rate due “on any loan, indebtedness, judgment or other obligation”).

CONTRACT INSTRUCTIONS

CONTRACT 22

Measure of Damages (Breach of Warranty)

The measure of damages for breach of warranty is the difference between the value of goods at the time of delivery and the value they would have had if they had been as warranted.

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SOURCE: *Isenberg v. Lemon*, 84 Ariz. 340, 345, 327 P.2d 1016, 1019-20, *modified on other grounds*, 84 Ariz. 364, 329 P.2d 882 (1985); A.R.S. § 47-2714(B).

CONTRACT 23

Mitigation of Damages

[Name of defendant] claims that [name of plaintiff] did not make reasonable efforts to prevent or reduce damages.

[Name of plaintiff] may not recover for any damages that could have been prevented or reduced through reasonable efforts. [name of defendant] must prove:

1. [Name of plaintiff] did not make reasonable efforts to prevent or reduce damages;
2. If [name of plaintiff] had acted reasonably, [name of plaintiff] could have prevented or reduced damages; and
3. The amount of [name of plaintiff]'s damages that could have been prevented or reduced through reasonable efforts.

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SOURCE: *Coury Bros. Ranches v. Ellsworth*, 103 Ariz. 515, 518, 446 P.2d 458, 461 (1968); *West Pinal Family Health Ctr, Inc., v. McBryde*, 162 Ariz. 546, 548-49 785 P.2d 66, 68-69 (App. 1989) (mitigation of damages does not require filing of lis pendens); *Fairway Builders, Inc. v. Malouf Towers Rental Co.*, 124 Ariz. 242, 255, 603 P.2d 513, 526 (App. 1979); C. McCORMICK, LAW OF DAMAGES § 127 (1935); RESTATEMENT (SECOND) OF CONTRACTS § 350 (no breach of duty where party has made reasonable, but unsuccessful efforts).

USE NOTE: 1. In some circumstances, it may be proper to include an instruction referring to the triggering incident that determines when mitigation efforts should have begun.

2. In some circumstances, it may be proper to include an instruction to the effect that the plaintiff is not required to incur unreasonable risk or cost in order to mitigate damages.

3. The amount that should be subtracted is net mitigation, i.e., if the plaintiff obtains \$20,000 in mitigation efforts but had to spend \$5,000 to do so, the actual mitigation effect would be \$15,000.

COMMENT: This instruction is designed for contract claims only.

CONTRACT INSTRUCTIONS

CONTRACT 24

Quantum Meruit

[*Name of plaintiff*] is entitled to recover the reasonable value of the services rendered to [*name of defendant*] unless you find that either one of two things was true in this case:

First, [*name of plaintiff*] is not entitled to recover for his services if it was understood by [*name of plaintiff*] and [*name of defendant*] that the services were being rendered free of charge. It is [*name of defendant*]'s burden to show that the parties had such an understanding.

Second, [*name of plaintiff*] may not recover for his services if you find that, under all the circumstances, it was not unfair for [*name of defendant*] to receive the benefit of [*name of plaintiff*]'s services without paying for them.

Unless you find that [*name of plaintiff*] and [*name of defendant*] understood that the services were being rendered free of charge, or that under all the circumstances it was not unfair for [*name of defendant*] to receive the benefit of those services without paying for them, you should award [*name of plaintiff*] the reasonable value of the services. In determining what the reasonable value of [*name of plaintiff*]'s services was, you may consider the nature of the services provided and the customary rate of pay for such services.⁰

SOURCE: *Pyeatte v. Pyeatte*, 135 Ariz. 346, 661 P.2d 196 (App. 1982); *Hegel v. O'Mally Ins. Co., Inc.*, 122 Ariz. 52, 593 P.2d 275 (1979); *Dey v. Quinn*, 21 Ariz. 265, 267, 187 P. 578, 579 (1920); *Blue Ridge Sewer Imp. v. Lowry & Associates, Inc.*, 149 Ariz. 373, 376, 718 P.2d 1026, 1029 (App. 1986); *City of Sierra Vista v. Cochise Enter., Inc.*, 144 Ariz. 375, 381, 697 P.2d 1125, 1131 (App. 1985); E. DEVITT, ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 87.02 (1987).

COMMENT: 1. Implied Promise: When one is employed in the services of another for any period of time, the law implies a promise to pay what such services are reasonably worth, unless the circumstances described in the second and third paragraphs of this instruction are present. *Dey*, 21 Ariz. at 267, 187 P. at 579. This instruction assumes that there is no dispute concerning whether plaintiff was employed in the service of defendant; if there is such a dispute, the instruction should be modified accordingly.

2. Factual Disputes: Quantum meruit recovery may be appropriate in a variety of circumstances. This instruction addresses a single, common fact pattern, which creates an implied-in-law obligation. Where an obligation to pay exists only if certain disputed facts are found to be true, it will be necessary to instruct the jury as to which findings of fact will create an obligation.

3. Express Contract: It is not proper to instruct the jury on a quantum meruit theory when the case has been brought and tried for breach of an express contract and not for the reasonable value of the work done under an implied contract. *S. J. Lind, Inc. v. Makler*, 18 Ariz. App. 572, 574, 504 P.2d 513, 515 (1973).

CONTRACT 25

Whether a Standardized Term Is Part of the Agreement

When someone signs an agreement and has reason to know that what he/she is signing is a standardized, form agreement which is regularly used in that kind of transaction, he/she is bound by its terms regardless of whether he/she actually read or understood those terms.

There is an exception to the rule I just stated. If you find that [*name of plaintiff*] had reason to believe that [*name of defendant*] would not have signed the standardized agreement if [*name of defendant*] had known that a particular term was there, and if you find that [*name of defendant*] was in fact unaware that the particular term was there, that term is not part of the agreement and [*name of defendant*] is not bound by it.

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SOURCE: *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 140 Ariz. 383, 393-94, 682 P.2d 388, 398-99 (1984); RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981).

USE NOTE: This instruction is intended to apply to only one of the many issues which may arise concerning provisions in standardized agreements. It is not a complete statement of all law that may be applicable in such cases.

COMMENT: This instruction may be applicable when there is a dispute as to whether a standardized term is part of an agreement. This instruction should not be given with regard to negotiated terms. *Darner Motor Sales*, 140 Ariz. at 392 n.8, 682 P.2d at 397 n.8.

This instruction assumes that the party has “signed” the agreement and should be modified if assent was manifested in some other way. See RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981).

The first paragraph of this instruction states the general rule; the second states one exception. It will not always be appropriate to give both portions of the instruction. A contract term may, of course, be ineffective for reasons other than those stated in the second paragraph, including illegality or unconscionability. *Maxwell v. Fidelity Fin.Servs., Inc.*, 184 Ariz. 82, 87, 907 P.2d 51, 56 (1995) (stating that unconscionability is a question of law); *Brand v. Elledge*, 89 Ariz. 200, 360 P.2d 213 (1961) (stating that as a “general rule,” courts will not enforce illegal contracts).

CONTRACT INSTRUCTIONS

CONTRACT 26

Determining Intent of the Parties⁰

In deciding what a contract provision means, you should attempt to determine what the parties intended at the time that the contract was formed.¹ You may consider the surrounding facts and circumstances as you find them to have been at the time that the contract was formed.² It is for you to determine what those surrounding facts and circumstances were.

Continued

SOURCE: *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 153, 854 P.2d 1134, 1139 (1993); *Gordinier v. Aetna Cas. & Sur. Co.*, 154 Ariz. 266, 269, 742 P.2d 277, 280 (1987); *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 140 Ariz. 383, 393, 682 P.2d 388, 398 (1984); *Polk v. Koerner*, 111 Ariz. 493, 495, 533 P.2d 660, 662 (1975); *United Cal. Bank v. Prudential Ins. Co.*, 140 Ariz. 238, 258, 261, 681 P.2d 390, 410, 413 (App. 1983); *Fairway Builders, Inc. v. Malouf Towers Rental Co., Inc.*, 124 Ariz. 242, 250, 603 P.2d 513, 521 (App. 1979); *Associated Students of the Univ. of Ariz. v. Arizona Bd. of Regents*, 120 Ariz. 100, 105, 584 P.2d 564, 569 (App. 1978), *cert. denied*, 440 U.S. 913 (1979).

USE NOTE: 1. If there is no evidence pertaining to one of the facts identified in the second paragraph, no reference to that factor should be made.

2. This instruction assumes that the parol evidence rule does not bar the evidence in question. The instruction should not be given unless the court has made a determination that a jury issue is present. The jury may have no role in determining what a contract or contract term means unless, for example, the court has made a prior determination that there is an ambiguity. *E.g.*, *Leikvold v. Valley View Community Hosp.*, 141 Ariz. 544, 548, 688 P.2d 170, 174 (1984). (“Where the terms of an agreement are clear and unambiguous, the construction of the contract is a question of law for the court”). This instruction should not be given where the dispute concerns the meaning of a standardized contract term; in such a situation, the intent of the immediate parties to the contract is not controlling. *See* RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. e (1981).

COMMENT: ¹ “The object of all rules of interpretation is to arrive at the intention of the parties as expressed in the contract.” *United Cal. Bank*, 140 Ariz. at 261, 681 P.2d at 413. Where the court cannot ascertain that intention from the contract itself, the jury may determine intent, but the goal remains the same. It is the intent of the parties at the time the contract was made which is controlling. *Polk*, 111 Ariz. at 495, 533 P.2d at 662.

² “The surrounding circumstances at the time that the contract was made should be considered in ascertaining its meaning” if it is first determined that “the contract and the instruments forming the contract” are ambiguous *Fairway Builders*, 124 Ariz. at 250, 603 P.2d at 521.

Continued

CONTRACT 26

Determining Intent of the Parties⁰

Continued

To determine what the parties intended the terms of a contract to mean, you may consider the language of the written agreement; the acts and statements of the parties themselves before any dispute arose;³ the parties' negotiations; any prior dealings between the parties; any reasonable expectations the parties may have had as the result of the promises or conduct of the other party;⁵ and any other evidence that sheds light on the parties' intent.⁶

³ "The acts of parties under a contract, before disputes arise, are the best evidence of the meaning of doubtful contract terms." *Associated Students*, 120 Ariz. at 105, 584 P.2d at 569. The Arizona cases on this point speak of the "acts" of the parties and say nothing about the "statements." To the extent a jury understands that "acts" may be verbal and include "statements," there is no problem, but it probably cannot be assumed that a jury would so understand an instruction which speaks only of "acts." Corbin points out that if the parties have discussed what a provision means and have agreed, that is the best evidence of what the provision means. 3 CORBIN ON CONTRACTS § 558 (1960), p. 257. If an instruction spoke of "acts" only, a jury might conclude that it should disregard an agreement as to what a provision means in favor of uncertain inferences from other conduct. "This principle of practical construction applies only to acts performed before any dispute arises." *United Cal. Bank*, 140 Ariz. at 266, 681 P.2d at 418.

⁵ The pertinence of negotiations, prior understandings, and reasonable expectations induced by the other party is recognized in *Darner Motor Sales*, 140 Ariz. at 393, 682 P.2d at 398; *see also Gordinier*, 154 Ariz. at 272-73, 742 P.2d at 283-84 (1987).

⁶ The final clause is intended to make it clear to the jurors that they are not required to consider only the previously enumerated factors. An instruction should not single out and make unduly prominent some parts of the evidence, or indicate to the jury that the court attached special importance to parts of the evidence. *Public Serv. Co. of Okla. v. Bleak*, 134 Ariz. 311, 319, 656 P.2d 600, 608 (1982). This does not necessarily mean that any list of evidentiary factors must be expressly made nonexclusive to avoid infirmity, but it may be an advisable practice.

CONTRACT INSTRUCTIONS

CONTRACT 27

Construction Against the Party Choosing the Words

You may find that, even after you have determined and considered the surrounding facts and circumstances, what the parties intended a particular written provision to mean is still not clear to you. If, and only if, you have determined and considered the facts and circumstances surrounding the formation of the contract and still cannot determine which of the possible, reasonable meanings was intended by the parties, you should apply the following rule of law:

In choosing between the possible meanings of language in a written agreement, the meaning that operates against the interests of the party who supplied the words is generally the preferred meaning.

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SOURCE: This is a slightly modified version of RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981).

CAVEAT: This instruction is designed for use in connection with written provisions. It should not be given where it cannot be determined that one party rather than the other actually chose the specific language of the contract. 3 CORBIN ON CONTRACTS § 559 (1960). Where each party supplied some of the language, this rule may still be applicable but the instruction will probably require modification. Where a contract term is required by statute, the rule may be inapplicable. *Id.*; see also RESTATEMENT (SECOND) OF CONTRACTS § 206 cmt. b (1981). This rule “is not one to be applied blindly without knowledge of the facts.” 3 CORBIN ON CONTRACTS § 559 (1960). See also Comment, *infra*.

COMMENT: Last Resort: This rule of law has been described as a rule of “last resort,” to be applied only if other rules of interpretation have been exhausted and only if, at that point, there remain two possible and reasonable explanations. 3 CORBIN ON CONTRACTS § 559 (1960). See also *Insurance Agencies Co. v. Weaver*, 124 Ariz. 327, 329, 604 P.2d 258, 260 (1979); *Polk v. Koerner*, 111 Ariz. 493, 495, 533 P.2d 660, 662 (1975); *United Cal. Bank v. Prudential Ins. Co.*, 140 Ariz. 238, 681 P.2d 390 (App. 1983); RESTATEMENT (SECOND) OF CONTRACTS § 295 reporter’s note (1981). Before telling the jury the rule, it is therefore advisable to clarify to the jury that they must not use it until other methods of determining intent have been exhausted. Were the rule stated without such qualification, a jury might interpret it to mean that whoever wrote the contract must lose, regardless of other circumstances.

CONTRACT 28
Promissory Estoppel

[Name of plaintiff] claims that [name of defendant] should be bound by [name of defendant]'s promise [specify nature of promise] even [if you find] [though]¹ there was no binding contract between the parties.

On this claim, [name of plaintiff] must prove:

1. [Name of defendant] made such a promise;
2. It was reasonably foreseeable to [name of defendant] that [name of plaintiff] would rely upon that promise;
3. [Name of plaintiff] justifiably relied upon the promise; and
4. [Name of plaintiff] incurred loss or suffered detriment as the result of such reliance.

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SOURCE: *Contempo Constr. Co. v. Mountain States T. & T. Co.*, 153 Ariz. 279, 282, 736 P.2d 13, 16 (1987); *Trollope v. Koerner*, 106 Ariz. 10, 18, 470 P.2d 91, 99 (1970) (reliance must be justified). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 90.

COMMENT: “Reliance is justified when it is reasonable, but is not justified when knowledge to the contrary exists.” *Higginbottom v. State*, 203 Ariz. 139, 144, 51 P.3d 972, 977 (App. 2002) (quoting *Carondelet Health Servs. v. Arizona Health Care Cost Containment System*, 187 Ariz. 467, 470, 930 P.2d 544, 547 (App. 1996) (citation omitted)).

The remedy for promissory estoppel is based on the damages resulting from the plaintiff's reliance on the defendant's promise, rather than the terms of the promise. *Arok Constr. Co. v. Indian Constr. Servs.*, 174 Ariz. 291, 300, 848 P.2d 870, 879 (App. 1993).

¹ Use the first bracketed phrase (“even if you find”) in cases where the plaintiff makes alternative claims sounding in both contract and promissory estoppel. Use the second bracketed phrase (“even though”) in those cases where the plaintiff makes no claim arising out of contract.

CONTRACT INSTRUCTIONS

CONTRACT 29

Impracticability (Commercial Frustration)

[*Name of defendant*] claims that it became impracticable to perform the contract. [*Name of defendant*] must prove this claim.

A party can be excused from performing the contract if that performance became impracticable after the contract was made due to circumstances beyond the party's control.

"Impracticable" means extreme and unreasonable difficulty, expense, injury, or loss to the party claiming it. This means something more than that the performance would have been somewhat more difficult or costly. On the other hand, it does not mean that performance was absolutely impossible.

The occurrence of a reasonably foreseeable event cannot render performance impracticable. In determining whether an event was reasonably foreseeable, you may consider the contract itself and the circumstances surrounding the making of the contract.

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SOURCE: *Mobile Home Estates v. Levitt Mobile Home Systems*, 118 Ariz. 219, 222, 575 P.2d 1245, 1248 (1978); *Garner v. Ellingson*, 18 Ariz. App. 181, 182, 501 P.2d 22, 23 (1972); *7200 Scottsdale Road General Partners v. Kuhn Farm Machinery*, 184 Ariz. 341, 345, 909 P.2d 408, 412 (App. 1995). RESTATEMENT (SECOND) OF CONTRACTS § 261, and cmt. d & Illustration 6 (1981); A.R.S. § 47-2615 (UCC § 2-615); VIRGINIA MODEL JURY INSTRUCTIONS—CIVIL, 45.450 (1988 ed. 1993).

USE NOTE: A related doctrine to impracticability is the doctrine of frustration of purpose. Frustration of purpose unlike impracticability deals with "the problem that arises when a change in circumstances makes one party's performance virtually worthless to the other. . ." *7200 Scottsdale Road General Partners v. Kuhn Farm Machinery*, 184 Ariz. 341, 345, 909 P.2d 408, 412 (App. 1995) (quoting the RESTATEMENT (SECOND) OF CONTRACTS § 265 cmt. a). A classic example cited in *7200 Scottsdale Road* is the English case of *Krell v. Henry*, [1903] 2 K.B. 740. The frustration of purpose is "essentially an equitable doctrine," and is therefore "generally treated as a question of law." 184 Ariz. at 347, 909 P.2d at 414. Accordingly, a jury instruction relating to the frustration of purpose doctrine is not provided.

COMMENT: "Impracticable" does not mean that the party is incapable of performing. It means that the contemplated performance itself cannot be done practicably.

Continued

The impracticability cannot be caused by the party who wants to rely on impracticability. That party must also have made reasonable efforts to overcome the obstacles to his performance.

CONTRACT 29
Impracticability
(Commercial Frustration)

Continued

If the contract allows for alternative performances, the impracticability of one of those alternatives does not relieve the party from performing one of the others.

This instruction does not cover temporary or partial impracticability or specific types of impracticability, such as death or incapacity of a person necessary for performance and destruction of a thing necessary for performance. Additional or alternative instructions will be needed in such cases.

The events contemplated by the rule of impracticability are usually “acts of God” or acts of third parties. RESTATEMENT (SECOND) OF CONTRACTS § 261 cmt. d (1981). However, when a party promises to perform and that performance depends on a third party’s actions, and those actions do not occur, this rule does not apply because the promisor is considered to have assumed the risk that the third party might not take those actions. *Id.* at cmt. f.

CONTRACT INSTRUCTIONS

CONTRACT 30

Duress

[*Name of defendant*] claims that he entered into the contract under duress.

Duress is a wrongful act or wrongful threat by a person that induces another person to enter into a contract which would not have been entered into without the duress.

A wrongful act or threat amounts to duress if the act or threat placed [*name of defendant*] in such fear that his free will and judgment were overcome.

If you find that [*name of defendant*] entered into the contract as a result of duress by [*name of plaintiff*], then the contract cannot be enforced against [*name of defendant*].

[*Name of defendant*] has the burden of proving that the contract was entered into as a result of duress.

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SOURCE: *In re Estate of Cohen*, 105 Ariz. 337, 341, 464 P.2d 620, 624 (1970); *Dunbar v. Dunbar*, 102 Ariz. 352, 355, 429 P.2d 949, 952 (1967); *Inter-Tel, Inc. v. Bank of America*, 195 Ariz. 111, 117, 985 P. 2d 596, 602 (App. 1999); *Republic Nat'l Life Ins. Co. v. Rudine*, 137 Ariz. 62, 65, 668 P.2d 905, 908 (App. 1983).

USE NOTE: Is the Element “Fear,” or Is It “No Reasonable Alternative”?: Arizona has adopted the old RESTATEMENT OF CONTRACTS § 492 definition of duress, in which “fear” is a requirement. *Dunbar v. Dunbar*, 102 Ariz. 352, 429 P.2d 949 (1967). However, the RESTATEMENT (SECOND) OF CONTRACTS § 175 has eliminated the fear requirement and has adopted the “no reasonable alternative” standard for all claims of duress.

The Restatement (Second) eliminates “fear” in favor of “no reasonable alternative” because “fear overcoming free will and judgment” are vague and impracticable standards.

The “no reasonable alternative” standard has been adopted in Arizona when business compulsion or economic duress has been asserted as a defense to enforcement of a contract. *See* Comment 2, *infra*. To date, no Arizona appellate court has addressed the change between Restatement and Restatement (Second), and RESTATEMENT § 492 has been cited, but not since 1983, as the Arizona rule for duress.

COMMENT: 1. Wrongful Act: To constitute duress, the act or threat must be *wrongful*. It is never duress to threaten to resort to the court to vindicate legal rights. *Dunbar v. Dunbar*, 102 Ariz. at 356, 429 P.2d at 953; *Republic Nat'l Life Ins. Co. v. Rudine*, 137 Ariz. 62, 65-66, 668 P.2d 905, 908-09 (App. 1983); *USLife Title Co. v. Gutkin*, 152 Ariz. 349, 356-57, 732 P.2d 579, 586-87 (App. 1986).

2. Business Compulsion: In *Frank Culver Elec., Inc. v. Jorgenson*, 136 Ariz. 76, 77-78, 664 P.2d 226, 227-28 (App. 1983), the court of appeals discussed the concept of business compulsion or economic duress. The doctrine of business compulsion or economic duress requires an improper act or improper threat by one party compelling the other party to act against his free will causing a serious business loss or monetary payment to his detriment *and* a showing that the party had no reasonable alternative. The element of fear required to prove duress is not a requirement to prove business compulsion or economic duress.

Continued

CONTRACT 30

Duress

Continued

3. Duress by Non-Party: Duress by a person not a party to the contract may also make a contract voidable by the victim of the duress unless the other party to the contract, in good faith and without reason to know of the duress, gives value or relies materially on the transaction. *USLife Title Co.*, 152 Ariz. at 357, 732 P.2d at 579 (citing RESTATEMENT OF CONTRACTS § 175(2) (1981)).

4. Acting Promptly: A party who claims duress must have acted within a reasonably prompt time to cancel the contract. If the party claiming duress failed to act promptly, the contract may be enforced. In determining whether the party claiming duress acted promptly, the jury should be instructed to consider all the circumstances surrounding the transaction including, for example, whether due to the length of time waited before asserting duress, the party claiming duress acquiesced in the contract and agreed to be bound to the contract despite the duress. *Hubbard v. Geare*, 77 Ariz. 262, 265, 269 P.2d 1064, 1066 (1954); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 381 (1981).

CONTRACT INSTRUCTIONS

CONTRACT 31

Definition of Option

(Lease Cases)

An option to [renew a lease] [purchase property] is an offer to enter into a [renewal of the lease] [contract to sell the property] on the terms contained in the option. An option remains open for the time period stated in the option.

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SOURCE: *University Realty & Dev. Co. v. Omid-Gaf, Inc.*, 19 Ariz. App. 488, 490, 508 P.2d 747, 749 (1973).

USE NOTE: 1. This instruction should be used with RAJI (CIVIL) 6TH Contract 3 and 4.

2. An option is a binding and continuing offer only if it is supported by consideration. *Allen R. Krauss Co. v. Fox*, 132 Ariz. 125, 126, 644 P.2d 279, 280 (App. 1982). If it is supported by consideration, it cannot be withdrawn or revoked until the time fixed for expiration. *Mack v. Coker*, 22 Ariz. App. 105, 108, 523 P.2d 1342, 1345 (1974). Otherwise, it is merely an offer that can be revoked at any time before acceptance. *Allen R. Krauss Co.*, 132 Ariz. at 125, 644 P.2d at 280. Consideration requires a benefit to the promisor or a detriment to the promisee, not necessarily monetary consideration. *Mack*, 22 Ariz. App. at 108, 523 P.2d at 1345. See RAJI (CIVIL) 6TH Contract 7. If there is a fact issue as to whether consideration was given for the option, an instruction should be given to that effect.

3. If an option does not state the deadline by which it must be exercised, the last sentence should be modified. The Committee does not state an opinion as to what the deadline would be in that circumstance, or whether it would be an issue of law or of fact.

CONTRACT 32
Exercising an Option
(Burden of Proof)

An option is exercised by acceptance of the offer to enter into a [renewal of the lease] [contract to sell the property]. [*Name of plaintiff*] has the burden of proving that the option was exercised exactly as required by the terms and conditions stated in the option.

[The method of giving notice, however, is an exception to the requirement of strict compliance. [*Name of plaintiff*] was not required to use the exact method of giving notice specified in the option, so long as the method used was effective to communicate the notice to [*name of defendant*]].

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SOURCE: *Oberan v. Western Machinery Co.*, 65 Ariz. 103, 174 P.2d 745 (1946); *Mack v. Coker*, 22 Ariz. App. 105, 108, 523 P.2d 1342, 1345 (1974); *University Realty & Dev. Co. v. Omid-Gaf, Inc.*, 19 Ariz. App. 488, 490, 508 P.2d 747, 749 (1973); *Richardson v. Casey*, 6 Ariz. App. 141, 143, 430 P.2d 720, 722 (1967).

USE NOTE: 1. This instruction should be used with RAJI (CIVIL) 6TH Contracts 3, 4, and 6.

2. The bracketed second paragraph should be used only when there is an issue as to whether communication or transmission of the notice by a method other than the exact method specified in the option (*e.g.*, registered mail, regular mail, hand-delivery, etc.) was sufficient to effectively exercise the options.

CONTRACT INSTRUCTIONS

CONTRACT 33 Lease Termination (Burden of Proof)

A lease can be terminated before it expires:

1. By an agreement of the parties; or
2. By conduct of the parties which implies that they both agree to termination of the lease.

[Party alleging termination] has the burden of proving the lease has been terminated.

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SOURCE: *Tempe Corporate Office Bldg. v. Arizona Funding Service*, 167 Ariz. 394, 398-99, 807 P.2d 1130, 1134-35 (App. 1991); *Lee Dev. Co. v. Papp*, 166 Ariz. 471, 477, 803 P.2d 464, 470 (App. 1990); *Wingate v. Gin*, 148 Ariz. 289, 293, 714 P.2d 459, 463 (App. 1985) (if the lease so provides, a suit filed by the landlord seeking judgment for all rents, past and future, constitutes a termination of the lease); *Roosen v. Schaffer*, 127 Ariz. 346, 349, 621 P.2d 33, 36 (App. 1980); *Riggs v. Murdock*, 10 Ariz. App. 248, 458 P.2d 115 (1969) (“the intent of the landlord in accepting the abandonment is a question of fact for the trier of fact”).

USE NOTE: 1. See RAJI (CIVIL) 6TH Contract 1 (Burden of Proof).

2. The first step in determining whether a lease has been terminated before its term expires is to determine whether the lease itself provides that the event(s) or default(s) at issue in the lawsuit shall or may result in termination of the lease. *Camelback Land & Inv. Co. v. Phoenix Entertainment Corp.*, 2 Ariz. App. 250, 254, 407 P.2d 791, 795 (App. 1965).

3. For leases of residential property or mobile homes, these instructions may need to be modified in accordance with, respectively, the Arizona Residential Landlord and Tenant Act, A.R.S. § 33-1301 *et seq.*, or the Arizona Mobile Home Parks Residential Landlord and Tenant Act, A.R.S. § 33-1401 *et seq.*

CONTRACT 34
Damages for Breach or Termination of Lease
(Commercial Lease)

[If you find that the lease has been terminated,] the landlord is entitled to recover rent at the lease rate until the date of termination.

[If you find that the lease has not been terminated,] the landlord is entitled to recover rent at the lease rate until the time of trial, plus the difference, if any, between the future rents due under the lease and the reasonable rental value of the premises for the period after trial until the end of the lease term.

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SOURCE: *Tempe Corporate Office Bldg. v. Arizona Funding Serv.*, 167 Ariz. 394, 399, 807 P.2d 1130, 1135 (App. 1991); *Lee Dev. Co. v. Papp*, 166 Ariz. 471, 478, 903 P.2d 464, 471 (App. 1990); *Wingate v. Gin*, 148 Ariz. 289, 293, 714 P.2d 459, 463 (App. 1985); *Roosen v. Schaffer*, 127 Ariz. 346, 621 P.2d 33 (App. 1980).

USE NOTE: 1. If there is no issue at trial as to whether the lease has been terminated, use whichever paragraph applies and delete the bracketed phrase “If you find . . .”

2. The first step in determining the landlord’s remedies and damages is to look to the terms of the lease. For example, *if the lease so provides*, the words “until the date of termination” in the first paragraph of this instruction should be replaced with:

until the time of trial, plus the difference, if any, between the future rents due under the lease and the reasonable rental value of the premises for the period after trial until the end of the lease term.

If the lease provides exclusive remedies, the landlord is bound by them and cannot obtain other remedies. Conversely, if the lease provides that its specified remedies are not exclusive but, instead, are in addition to all other legal and equitable remedies that may be available, the landlord is not restricted to the remedies specified in the lease. *Roosen v. Schaffer*, 127 Ariz. at 349, P.2d at 36; *Camelback Land & Inv. Co. v. Phoenix Entertainment Corp.*, 2 Ariz. App. 250, 256, 407 P.2d 791, 797 (App. 1965).

3. For an overview instruction as to the purpose of lost rent damages, see the first two sentences of RAJI (CIVIL) 6TH Contract 17 (Measure of Direct Damages—Breach of Contract).

4. For damages other than lost rents, see RAJI (CIVIL) 6TH Contract 18 (Consequential Damages).

CONTRACT INSTRUCTIONS

CONTRACT 35

Mitigation of Damages for Past Rent

The landlord may not recover any damages that could have been avoided through reasonable efforts to find a new tenant. If you find that the landlord failed to make reasonable efforts to find a new tenant, the damages for past rent must be reduced by the amount the landlord could have avoided through reasonable efforts. The tenant must prove:

1. The landlord did not make reasonable efforts to find a new tenant;
2. If the landlord had acted reasonably, it is probable that a new tenant could have been found; and
3. The amount of damages the landlord could have avoided through reasonable efforts.

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SOURCE: *Barnes v. Lopez*, 25 Ariz. App. 477, 544 P.2d 694 (1976) (lessee must prove lessor's efforts were not reasonable and the probability that mitigation efforts would have been successful). *Accord Dushoff v. Phoenix Co.*, 22 Ariz. App. 445, 528 P.2d 637, *reh'g denied*, 23 Ariz. App. 238, 532 P.2d 180 (1975) (the party in breach has the burden of showing that mitigation was reasonably possible but not reasonably attempted). *Northern Arizona Gas Serv. v. Petrolane Transp., Inc.*, 145 Ariz. 467, 702 P.2d 696 (App. 1984); *see also Continental Townhouses East v. Brockbank*, 152 Ariz. 537, 541, 733 P.2d 1120, 1124 (App. 1986) (approving the following jury instruction: "Defendant must prove by the preponderance of the evidence that a portion of plaintiff's losses occurred as a result of plaintiff's failure to take reasonable steps to avoid those losses"); *Wingate v. Gin*, 148 Ariz. 289, 291, 714 P.2d 459, 461 (App. 1985) (the landlord's efforts to relet the premises need only be reasonable, not heroic); *Northern Arizona Gas Serv. v. Petrolane Transp., Inc.*, 145 Ariz. 467, 477, 702 P.2d 696, 706 (App. 1984); *Stewart Title & Trust of Tucson v. Pribbeno*, 129 Ariz. 15, 16, 628 P.2d 52, 53 (App. 1981) (a tenant who has asserted the doctrine of avoidable consequences has the burden of proving that mitigation was probable); *Dushoff v. Phoenix Co.*, 22 Ariz. App. 445, 447-48, 528 P.2d 637, 639-40 (1975) (the party in breach has the burden of showing that mitigation was reasonably possible but not reasonably attempted).

USE NOTE: 1. In some circumstances, it may be proper to include an instruction regarding the triggering incident that determines when mitigation efforts should have begun.

2. In some circumstances, it may be proper to include an instruction to the effect that the landlord is not required to incur unreasonable risk or cost in order to mitigate damages. *See* RAJI (CIVIL) 6TH Contract 23 (Mitigation of Damages).

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