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Breach of Contract Defenses: Florida

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

Defenses to Contract Formation

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

Ambiguity is a defense to contract formation under Florida law. A defendant should assert ambiguity as a defense to contract formation where both:

- An essential term of the alleged contract is open to more than one reasonable interpretation.
- The parties never formed an enforceable contract because their different interpretations of an essential contractual term prevented a meeting of the minds.

(See *King v. Bray*, 867 So. 2d 1224, 1226-28 (Fla. 5th DCA 2004).)

To determine whether a contract term is ambiguous, Florida courts:

- Review:
  - the plain language of the contract to determine the parties' intent; and
  - the contract as a whole, not as a single term or group of words in isolation.
- Attempt to reconcile conflicting provisions.
- Exclude "fanciful, inconsistent, and absurd interpretations" of the contract's plain language.

(*Sidiq v. Tower Hill Select Ins. Co.*, 276 So. 3d 822, 827 (Fla. 4th DCA 2019); *Nabbie v. Orlando Outlet Owner, LLC*, 237 So. 3d 463, 466-67 (Fla. 5th DCA 2018).)

Florida law recognizes three types of contractual ambiguities:

- Patent ambiguities, which appear on the face of a contract and arise from "defective, obscure, or insensible language."
- Latent ambiguities, where the contract language is clear, but an extrinsic fact creates:
  - the need for interpretation of a contractual provision; or
  - a choice between two or more possible interpretations.
- Intermediate ambiguities, where the contract includes patent and latent ambiguities.

(*MDS (Canada) Inc. v. Rad Source Techs., Inc.*, 720 F.3d 833, 844 (11th Cir. 2013) (applying Florida law); *Clayton v. Poggendorf*, 237 So. 3d 1041, 1046-47 (Fla. 4th DCA 2018).)

Parties may use extrinsic (parol) evidence to explain latent or intermediate ambiguities. However, parties typically may not introduce extrinsic evidence to explain patent ambiguities. (*MDS (Canada) Inc.*, 720 F.3d at 844; *Nationstar Mortg. Co. v. Levine*, 216 So. 3d 711, 715-16 (Fla. 4th DCA 2017).)

While a contract's integration clause does not always bar a party from introducing parol evidence, Florida courts find integration clauses:

- Are a "highly persuasive statement" that the parties intended the contract to be their complete and exclusive agreement.
- Generally prevent a party from introducing parol evidence to vary or contradict contractual terms.

(*Jenkins v. Eckerd Corp.*, 913 So. 2d 43, 53 (Fla. 1st DCA 2005).)

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

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

- It entered into the contract involuntarily and not by its free choice or will.
- Its involuntary action was the result of the plaintiff's improper or coercive conduct.

(*Parra de Rey v. Rey*, 114 So. 3d 371, 387 (Fla. 3d DCA 2013); *Francavilla v. Francavilla*, 969 So. 2d 522, 524-25 (Fla. 4th DCA 2007).)

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

Economic duress is a defense to contract formation under Florida law. A defendant should assert economic duress where:

- The plaintiff committed wrongful acts or threats against the defendant, causing the defendant financial distress.
- The defendant lacked a reasonable alternative course of action.

(*Leader Global Sols., LLC v. Tradeco Infraestructura, S.A. DE C.V.*, 155 F. Supp. 3d 1310, 1317-18 (S.D. Fla. 2016) (applying Florida law); *Riedel v. NCNB Nat'l Bank of Fla., Inc.*, 591 So. 2d 1038, 1040 (Fla. 1st DCA 1991) (Florida recognizes economic duress as an affirmative defense but not as an independent tort).)

Note that economic duress is difficult to prove because a defendant must show that its actions were essentially involuntary and not an "exercise of free choice or free will" (*Leader Global Sols., LLC*, 155 F. Supp. 3d at 1318).

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

Failure of a condition precedent is a defense to contract formation under Florida law. A defendant should assert failure of a condition precedent where:

- Certain events or other conditions must be satisfied before the parties' contract is formed.
- The condition precedent never occurred.

(Fla. Standard Jury Instructions in Contract and Business Cases §§ 416.21 and 416.22; *Mitchell v. DiMare*, 936 So. 2d 1178, 1180 (Fla. 5th DCA 2006); *Univ. Hous. by Dayco Corp. v. Foch*, 221 So. 3d 701, 704 (Fla. 3d DCA 2017).)

If pleaded as an affirmative defense, a defendant must plead it with particularity (Fla. R. Civ. P. 1.120(c); *Custer Med. Ctr. v. United Auto. Ins. Co.*, 62 So. 3d 1086, 1096-97 (Fla. 2010)).

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

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

Fraudulent inducement is a defense to contract formation under Florida law. A defendant should assert fraudulent inducement where:

- The plaintiff made a false statement concerning a material fact.
- The plaintiff made the false statement with:
  - actual knowledge that the statement was false; or
  - recklessness regarding the truth of the statement.
- The plaintiff made the false statement with the intent to induce the defendant to enter into the contract or transaction.
- The defendant relied on the false statement and entered into the contract or transaction.
- The plaintiff's false statement was the legal cause of the defendant's loss or injury.

(Fla. Standard Jury Instructions in Contract and Business Cases § 416.28; Fla. R. Civ. P. 1.110(d) and 1.120(b); *Hillcrest Pac. Corp. v. Yamamura*, 727 So. 2d 1053, 1056 (Fla. 4th DCA 1999); *Guarantee Ins. Co. v. Brand Mgmt. Serv., Inc.*, 2013 WL 6768641, at *4 (S.D. Fla. Dec. 20, 2013) (applying Florida law).)

If pleaded as an affirmative defense, a defendant must plead it with particularity (Fla. R. Civ. P. 1.120(b); *Thompson v. Bank of N.Y.*, 862 So. 2d 768, 769-70 (Fla. 4th DCA 2003) (fraud affirmative defense must be pled with particularity)).

Fraudulent inducement is distinct from other kinds of fraud. A fraudulent inducement defense requires that the plaintiff make the misrepresentation **before** the parties form the contract. A defendant may not assert fraudulent inducement when the plaintiff's alleged misrepresentation occurred **after** the parties formed the contract. (*HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.*, 685 So. 2d 1238, 1239-40 (Fla. 1996); *Peebles v. Puig*, 223 So. 3d 1065, 1068-69 (Fla. 3d DCA 2017).)

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

Illegal purpose is a defense to contract formation under Florida law. A defendant should assert illegal purpose where the contract either:

- Violates a provision of:
  - the constitution; or
  - a statute.
- Is clearly contrary to public policy, which typically involve matters concerning public:
  - morals;
  - health;
  - safety; or
  - welfare.

(*Lucas Games Inc. v. Morris AR Assocs., LLC*, 197 So. 3d 1183, 1184 (Fla. 4th DCA 2016); *Harris v. Gonzalez*, 789 So. 2d 405, 409 (Fla. 4th DCA 2001); *Johnson, Pope, Bokor, Ruppel & Burns, LLP v. Forier*, 67 So. 3d 315, 318 (Fla. 2d DCA 2011).)

However, a Florida court may enforce an illegal contract where either:

- The contract contains a severability clause and:
  - the illegal contractual provision does not go to the contract's essence; and
  - the contract contains valid legal obligations after severing the illegal provision.

  (*Premier Compounding Pharmacy, Inc. v. Larson*, 250 So. 3d 94, 97-99 (Fla. 4th DCA 2018); *Fonte v. AT&T Wireless Servs., Inc.*, 903 So. 2d 1019, 1024 (Fla. 4th DCA 2005).)
- In limited circumstances, one of the contracting parties is innocent of any wrongdoing (see *Patterson v. Law Office of Lauri J. Goldstein, P.A.*, 980 So. 2d 1234, 1237 (Fla. 4th DCA 2008)).

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

Infancy is a defense to contract formation under Florida law. A defendant should assert infancy where:

- The defendant is:
  - under 18 years old;
  - not married or previously married (§ 743.01, Fla. Stat.); and
  - not emancipated by a circuit court (§ 743.015, Fla. Stat.).
- The contract **does not** relate to:
  - "necessaries," such as medical care, food, or shelter;
  - money borrowed for higher educational expenses;
  - the minor's artistic, creative, or athletic services that a Florida probate court approved; or
  - other narrow statutory exceptions, such as allowing minors in foster care to contract for services.

(§§ 743.01-743.095, Fla. Stat.; Fla. R. Civ. P. 1.120(a); *Charles v. Klemick & Gampel, P.A.*, 984 So. 2d 563, 563-64 (Fla. 2d DCA 2008) (minors lack the capacity to enter into a contract); *MN MedInvest Co., L.P. v. Estate of Nichols ex rel. Nichols*, 908 So. 2d 1178, 1179 (Fla. 2d DCA 2005) (contracts for necessaries binding on minors); *Lane v. MRA Holdings, LLC*, 242 F. Supp. 2d 1205, 1215 (M.D. Fla. 2002) (discussing instances where minors may consent to contract) (applying Florida law).)

A minor repudiating a contract must return the property received if they still possess it (see *Putnal v. Walker*, 55 So. 844, 846 (Fla. 1911)).

On reaching the age of majority an individual may ratify a contract that they formed while a minor (see *Robertson v. Robertson*, 229 So. 2d 642, 644 (Fla. 3d DCA 1969)).

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

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

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

(*John Knox Vill. of Tampa Bay, Inc. v. Perry*, 94 So. 3d 715, 717 (Fla. 2d DCA 2012); *Gilmore v. Life Care Ctrs. of Am., Inc.*, 2010 WL 3944653, at *3 (M.D. Fla. Oct. 7, 2010) (applying Florida law).)

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

Mutual mistake is a defense to contract formation under Florida law. A defendant should assert mutual mistake where:

- Both contracting parties made a mistake about a fundamental assumption underlying the contract, such as where the parties agree to one thing but write something different in the contract due to a scrivener's error or inadvertence.
- The defendant did not bear the risk of the mistake. A defendant bears the risk of mistake where:
  - the contract assigned the risk to it;
  - it had limited knowledge of the facts underlying the mistake but considered that limited knowledge sufficient; or
  - the court assigns the risk to the defendant because it is reasonable under the circumstances to do so.

(Fla. Standard Jury Instructions in Contract and Business Cases § 416.25; *Leff v. Ecker*, 972 So. 2d 965, 966 (Fla. 3d DCA 2007); *Rawson v. UMLIC VP, L.L.C.*, 933 So. 2d 1206, 1210 (Fla. 1st DCA 2006).)

If pleaded as an affirmative defense, a defendant must plead it with particularity (Fla. R. Civ. P. 1.120(b); *Arvida Corp. v. Nu-Way Plumbing, Inc.*, 295 So. 2d 118, 118 (Fla. 4th DCA 1974) (mistake must be alleged with particularity)).

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

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

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

- Promise to answer for or pay another person's debt or default (§ 725.01, Fla. Stat.).
- Involve an executor's or administrator's promise to answer for or pay a debt or damages out of their own estate (§ 725.01, Fla. Stat.).
- The parties made on consideration of marriage (§ 725.01, Fla. Stat.).
- Sell or transfer an interest in real property or lease real property for longer than one year (§ 725.01, Fla. Stat.).
- Cannot be performed within one year of the contract's making (§ 725.01, Fla. Stat.).
- Provide a guarantee, warranty, or assurance from a health care provider concerning the results of a medical, surgical, or diagnostic procedure (§ 725.01, Fla. Stat.).
- Require a defendant to pay for a newspaper or periodical (§ 725.03, Fla. Stat.).
- Relate to a debtor's action on a "credit agreement," as defined by Florida Statute section 687.0304(1)(a) (§ 687.0304(2), Fla. Stat.).
- Involve the sale of goods valued at $500 or more, with certain exceptions listed in Florida Statute § 672.201(2)-(3)(c) (§ 672.201(1), Fla. Stat.).

A defendant may not assert the statute of frauds defense if the plaintiff fully performed its obligations under an oral contract (see *Fresh Capital Fin. Servs., Inc. v. Bridgeport Capital Servs., Inc.*, 891 So. 2d 1142, 1144 (Fla. 4th DCA 2005); *Brodie v. All Corp. of USA*, 876 So. 2d 577, 579 (Fla. 4th DCA 2004)).

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

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

- The plaintiff seeks equitable relief and not money damages.
- The plaintiff committed fraud or wrongdoing in procuring the contract.
- The defendant relied on the plaintiff's misconduct.
- The plaintiff's misconduct caused harm to the defendant.

(*McMichael v. Deutsche Bank Nat'l Tr. Co.*, 241 So. 3d 179, 181 (Fla. 4th DCA 2018); *Congress Park Office Condos II, LLC v. First-Citizens Bank & Tr. Co.*, 105 So. 3d 602, 609-10 (Fla. 4th DCA 2013).)

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

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

- Procedurally unconscionable because, for example:
  - the plaintiff had overwhelming bargaining power; or
  - the defendant did not have a reasonable opportunity to understand the contract terms.
- Substantively unconscionable because the contract terms were so outrageously unfair to the defendant as to "shock the judicial conscience."

(*FI-Pompano Rehab, LLC v. Irving*, 221 So. 3d 781, 783-85 (Fla. 4th DCA 2017); *Lumpuy v. Scottsdale Ins. Co.*, 2013 WL 489139, at *7 (M.D. Fla. Feb. 8, 2013) (applying Florida law); *In re Colony Beach & Tennis Club Ass'n, Inc.*, 454 B.R. 209, 217-219 (M.D. Fla. 2011) (applying Florida law).)

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

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

- The plaintiff controlled, persuaded, or pressured the defendant to enter into the contract by using:
  - a relationship of trust and confidence;
  - the defendant's weakness of mind; or
  - the defendant's needs or distress.
- The defendant would not otherwise have voluntarily entered into the contract.

(Fla. Standard Jury Instructions in Contract and Business Cases § 416.27; *Jackson v. Home Team Pest Def., Inc.*, 2013 WL 6051391, at *6 (M.D. Fla. Nov. 15, 2013) (applying Florida law).)

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

Unilateral mistake is a defense to contract formation under Florida law. Although the elements for unilateral mistake vary slightly among the appellate courts, a defendant should assert unilateral mistake where:

- The defendant made a mistake about a material feature of the contract.
- The mistake was not due to the defendant's "inexcusable lack of due care."
- It would be inequitable for the court not to release the defendant from its contractual obligations.
- The plaintiff has not so detrimentally relied on the contract that it would be unconscionable to release the defendant from its contractual obligations.

(Fla. Standard Jury Instructions in Contract and Business Cases § 416.26; see *DePrince v. Starboard Cruise Servs., Inc.*, 271 So. 3d 11, 19-20 (Fla. 3d DCA 2018); *Garvin v. Tidwell*, 126 So. 3d 1224, 1228 (Fla. 4th DCA 2012); *Flynt v. Progressive Consumers Ins. Co.*, 980 So. 2d 1217, 1219 (Fla. 5th DCA 2008).)

If pleaded as an affirmative defense, a defendant must plead it with particularity (Fla. R. Civ. P. 1.120(b); *Arvida Corp. v. Nu-Way Plumbing, Inc.*, 295 So. 2d 118, 118 (Fla. 4th DCA 1974) (mistake must be alleged with particularity)).

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

No.

Defenses to Contract Performance

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

Accord and satisfaction is a defense to a breach of contract claim under Florida law. A defendant should assert accord and satisfaction where the parties:

- Had a dispute under an existing contract.
- Mutually intended to resolve the dispute by entering into a new agreement.
- Extinguished the old agreement and created a new agreement.
- Performed under the new agreement.

(*Rocka Fuerta Constr. Inc. v. Southwick, Inc.*, 103 So. 3d 1022, 1025 (Fla. 5th DCA 2012); *Martinez v. S. Bayshore Tower, L.L.L.P.*, 979 So. 2d 1023, 1024 (Fla. 3d DCA 2008).)

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

Ambiguity is a defense to a breach of contract claim under Florida law. A defendant should assert ambiguity where both:

- The contract term on which the breach of contract claim is based is open to more than one reasonable interpretation.
- The defendant believes that its interpretation of the contract term is correct.

(*Nabbie v. Orlando Outlet Owner, LLC*, 237 So. 3d 463, 466-67 (Fla. 5th DCA 2018).)

To determine whether a contract term is ambiguous, Florida courts:

- Review:
  - the plain language of the contract to determine the parties' intent; and
  - the contract as a whole, not as a single term or group of words in isolation.
- Attempt to reconcile conflicting provisions.
- Exclude "fanciful, inconsistent, and absurd interpretations" of the contract's plain language.

(*Sidiq v. Tower Hill Select Ins. Co.*, 276 So. 3d 822, 827 (Fla. 4th DCA 2019); *Nabbie*, 237 So. 3d at 466-67.)

Florida law recognizes three types of contractual ambiguities:

- Patent ambiguities, which appear on the face of a contract and arise from "defective, obscure, or insensible language."
- Latent ambiguities, where the contract language is clear, but an extrinsic fact creates:
  - the need for interpretation of a contractual provision; or
  - a choice between two or more possible interpretations.
- Intermediate ambiguities, where the contract includes patent and latent ambiguities.

(*MDS (Canada) Inc. v. Rad Source Techs., Inc.*, 720 F.3d 833, 844 (11th Cir. 2013) (applying Florida law); *Clayton v. Poggendorf*, 237 So. 3d 1041, 1046-47 (Fla. 4th DCA 2018).)

Parties may introduce extrinsic (parol) evidence to explain latent or intermediate ambiguities. However, parties typically may not introduce extrinsic evidence to explain patent ambiguities. (*MDS (Canada) Inc.*, 720 F.3d at 844; *Nationstar Mortg. Co. v. Levine*, 216 So. 3d 711, 715-16 (Fla. 4th DCA 2017).)

While a contract's integration clause does not always bar a party from introducing parol evidence, Florida courts find integration clauses:

- Are a "highly persuasive statement" that the parties intended the contract to be their complete and exclusive agreement.
- Generally prevent a party from introducing parol evidence to vary or contradict contractual terms.

(*Jenkins v. Eckerd Corp.*, 913 So. 2d 43, 53 (Fla. 1st DCA 2005).)

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

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

- The parties had a valid contract.
- Both parties had future performance obligations under the contract.

- The plaintiff breached the contract by "clearly and positively indicating, by words or conduct" that it would not perform its contractual obligations.
- The defendant was able to perform its contractual obligations at the time of the breach.

(Fla. Standard Jury Instructions in Contract and Business Cases § 416.23 (providing the elements for an anticipatory breach cause of action to recover damages); *Ryan v. Landsource Holding Co., LLC*, 127 So. 3d 764, 768 (Fla. 2d DCA 2013); *Alvarez v. Rendon*, 953 So. 2d 702, 709 (Fla. 5th DCA 2007); *Kaplan v. Laratte*, 944 So. 2d 1074, 1075 (Fla. 4th DCA 2006).)

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

Economic duress is a defense to a breach of contract claim under Florida law. A defendant should assert economic duress where:

- The plaintiff committed wrongful acts or threats against the defendant, causing the defendant financial distress.
- The defendant lacked a reasonable alternative course of action.

(*Leader Global Sols., LLC v. Tradeco Infraestructura, S.A. DE C.V.*, 155 F. Supp. 3d 1310, 1317-18 (S.D. Fla. 2016) (applying Florida law); *Riedel v. NCNB Nat'l Bank of Fla., Inc.*, 591 So. 2d 1038, 1040 (Fla. 1st DCA 1991) (Florida recognizes economic duress as an affirmative defense but not as an independent tort).)

Note that economic duress is difficult to prove because a defendant must show that its actions were essentially involuntary and not an "exercise of free choice or free will" (*Leader Global Sols., LLC*, 155 F. Supp. 3d at 1318).

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

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

- The plaintiff made a representation of a material fact.
- The defendant reasonably relied to its detriment on the plaintiff's representation.

(Fla. Standard Jury Instructions in Contract and Business Cases § 416.33; *State v. Harris*, 881 So. 2d 1079, 1084 (Fla. 2004); *Lloyds Underwriters at London v. Keystone Equip. Fin. Corp.*, 25 So. 3d 89, 93 (Fla. 4th DCA 2009); *WSG W. Palm Beach Dev., LLC v. Blank*, 990 So. 2d 708, 715 (Fla. 4th DCA 2008).)

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

Failure of a condition precedent is a defense to a breach of contract claim under Florida law. A defendant should assert failure of a condition precedent where:

- Certain events or other conditions must be satisfied before the defendant is required to perform under the contract.
- The condition precedent never occurred.

(Fla. Standard Jury Instructions in Contract and Business Cases §§ 416.21 and 416.22; *Mitchell v. DiMare*, 936 So. 2d 1178, 1180 (Fla. 5th DCA 2006); *Univ. Hous. by Dayco Corp. v. Foch*, 221 So. 3d 701, 704 (Fla. 3d DCA 2017).)

If pleaded as an affirmative defense, a defendant must plead it with particularity (Fla. R. Civ. P. 1.120(c); *Custer Med. Ctr. v. United Auto. Ins. Co.*, 62 So. 3d 1086, 1096-97 (Fla. 2010)).

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

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

Failure of consideration is a defense to a breach of contract claim under Florida law. A defendant should assert failure of consideration where the plaintiff neglected, refused, or failed to either:

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

(*BRE Mariner Marco Town Ctr., LLC v. Zoom Tan, Inc.*, 2016 WL 1704197, at *6 (M.D. Fla. Apr. 28, 2016) (applying Florida law); *Narus v. Narus*, 382 So. 2d 144, 145-46 (Fla. 4th DCA 1980).)

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

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

- Due to an unforeseen change in circumstances, the defendant's purpose for entering into the contract is frustrated to the extent that it would no longer receive the benefit of the bargain.
- At the time of contracting, the plaintiff was aware of the defendant's purpose for entering into the contract.
- The frustrating event was not foreseeable when the parties entered into the contract.

(*In re Maxko Petroleum, LLC*, 425 B.R. 852, 872-73 (Bankr. S.D. Fla. 2010) (applying Florida law); *Bland v. Freightliner LLC*, 206 F. Supp. 2d 1202, 1208 (M.D. Fla. 2002) (applying Florida law); *Valencia Ctr., Inc. v. Publix Super Markets, Inc.*, 464 So. 2d 1267, 1269 (Fla. 3d DCA 1985).)

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

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

- The parties have an enforceable contract.
- The plaintiff breached an implied obligation of the contract that:
  - thwarted the defendant's reasonable contractual expectations;
  - involved the plaintiff's performance of an express contractual provision; and
  - did **not** contradict or vary the express terms of the contract.
- The plaintiff's breach must be "a conscious and deliberate act" that was not:
  - an honest mistake;
  - bad judgement; or
  - negligence.

(Fla. Standard Jury Instructions in Contract and Business Cases § 416.24; *Burger King Corp. v. Weaver*, 169 F.3d 1310, 1316-17 (11th Cir. 1999) (defining good faith as "honesty, in fact, in the conduct of contractual relations") (applying Florida law); *Exim Brickell, LLC v. Bariven, S.A.*, 2011 WL 13131263, at *39 (S.D. Fla. Aug. 16, 2011) (applying Florida law); *Ament v. One Las Olas, Ltd.*, 898 So. 2d 147, 149 (Fla. 4th DCA 2005).)

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

Impossibility is a defense to a breach of contract claim under Florida law. A defendant should assert impossibility where:

- An unanticipated event beyond the defendant's control makes performance of the contract impossible and not merely difficult or burdensome.
- The event creating the impossibility of performance **was not**:
  - foreseeable when the parties entered into the contract; or
  - the result of the defendant's actions or inaction.

(*Marathon Sunsets, Inc. v. Coldiron*, 189 So. 3d 235, 236 (Fla. 3d DCA 2016); *Zephyr Haven Health & Rehab Ctr., Inc. v. Hardin ex rel. Hardin*, 122 So. 3d 916, 920-21 (Fla. 2d DCA 2013); *Ferguson v. Ferguson*, 54 So. 3d 553, 556 (Fla. 3d DCA 2011).)

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

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

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

(Fla. Standard Jury Instructions in Contract and Business Cases § 416.31; *In re Sunshine Jr. Stores, Inc.*, 456 F.3d 1291, 1309-10 (11th Cir. 2006) (applying Florida law); *Seawell v. Hargarten*, 28 So. 3d 152, 155 (Fla. 1st DCA 2010).)

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

Florida law allows parties to modify a written contract in writing or orally. The requirements for an oral modification vary depending on whether the contract prohibits oral modifications. (See *DK Arena, Inc. v. EB Acquisitions I, LLC*, 112 So. 3d 85, 88 (Fla. 2013) (example of a written contractual modification); *Okeechobee Resorts, L.L.C. v. E Z Cash Pawn, Inc.*, 145 So. 3d 989, 992 (Fla. 4th DCA 2014) (analyzing alleged oral modification to a contract).)

If the contract **does not** require that modifications be in writing, an oral modification is enforceable if it is both:

- Supported by valid consideration.
- Not prohibited by a statute.

(*Okeechobee Resorts, L.L.C.*, 145 So. 3d at 992.)

If the contract contains a "no oral modification" clause, Florida law nevertheless permits oral modifications if:

- The parties agreed on and accepted an oral modification to the contract.
- Both parties, or the party seeking to enforce the oral modification, performed under the modification's terms.
- The oral modification was supported by independent consideration.

(*Energy Smart Indus., LLC v. Morning Views Hotels-Beverly Hills, LLC*, 660 Fed. Appx. 859, 863 (11th Cir. 2016) (applying Florida law); *Okeechobee Resorts, L.L.C.*, 145 So. 3d at 992 (Fla. 4th DCA 2014).)

Oral contractual modifications that violate the statute of frauds are not enforceable (*DK Arena, Inc.*, 112 So. 3d at 97; *Ocwen Loan Servicing, LLC v. Delvar*, 180 So. 3d 1190, 1194 (Fla. 4th DCA 2015)).

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

Ratification is a defense to a breach of contract claim under Florida law. A defendant should assert ratification where:

- The defendant performed an act that breached the contract.
- The plaintiff knew:
  - of the defendant's act; and
  - that it could reject the contract because of the defendant's act.
- The plaintiff accepted or expressed its intention to accept the defendant's act.

(Fla. Standard Jury Instructions in Contract and Business Cases § 416.36; *Pleasant Valley Biofuels, LLC v. Sanchez-Medina*, 2014 WL 11881019, at *2 (S.D. Fla. Nov. 21, 2014) (applying Florida law); *Citron v. Wachovia Mortg. Corp.*, 922 F. Supp. 2d 1309, 1321 (M.D. Fla. 2013) (applying Florida law).)

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

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

- The plaintiff seeks equitable relief and not money damages.
- The plaintiff committed fraud or wrongdoing in performing the contract.
- The defendant relied on the plaintiff's misconduct.
- The plaintiff's misconduct caused harm to the defendant.

(*McMichael v. Deutsche Bank Nat'l Tr. Co.*, 241 So. 3d 179, 181 (Fla. 4th DCA 2018); *Congress Park Office Condos II, LLC v. First-Citizens Bank & Tr. Co.*, 105 So. 3d 602, 609-10 (Fla. 4th DCA 2013).)

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

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

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

(Fla. Standard Jury Instructions in Contract and Business Cases § 416.30; *Winans v. Weber*, 979 So. 2d 269, 274 (Fla. 2d DCA 2007); *Bueno v. Workman*, 20 So. 3d 993, 998 (Fla. 4th DCA 2009).)

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

Yes, abandonment of a contract is an affirmative defense under Florida law that must be pled. A defendant should assert abandonment where the plaintiff's conduct was "positive, unequivocal, and inconsistent with the existence of the contract." (See *Bilow v. Benoit*, 519 So. 2d 1114, 1117 (Fla. 1st DCA 1988).)

Defenses Related to Damages

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

Under Florida law, a plaintiff may not recover damages that:

- Are duplicative of damages sought for another claim (see *Peebles v. Puig*, 223 So. 3d 1065, 1068 (Fla. 3d DCA 2017) (fraud damages must be "independent, separate and distinct" from breach of contract damages); *Williams v. Peak Resorts Intern. Inc.*, 676 So. 2d 513, 516 (Fla. 5th DCA 1996) (plaintiff may not recover fraud damages that duplicate breach of contract damages)).
- Results in the plaintiff recovering twice for the same loss (see *Kritchman v. Wolk*, 152 So. 3d 628, 632-33 (Fla. 3d DCA 2014); *Kingswharf, Ltd. v. Kranz*, 545 So. 2d 276, 278 (Fla. 3d DCA 1989)).

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

Under Florida law, a liquidated damages clause is unenforceable if the court finds that either:

- The amount set out in the liquidated damages clause is so grossly disproportionate to the actual amount of damages the court would expect to follow from the breach that it constitutes to a penalty.
- The parties, when they entered into the contract, could have readily determined the likely amount of damages in the event of a breach.

(See *Rusniaczek v. Tableau Fine Art Grp., Inc.*, 139 So. 3d 355, 358 (Fla. 3d DCA 2014); *Goldblatt v. C.P. Motion, Inc.*, 77 So. 3d 798, 800-02 (Fla. 3d DCA 2011).)

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

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

- Punitive damages (see *Ghodrati v. Miami Paneling Corp.*, 770 So. 2d 181, 182-83 (Fla. 3d DCA 2000) (punitive damages generally not recoverable for breach of contract unless accompanied by a separate tort claim)).
- Damages that are speculative or cannot be established with reasonable certainty (see *Devon Med., Inc. v. Ryvmed Med., Inc.*, 60 So. 3d 1125, 1128-30 (Fla. 4th DCA 2011); *Paul Gottlieb & Co., Inc. v. Alps S. Corp.*, 985 So. 2d 1, 9 (Fla. 2d DCA 2007)).
- Damages or remedies that the contract expressly precludes or limits (see *Keystone Airpark Auth. v. Pipeline Contractors, Inc.*, 266 So. 3d 1219, 1224 (Fla. 1st DCA 2019); *Bartram, LLC v. C.B. Contractors, LLC*, 2011 WL 1299856, at *2 (N.D. Fla. Mar. 31, 2011) (applying Florida law); *Amoco Oil Co. v. Gomez*, 125 F. Supp. 2d 492, 511 (S.D. Fla. 2000) (applying Florida law)).

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

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

- Are superseded by a valid liquidated damages clause (see *Mineo v. Lakeside Vill. of Davie, LLC*, 983 So. 2d 20, 21 (Fla. 4th DCA 2008)).

- Do not directly and naturally result from the breach (Fla. Standard Jury Instructions in Contract and Business Cases § 504.2a; *Keystone Airpark Auth. v. Pipeline Contractors, Inc.*, 266 So. 3d 1219, 1222 (Fla. 1st DCA 2019); *Sharick v. Se. Univ. of Health Scis., Inc.*, 780 So. 2d 136, 139 (Fla. 3d DCA 2000)).
- Were replaced or indemnified in whole or in part by collateral sources (see *City of Miami Beach v. Carner*, 579 So. 2d 248, 253-54 (Fla. 3d DCA 1991) (collateral source rule does not apply to breach of contract actions); but see *Citizens Prop. Ins. Corp. v. Ashe*, 50 So. 3d 645, 655 (Fla. 1st DCA 2010) (collateral source rule applies to contract actions but noting "the better view is that the collateral source rule should not apply in pure contract actions ... it may be time to revisit this issue.")).

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

Under Florida law, a defendant can challenge a special or consequential damages claim if either:

- When the parties made the contract, the defendant did not know or could not have reasonably known of the special circumstances leading to the alleged special or consequential damages (Fla. Standard Jury Instructions in Contract and Business Cases § 504.2b; *Keystone Airpark Auth. v. Pipeline Contractors, Inc.*, 266 So. 3d 1219, 1222 (Fla. 1st DCA 2019); *Hardwick Props., Inc. v. Newbern*, 711 So. 2d 35, 40 (Fla. 1st DCA 1998)).
- The plaintiff failed to specifically plead special or consequential damages (Fed. R. Civ. P. 9(g); Fla. R. Civ. P. 1.120(g); *JP Morgan Chase Bank Nat'l Ass'n v. Colletti Inv., LLC*, 199 So. 3d 395, 398 (Fla. 4th DCA 2016); *Robbins v. McGrath*, 955 So. 2d 633, 634 (Fla. 1st DCA 2007)).

Parties may contractually waive their right to recover special or consequential damages (see *Keystone Airpark Auth.*, 266 So. 3d at 1224 (Fla. 1st DCA 2019); *Bartram, LLC v. C.B. Contractors, LLC*, 2011 WL 1299856, at *2 (N.D. Fla. Mar. 31, 2011) (applying Florida law); *Amoco Oil Co. v. Gomez*, 125 F. Supp. 2d 492, 511 (S.D. Fla. 2000) (applying Florida law)).

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

Under Florida law, contract damages may be precluded or limited due to lack of mitigation. A defendant should assert failure to mitigate where:

- The plaintiff did not take reasonable and available steps to minimize injury and reduce its damages (see *Sys. Components Corp. v. Fla. Dept. of Transp.*, 14 So. 3d 967, 982 (Fla. 2009)).
- The plaintiff's duty to mitigate is not eliminated by a statute or case law (see, for example, § 83.595(3), Fla. Stat.; *Wright v. Logan*, 2010 WL 11507114, at *7 (M.D. Fla. June 4, 2010) (landlord has no common law duty to mitigate damages under a lease agreement) (applying Florida law); *Tim Hortons USA, Inc. v. Singh*, 2017 WL 4837552, at *13 (S.D. Fla. Oct. 25, 2017) (plaintiff is not required to mitigate damages in actions involving certain nonexclusive contracts) (applying Florida law)).

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

No.

Procedural Defenses

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

Under Florida law, a defendant should assert that a plaintiff lacks the legal capacity to sue for breach of contract where the plaintiff does not have the power to appear and bring its grievance before the court (Fla. R. Civ. P. 1.120(a) and 1.210; Fed. R. Civ. P. 9(a) and 17; *Sun Valley Homeowners, Inc. v. Am. Land Lease, Inc.*, 927 So. 2d 259, 261-62 (Fla. 2d DCA 2006)). This may occur where, for example, the plaintiff:

- Lacks capacity to sue on behalf of a trustee (see *Wells Fargo Bank, N.A. v. Reeves*, 92 So. 3d 249, 252-53 (Fla. 1st DCA 2012) (mortgage foreclosure action)).
- Sues on behalf of an estate but is not the estate's appointed legal representative (§ 733.607, Fla. Stat.; *Tennyson v. ASCAP*, 477 Fed. Appx. 608, 611 (11th Cir. 2012) (applying Florida law)).

- Is a foreign corporation transacting business in Florida and failed to obtain a certificate of authority (§ 607.1502, Fla. Stat.; *RooR v. Smoke This Too, LLC*, 2017 WL 5714554, at *2 (S.D. Fla. Mar. 10, 2017) (failure to comply with § 607.1502, Fla. Stat. is an affirmative defense to a noncompliant foreign corporation's state law claims) (applying Florida law); *Baker Cty. Med. Servs., Inc. v. Summit Smith L.L.C.*, 2007 WL 1229702, at *8 (M.D. Fla. Apr. 25, 2007) (§ 607.1502, Fla. Stat., allows a court to stay a proceeding until a foreign corporation obtains a required certificate of authority) (applying Florida law)).

A defendant should allege that it lacks the legal capacity to be sued where, for example, the defendant is:

- An unincorporated association (see *Larkin v. Buranosky*, 973 So. 2d 1286, 1287 (Fla. 4th DCA 2008) (plaintiffs must sue unincorporated associations in the names of individual members and not in the unincorporated association's name)).
- A governmental body that cannot be sued (see, for example, *Pestana v. Miami-Dade Cty. Bd. of Comm'rs*, 282 F. Supp. 3d 1284, 1287 (S.D. Fla. 2017) (Florida law requires a plaintiff to sue county commissioners in the county's name) (applying Florida law)).
- Deceased, and the plaintiff is attempting to sue the decedent individually (see *United States v. Estate of Schoenfeld*, 344 F. Supp. 3d 1354, 1360 (M.D. Fla. 2018) ("Under Florida law a decedent lacks the capacity to be sued.") (applying Florida law)).

Counsel must specifically deny a party's capacity to sue or be sued and include supporting facts that are "within the pleader's knowledge" (FRCP 9(a); Fla. R. Civ. P. 1.120(a); *Sun Valley Homeowners, Inc.*, 927 So. 2d at 261-62).

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

Under Florida law, a defendant should assert that the plaintiff lacks standing to bring a breach of contract action when the plaintiff does not have a sufficient interest in the outcome of the lawsuit. This may occur where, for example, the plaintiff is not:

- A party to the contract (see *Henry v. United Nat'l Ins. Co.*, 813 So. 2d 177, 178 (Fla. 3d DCA 2002)).
- A third-party beneficiary of the contract (see *Livesmart 360, LLC v. McCool*, 2015 WL 8269974, at *2 (M.D. Fla. Dec. 8, 2015) (applying Florida law)).

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

Laches is a defense to a breach of contract claim under Florida law. A defendant should assert laches where:

- The plaintiff seeks equitable relief.
- The defendant's breach of contract forms the basis of the plaintiff's complaint.
- The plaintiff delayed in asserting its rights despite having:
  - knowledge of the defendant's breach; and
  - the opportunity to file suit to enforce its rights.
- The defendant lacked knowledge that the plaintiff intended to enforce its rights.
- The defendant would be injured or prejudiced if the plaintiff were permitted to enforce its rights after the delay.

(*Lennar Homes, Inc. v. Dorta-Duque*, 972 So. 2d 872, 879 (Fla. 3d DCA 2007); *McIlmoil v. McIlmoil*, 784 So. 2d 557, 563-64 (Fla. 1st DCA 2001).)

Florida law also recognizes statutory laches as an equitable defense to a breach of contract action. A defendant should assert statutory laches where a plaintiff does not commence suit within the limitations period for legal actions "concerning the same subject matter," regardless of whether the defendant:

- Lacked knowledge that the plaintiff intended to enforce its rights.
- Is injured or prejudiced by the plaintiff's delay in enforcing its rights.

(§ 95.11(6), Fla. Stat.; *Corinthian Invs., Inc. v. Reeder*, 555 So. 2d 871, 873-75 (Fla. 2d DCA 1989).)

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

The limitations period for breach of contract in Florida is:

- Five years of the alleged breach of a **written** contract (§§ 95.11(2)(b), Fla. Stat.; *Lexon Ins. Co. v. City of Cape Coral*, 238 So. 3d 356, 358 (Fla. 2d DCA 2017)).

- Four years:
  - of an alleged breach of an **oral** contract (that is, a contract not based on a written instrument) (§ 95.11(3)(k), Fla. Stat.; *Cabana on Collins, LLC v. Regions Bank*, 2011 WL 13223712, at *4 (S.D. Fla. June 7, 2011) (applying Florida law)); or
  - if the plaintiff seeks rescission of a contract (§ 95.11(3)(l), Fla. Stat.; *Glynn v. Basil St. Partners, LLC*, 2010 WL 11623025, at *9 (M.D. Fla. Sept. 21, 2010) (applying Florida law)).
- One year if the plaintiff seeks specific performance of a contract (§ 95.11(5)(a), Fla. Stat.; *McMillan v. Shively*, 23 So. 3d 830, 831 (Fla. 1st DCA 2009)).

The statute of limitations period for a breach of contract cause of action begins at the time of the breach (*Lexon Ins. Co.*, 238 So. 3d at 358).

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

No.

Equitable Defenses

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

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

- Equitable estoppel (see Question 20).
- *In pari delicto* (in equal fault) (see *O'Halloran v. PricewaterhouseCoopers LLP*, 969 So. 2d 1039, 1044 (Fla. 2d DCA 2007)).
- Laches (see Question 41).
- Reformation, as a counterclaim or cross-claim (see *Mt. Hawley Ins. Co. v. Miami River Port Terminal, LLC*, 228 F. Supp. 3d 1313, 1327 (S.D. Fla. 2017) (applying Florida law); *Calypso Developers I, LLC v. Pelican Props. of S. Walton, LLC*, 109 So. 3d 1214, 1217 (Fla. 1st DCA 2013)).
- Rescission (see *Braddy v. Infinity Assur. Ins. Co.*, 2015 WL 1056068, at *2 (M.D. Fla. Mar. 10, 2015) (applying Florida law); *Joseph Bucheck Const. Corp. v. W.E. Music*, 420 So. 2d 410, 414 (Fla. 1st DCA 1982)).
- Unclean hands (see Question 11 and Question 29).