**Defenses Overview**

Welcome to this podcast on Defenses Overview brought to you by CALI. I am Professor Jennifer S. Martin. The topic of this podcast is an introduction to defenses to enforcement of a contract based upon defects in the bargaining process, capacity of one of the parties, or public policy.

There are three sets of defenses to enforcement of a contract which is otherwise valid. The first set of defenses relate to capacity to contract. There are three capacity related defenses: (i) infancy (where a party is a minor, meaning below the age of majority), (ii) mental illness or defect; and (iii) intoxication. The second set of defenses involves circumstances where a party might argue that their assent to contract was flawed such that enforcement should not be had against them. There are five assent related defenses: (i) mistake; (ii) misrepresentation; (iii) duress; (iv) undue influence; and (v) unconscionability. The last set of defenses relates to contracts that violate societal norms, including illegality and public policy. Each of these defenses have their own elements that dictate whether a party can avoid the contract or whether the contract is simply void. This podcast introduces the defenses, but an in-depth review of the defenses and their elements are left to other podcasts.

It’s worth noting that the factual situations will sometimes allow a contracting party to claim multiple defenses to contract enforcement because the defenses have some overlap in some situations. For instance, a minor might have entered into a contract because of a misrepresentation. In such cases, the party can claim both defenses.

Some defenses can result in a contract being void and others voidable. In cases where the contract is void, neither party can enforce the contract or claim a remedy on the contract. For most defenses, though, the contract is simply avoidable as to the party protected by the defense. That party has the power to affirm or disaffirm the contract, meaning they can elect to carry on the contract or to disaffirm it. In the event that a party seeks to avoid the contract, the party will request that a court rescind the contract. Rescission will allow a party to avoid the contract by essentially unmaking it. In most cases, the court will place the parties in the position they would have been in if the contract never existed, allowing the court to choose the remedy of restitution to effectuate this result. However, at times, additional remedies may be available, including reformation of the contract.

Situations where contracts are void include mental illness where there is an adjudication, duress with physical compulsion, illegality involving moral wrongs and some types of fraud. Let’s look at several (but not all) of these defenses.

The incapacity defense of mental illness seeks to protect people suffering from mental illness from exploitation by others and renders contracts entered into with someone adjudicated incompetent by a court simply void.

Example #1. Billy was adjudicated mentally incompetent and is under a guardianship order by the court. Billy entered into a contract with Jeweler for the purchase of a $25,000 watch. This contract is void and unenforceable.

The assent defense of duress can also result in a contract being void, but it depends on the type of duress involved. Where assent to contract is physically compelled by duress (an improper threat), the contract is void.

Example #2. Husband applied for a loan, but Lender required Wife to also sign. Wife did not want to sign, but husband threatened her with a kitchen knife until she signed the papers. Wife informed Lender of the behavior of Husband prior to Lender disbursing the loan. In the event that Lender disbursed the loan anyway, Wife’s best defense would be duress making the contract void because her manifestation of assent was physically compelled by duress. Notice here the victim of the duress is avoiding a contract with someone who did not commit the duress themselves, but had reason to know of the duress.

The public policy defense of illegality can also result in a contract being void, but it depends on the type of illegality. Illegal conduct that is considered *malum in se*, meaning conduct that is wrong in itself, renders the contract void.

Example #3. Sarah and Maven agree that Sarah will pay Maven $25,000 and an additional $75,000 if Maven kills Sarah’s employer, Eddie. Maven is unsuccessful, and Sarah demands return of her money. This contract is completely void as against public policy and neither party can recover anything from the other.

Situations where contracts are not void, but rather, voidable include infancy, intoxication, mistake, misrepresentations, undue influence, unconscionability, illegality involving regulatory prohibitions, some forms of duress and some forms of mental illness. Let’s look at several (but not all) of these.

First, the capacity defense of infancy seeks to protect all minors. That is, children up to the age of majority, typically under the age of 18, making a contract formed by them voidable at the option of the minor.

Example #4. Percy, age 16, bought a used car from Olympus Motors with a $1500 down payment on a $7000 price, the remainder to be paid in monthly installments. Percy is a minor and, at his election, can avoid the contract prior to his becoming 18 years old. If Olympus Motors brought suit for the remainder of the payments, Percy could request rescission of the contract, which would permit him to avoid all liability on the loan (but he must return the car, or what’s left of it). Percy would also be able to recover the $1500 down payment and any payments made.

Another capacity defense that renders a contract voidable is intoxication. Contracts entered into with someone who is intoxicated are voidable if the other person has reason to know of the intoxication and where (i) the intoxicated person is unable to understand in a reasonable manner the nature and consequences of the transaction; or (ii) the intoxicated person is unable to understand in a reasonable manner in relation to the transaction.

Example #5. Esther, who was obviously severely intoxicated, slurring her words and stumbling about, purchased a used car from Olympus Motors for $7500. Esther would be able to avoid the contract because Olympus Motors would have reason to know of the intoxication and it would seem that either Esther was unable to understand the manner and nature of the transaction or she was unable to act in a reasonable manner in relation to the transaction. Esther would request rescission of the contract.

Another defense that results in a voidable contract is mistake. A mistake is a belief not in accord with the facts. Mistake can be unilateral (by one party) or mutual (shared by both parties). A mistake by both parties as to a basic assumption of the contract that has a material effect on the contract makes the contract voidable unless the party bears the risk of the mistake. A unilateral mistake is voidable as to a basic assumption on the contract that has a material effect on the contract where either the contract would then be unconscionable or the other party had reason to know of the mistake.

Example #6. Joe, a blacksmith, sent a proposal to Harry, a general contractor that he would do all metalwork for Harry’s project for $54,000, if Harry accepted within a reasonable time after the main contract was awarded. Harry receives bids from other contractors for the same work in the amount of $94,000, $95,000, and $102,000. Harry uses Joe’s $54,000 figure in preparing and submitting his own bid, but before the bids were opened, Joe realizes he had made a computational error and calls Harry to revoke his bid. If Harry attempts to hold Joe to the $54,000 proposal, Joe’s best defense would be that he made a unilateral mistake and that Harry had reason to suspect that Joe had made a computational mistake in figuring his proposal. Joe would request rescission of the contract.

Recall that the assent defense of duress can also result in a contract being void, but where the improper threat does not involve physical compulsion, whether the contract is voidable depends on the type of duress involved. Where assent to contract is physically compelled by duress (an improper threat) that leaves the victim no reasonable alternative, the contract is void. However, in other cases of an improper threat leaving the victim with no reasonable alternative, the contract is voidable.

Example #7. Joe is engaged to marry Jane, who does not speak English and who is dependent on Joe for her support. Jane’s visa to be in the United States is due to expire. Jane discovers that she is pregnant. Joe agrees to marry Jane, but tells her she will be deported unless she signs a prenuptial agreement waiving all rights to his financial assets. Jane cannot translate the agreement properly, has no money to hire an attorney and is fearful for herself and for the future of her child if she is deported. Jane signs the agreement. Jane might have a defense of duress due to an improper threat by Joe as to the prenuptial agreement and would claim rescission of the contract. This contract might be voidable, but not void as there is no physical compulsion

Recall that public policy can also result in a contract being void, but where an illegality involves merely a lesser regulatory prohibition, such as minor licensing or permitting requirements, the contract is more likely avoidable.

Example #8. Debbie promises to run errands in her car for Victoria for $200. Both parties know that Debbie’s driver’s license is expired and she has not yet renewed it. Here, neither party would be able to avoid this contract on grounds of public policy. The violation here would be considered *malum prohibitum*, conduct that is wrong but only because a legislative body has prohibited it, such that the contract is fully enforceable. In other cases, though, the prohibition might lead to voidability.

At this point, you should be able to identify the defenses related to incapacity, assent and public policy. You should also be able to describe how defenses might render a contract void or might be used to enable a party to rescind a contract otherwise validly entered into.

I hope you’ve enjoyed this podcast on Defenses Overview.

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