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## Proposed Arkansas Model Contract Jury Instructions (Unofficial Preliminary Draft for Comments)

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PROPOSED ARKANSAS MODEL CONTRACT JURY INSTRUCTIONS  
[Unofficial Preliminary Draft For Comments]

A Project of the Jury Instructions Subcommittee  
Business Law Section  
Arkansas Bar Association

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ARKANSAS MODEL CONTRACT JURY INSTRUCTIONS  
INTRODUCTION TO 1997 PRELIMINARY DRAFT

Arkansas practitioners have long suffered from the lack of any standard set of jury instructions for contract cases, a resource that would be advantageous for the profession and the public. First, there are peculiarities in our law (e.g., the Tacit Agreement Rule) and in our procedures (e.g., election of remedies) which make resorting to “national” standardized instructions perilous. The Committee believes that parties familiar with our law should formulate these instructions, if only to assure that they do not trespass our constitutional prohibition against commenting on the evidence, as other states’ pattern instructions sometimes do.

Second, standardized instructions offer economies to the profession and the public. Too many contract cases are “not worth instructing” because the amount in controversy is relatively small, and the investment of time in developing instructions for the specific case is relatively high. Actions at law are time-consuming enough as it is, without having to spend an inordinate amount of time developing a basic charge to the jury. If nothing else, the Committee hopes that its labors will allow our colleagues in the bar, and the learned judges of our bench, a respite from one of their more time-consuming and disagreeable tasks.

Third, the Committee believes that a set of standardized instructions may have the beneficial effect of introducing a greater rigor and predictability in the law. For example, it is loosely said that a contract can be interpreted by

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reference to the parties' conduct and subsequent acts. But this is so only if the contract is ambiguous, a qualifying condition that is often lost in the shuffle. It is a question of law whether a contract is ambiguous.<sup>1</sup> Ultimately, it may be improper even to consider evidence of subsequent acts, statements, and conduct for purposes of interpretation, if the contract is otherwise clear, although such evidence may be considered on questions of waiver or estoppel. If a defendant learns that the issue of interpretation (on which the plaintiff would ordinarily have the burden) is foreclosed to him, and that he must shoulder the burden of proving waiver or estoppel or novation, then his relish for a jury fight may be diminished. In other words, a fairly rigorous set of instructions can reduce unnecessary contention in the law courts.

Last, these instructions are without partisan edges; they are free of the sly adverbial clauses of the advocate's trick bag. The trial bench can use these instructions with some confidence that none of the roils of the parties at bar find expression here.

There is a design, however imperceptible, to the order and division of these instructions. They proceed from a "decision tree" that is possible to reconstruct. The Committee begins with Form A-1 expressing the elements of a plaintiff's claim for breach of contract. The first element—valid contract—may or may not be the subject of a legitimate contest. If it is, then the jury is directed to ponder the elements of a valid contract, in Form A-2, and is given definitions for offer, acceptance, and consideration in Forms A-3, A-4, and A-5. Forms A-7 through A-11 provide special instructions regarding consideration and acceptance, rejection, and revocation of offers.

The parties may, on the other hand, agree that they entered into a valid contract, but one of them may contest either that he breached it, or that the contract means what his adversary says it does. Questions about interpretation are handled in Section B and questions of performance or breach are taken up in Section E. The defendant-obligor may admit the contract but believe that his performance should be relieved for fraudulent inducement or duress. These matters are taken up in Section C.

A thorny problem arises over questions of modification. Typically, X will contract with Z to erect an addition to his home. The contract will contain boilerplate that no modifications will be allowed unless signed by both parties. X and Z will then decide to move a wall, resulting in additional cost to Z. X will decide he does not need to pay for the change. This typical case is covered by instructions on modification in Section D.

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1. See *Moore v. Columbia Mut. Casualty Ins. Co.*, 36 Ark. App. 226, 821 S.W.2d 59 (1991).

The Committee also included instructions on promissory estoppel (Form A-12) and contracts implied in fact<sup>2</sup> (Form A-13) as well as damages (Section G).

While the Committee attempted to provide a basic set of instructions on key contract issues, it consciously avoided any treatment of issues raised by special classes of contracts such as those relating to construction, employment or the Uniform Commercial Code. Where appropriate, the proposed contract instructions may serve in cases involving those types of contracts. However, the Committee believes a comprehensive set of instructions for particular types of contracts is best left to a future committee of practitioners in those areas.

The Committee expresses its deep gratitude to the University of Arkansas at Little Rock Law Journal for its generous decision to publish these proposed instructions as a service to the bar. Members of the bench and bar are encouraged to review the proposed instructions and to submit comments and suggestions concerning the instructions to William A. Waddell, Jr., Friday, Eldredge & Clark, 2000 First Commercial Building, 400 West Capitol Avenue, Little Rock, Arkansas 72201. Ultimately, a final revised draft of the proposed instructions will be submitted to the Arkansas Supreme Court's Committee on Jury Instructions-Civil for study and possible adoption.

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2. The Committee was aware of cases such as *Sellers v. West-Ark. Const. Co.*, 283 Ark. 341, 676 S.W.2d 726 (1984), which discuss the propriety of instructing the jury on the theory of quasi-contract. However, the Committee elected not to propose a model instruction on this theory of contract liability.

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**A. CONTRACT FORMATION  
FORM A-1  
ELEMENTS OF CLAIM**

**To establish his claim for breach of contract, the plaintiff has the burden of proving the following elements by a preponderance of the evidence:**

**First, that the parties entered into a valid contract that required the defendant to perform a certain act [or refrain from performing a certain act]; and**

**Second, that the plaintiff did [or refrained from doing] all or substantially all the acts that the contract required of him; and**

**Third, that the defendant substantially failed to do what the contract required him to do; and**

**Fourth, that as a result of the defendant's failure to do what the contract required him to do, plaintiff suffered damages for which the law gives compensation.**

[If you find that the plaintiff has proved all of these elements by a preponderance of the evidence, then your verdict must be for the plaintiff. If, however, plaintiff has failed to prove any one or more of these propositions, then your verdict must be for the defendant.]

**COMMENT**

The first question confronting the Committee was how many elements an Arkansas plaintiff must prove. Arkansas case law indicates that damages must be alleged and proved to sustain a claim for breach of contract.<sup>3</sup> Nominal damages may be recovered from breach of contract in the absence of actual damages.<sup>4</sup> Statutory law provides for an award of attorney's fees to a party who proves a breach of contract, recoverable as costs.<sup>5</sup> To require a party to prove actual damages, and put him at pains of paying large fees to the other even where he has proved a contract and its breach, could be error. The Committee's decision to include damages as a fourth element to the formula for liability is a bow to the uncertainty presented by dicta in some Arkansas cases,<sup>6</sup> to the practice of the other jurisdictions who have promulgated model

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3. See *Marks v. Powell*, 162 B.R. 820 (Bankr. E.D. Ark. 1993); *Rabalaias v. Barnett*, 284 Ark. 527, 683 S.W.2d 919 (1985) (concerning the adequacy of pleadings).

4. See *Western Union Tel. Co. v. Aubrey*, 61 Ark. 613, 33 S.W. 1063 (1896).

5. See ARK. CODE ANN. § 16-22-308 (Michie 1994).

6. See *Rabalaias*, 284 Ark. 527, 683 S.W.2d 919.

instructions;<sup>7</sup> and, finally, to the practical realization that this problem will not often present itself. To the extent that it does, the fourth element can be deleted, and the final sentences of the instruction amended to state:

**If you find that the plaintiff has proved all three of these propositions by a preponderance of the evidence, then you will determine from the evidence what damage the plaintiff has suffered. If, however, plaintiff has failed to prove any one or more of these three propositions, then your verdict must be for the defendant.**

We have formulated the fourth element, damages, in a somewhat circular fashion to exclude damages for mental suffering in a case where that might be an area of concern for the jury.

The elements instruction is consciously referential. To find that the parties entered a valid contract, the jury will be referred to Form A-2, and those following and defining its terms. To determine whether the parties substantially performed their duties, they are referred to Form E-4. To determine whether the law gives compensation for the damages suffered by the plaintiff, they are referred to instructions given in Part G: Damages.

The bracketed portion of the instruction should not be given when the case is submitted on interrogatories.

**A. CONTRACT FORMATION  
FORM A-2  
ELEMENTS OF CONTRACT**

**To establish that the parties entered into a valid contract, the plaintiff has the burden of proving the following elements by a preponderance of the evidence:**

- (1) That one party made an “offer” to the other, which was “accepted”; and**
- (2) That the offer and acceptance included an exchange of “consideration”; and**
- (3) That the agreement, when it was made, was “reasonably certain” in all its essential terms.**

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7. See CALIFORNIA JURY INSTRUCTIONS, CIVIL, No. 10.85 (2d ed. 1994); ILLINOIS PATTERN JURY INSTRUCTIONS, CIVIL, No. 700.19 (3d ed.).

## COMMENT

Under Arkansas case law, certain elements of a valid contract—competent parties, subject matter, legal consideration, mutual agreement, and mutual obligations—are matters of law for the court to decide.<sup>8</sup> Some of them, such as capacity, are defenses.<sup>9</sup> It is thought better to instruct on factual elements like offer, acceptance, consideration, certainty, and completeness rather than on conclusions like mutual agreement and legal consideration.

**A. CONTRACT FORMATION**  
**FORM A-3**  
**OFFER**

**An “offer” is a proposal to enter into an agreement. It is a promise or a statement made by one party of what he will do or not do in return for some promise or act by another. An offer occurs when one party communicates to another a willingness to enter into an agreement with that other party, and does so under circumstances that justify the other party in concluding that a binding agreement will result if he accepts the offer according to its terms.**

## COMMENT

Arkansas case law does not appear to provide a good definition of “offer.” The Committee has adapted a definition of “offer” from Montana case law.<sup>10</sup>

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8. See *Keith v. City of Cave Springs*, 233 Ark. 363, 344 S.W.2d 591 (1961) (mutuality of obligation); *Bene v. New York Life Ins. Co.*, 191 Ark. 714, 87 S.W.2d 979 (1935) (subject matter); *Moss v. Allstate Ins. Co.*, 29 Ark. App. 33, 776 S.W.2d 831 (1989). Mutuality of obligation is a common law saw that has been much dulled, and cases now simply ask whether there is sufficient consideration for a contract. See *Keith v. City of Cave Springs*, 233 Ark. 363, 344 S.W.2d 591 (1961).

9. See *Maddox v. Hamp Williams Hardware Co.*, 181 Ark. 403, 26 S.W.2d 85 (1930) (holding that incapacity must be pleaded or the defense is waived).

10. See *Sunburst Oil & Gas Co. v. Neville*, 257 P. 1016 (Mont. 1927). The Committee believes the instruction is more workable than the RESTATEMENT definition. RESTATEMENT (SECOND) OF CONTRACTS § 24 (1981) defines “offer” as follows: “An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.”

**A. CONTRACT FORMATION  
FORM A-4  
ACCEPTANCE**

**A party “accepts” another’s offer to him when he, by words or conduct, demonstrates his unconditional assent to the terms of the offer. If a party has made an offer to another, and the other accepts conditionally, or introduces a new term into the bargain, then his response is not an acceptance. Acceptance may reasonably be implied from words or conduct, and must occur before the offer is withdrawn or lapses.**

**COMMENT**

Arkansas case law does not afford a pithy, usable definition of “acceptance,” but the formulation chosen is in accord with Arkansas cases.<sup>11</sup> It should be noted, however, that an acceptance which recites additional terms that would have been implied anyway is not a counteroffer.<sup>12</sup>

**A. CONTRACT FORMATION  
FORM A-5  
CONSIDERATION**

**“Consideration” is a promise or a performance that is bargained-for. A promise or performance is bargained-for if it is sought by one party in exchange for his promise. Consideration can consist of a promise, an act, or a promise not to do something that a party has a legal right to do. It can consist of a benefit to the party making the promise to which he is not already lawfully entitled, or any detriment to the other, that he was not already lawfully bound to suffer.**

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11. See *Tucker Duck & Rubber Co. v. Byram*, 206 Ark. 828, 177 S.W.2d 759 (1944); *Webster Lumber Co. v. Lincoln*, 115 S. 498 (Fla. 1927). RESTATEMENT (SECOND) OF CONTRACTS § 50(1) (1981), defines the term as follows: “Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.” This definition is too awkward for use in instructing a jury because of its use of lawyerly and confusing phrases.

12. See *Byford v. Gates Bros. Lumber Co.*, 216 Ark. 400, 225 S.W.2d 929 (1950).

## COMMENT

This instruction is drawn from Arkansas case law and the RESTATEMENT.<sup>13</sup> This instruction does not address the rare case in which the consideration passes to or from a third party.<sup>14</sup>

**A. CONTRACT FORMATION  
FORM A-6  
CERTAINTY**

**Contracts must be reasonably certain in each of their essential terms. A contract is reasonably certain if it enables the parties to understand the rights and obligations created by the contract. [If the terms of a contract are vague, it can nevertheless be enforced if the actions of the parties make the agreement a reasonably certain one].**

## COMMENT

Arkansas cases hold that a vague contract may be enforced if the parties' actions can make it reasonably definite.<sup>15</sup> The bracketed language may be used if appropriate.<sup>16</sup>

**A. CONTRACT FORMATION  
FORM A-7  
REVOCATION OF OFFER**

**An offer may be revoked at any time before it is accepted, by a communication from the party who made the offer, received by the party to whom the offer was made, or by a person authorized by that party to**

13. See *Bass v. Service Supply Co.*, 25 Ark. App. 273, 757 S.W.2d 189 (1988); RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981).

14. See *John Deere Co. v. Broomfield*, 803 F.2d 408 (8th Cir. 1986) (applying Arkansas law).

15. See *Swafford v. Sealtest Foods Div. of Nat'l Dairy Prods. Corp.*, 252 Ark. 1182, 483 S.W.2d 202 (1972) (reflecting a distaste for nullity).

16. This instruction is modeled, in part, after COLORADO MODEL JURY INSTRUCTION, CIVIL § 30.07 (Bancroft-Whitney, 3d ed. 1990). RESTATEMENT (SECOND) OF CONTRACTS § 33(2) (1981), defines certainty in an elliptical fashion: "The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy." See also *Ciba-Geigy Corp. v. Alter*, 309 Ark. 426, 834 S.W.2d 136 (1992). The RESTATEMENT language is unsatisfactory because it leads to absurdity; if an agreement is uncertain it cannot be a contract, so there is no need to determine a breach.

**receive it, or when it is deposited in some place which that party has authorized for such communications to be deposited.**

#### COMMENT

This instruction is derived from Arkansas case law as expanded by the RESTATEMENT (SECOND) OF CONTRACTS.<sup>17</sup> An offer is accepted if it is posted “before *any intimation* is received that the offer is withdrawn.”<sup>18</sup> The emphasized language is too open-ended, too unbounded by rule, to function in a law court. It has evidently found its way into the law by the route of equity, where a party has attempted to enforce a bad bargain against another in circumstances where he knew the other intended to revoke his offer. It appears more appropriate to equity, as where a party sues to enforce a contract he had reason to believe was not intended, to which the defendant interposes an equitable defense of mistake or accident.<sup>19</sup> If, as we suppose, “intimations” will be judged “communications” in courts of equity only, then it is inappropriate to include this language in a jury instruction.

#### A. CONTRACT FORMATION FORM A-8 REJECTION OF OFFER

**If an offer is rejected, it may not thereafter be accepted by the party to whom it was made. An offer is considered to be rejected if the person to whom it was made proposes new terms or imposes conditions or reservations not contained in the original offer. However, if an acceptance only expresses terms, reservations, or conditions that were implied in the original offer, it is not a rejection of the offer, but an acceptance, and both parties are bound by the agreement, if it is otherwise certain, and supported by consideration.**

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17. See *Kempner v. Cohn*, 47 Ark. 519, 1 S.W. 869 (1886); RESTATEMENT (SECOND) OF CONTRACTS § 68 (1981).

18. *Kempner*, 47 Ark. at 525, 1 S.W. at 871 (emphasis added) (citing, *inter alia*, 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 477 (Charles M. Barnes, ed., 13th ed. 1884)).

19. In 1869, the Arkansas Supreme Court stated that “[t]o correct and relieve against mistakes and accidents is one of the principal objects and most ordinary duties of courts of equity.” *Simpson v. Montgomery*, 25 Ark. 365 (1869).

## COMMENT

This instruction is taken from *Smith v. School District No. 89*. If a response proposes terms, conditions, and reservations, it becomes a counteroffer, which must be accepted, to ripen into a contract.<sup>20</sup>

**A. CONTRACT FORMATION  
FORM A-9  
TIME FOR ACCEPTANCE**

**When an offer has been made, it will be deemed to be open for the time specified in the offer, or for a reasonable time, and if not accepted during that time, it will be considered rejected. If an offer has been made, and an immediate acceptance is requested, or is to be expected by the usages of the particular trade or business, then the making of the offer is accompanied by the implied stipulation that the acceptance shall be immediate.**

## COMMENT

*See Kempner v. Cohn.*<sup>21</sup> Forms B-9, B-11, and B-12 might be used in conjunction with this instruction.

**A. CONTRACT FORMATION  
FORM A-10  
PAST ACT AS CONSIDERATION**

**An act done in the past cannot be consideration for a later contract. An undertaking by a party to do something which he is already obligated to do is not sufficient to constitute consideration, except where the existence of the duty is the subject of an honest and reasonable dispute.**

## COMMENT

*See United States v. Westmoreland Manganese Corp.*<sup>22</sup>

20. *See* *Byford v. Gates Bros. Lumber Co.*, 216 Ark. 400, 225 S.W.2d 929 (1950); *Smith v. School Dist. No. 89*, 187 Ark. 405, 59 S.W.2d 1022 (1933).

21. 47 Ark. 519, 1 S.W. 869 (1886).

22. 134 F. Supp. 898 (E.D. Ark. 1955).

**A. CONTRACT FORMATION  
FORM A-11  
SILENCE AS ACCEPTANCE**

**Generally, silence and inaction do not constitute acceptance but imply rejection after lapse of reasonable time. A party who knowingly accepts the benefits of a proposed contract, is bound by its terms.**

COMMENT

Acceptance by silence may constitute acceptance only in special circumstances.<sup>23</sup> Silence where there is a duty to speak may create liabilities.<sup>24</sup> In other unspecified but nevertheless special circumstances such as long-term dealing and settled customs, silence may constitute acceptance of an offer.<sup>25</sup>

We believe this instruction correctly states the law on this point. However, it may not be appropriate for use when the special circumstances referred to above are present or when the instruction in Form A-12 concerning promissory estoppel is given.

**A. CONTRACT FORMATION  
FORM A-12  
PROMISSORY ESTOPPEL**

**To establish his claim for promissory estoppel, the plaintiff has the burden of proving the following elements by a preponderance of the evidence:**

**First, that the defendant made a promise to the plaintiff;  
and**

**Second, that the defendant should reasonably have expected the plaintiff to act in reliance on the promise or to refrain from acting in reliance on the promise; and**

**Third, that the plaintiff acted or refrained from acting in reasonable reliance on the promise; and**

**Fourth, that the plaintiff suffered damage for which the law gives compensation as a result of the reliance.**

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23. See *Reliance Bagging Co. v. Electric Gin Co.*, 208 Ark. 829, 187 S.W.2d 724 (1945).

24. *Camp v. First Fed. Sav. & Loan*, 12 Ark. App. 150, 671 S.W.2d 213 (1984) (confidential relationship).

25. See *Reliance Bagging Co. v. Electric Gin Co.*, 208 Ark. 829, 187 S.W.2d 724 (1945).



## COMMENT

The Committee submits this instruction in element format (as opposed to a statement of black letter law) to make it more workable for juries.<sup>26</sup>

**A. CONTRACT FORMATION  
FORM A-13  
CONTRACT IMPLIED IN FACT**

**A contract may be either express or implied. A promise, either express or inferred, is an essential element of both express and implied contracts. A promise sufficient to form an implied contract may be inferred from the acts of the parties or their general course of dealing. In determining whether an implied contract was formed between the plaintiff and the defendant, you are to consider the parties' conduct and course of dealing from the viewpoint of a reasonable person, considering all of the attendant circumstances.**

## COMMENT

The Committee designed this instruction to be used in cases in which the facts are sufficient for the jury to decide whether there was a contract implied in fact between the parties.<sup>27</sup> The instruction may be used in conjunction with Form A-1. An issue unclear in Arkansas law (and left undecided by the Committee) is how to instruct the jury on the other essential elements of a contract.<sup>28</sup> Montana concludes its model instruction on implied contracts with this sentence: "The same elements are essential to an implied contract as are essential to an express contract."<sup>29</sup> The Committee seeks comments from the bar and bench as to whether a similar statement should be included in the Arkansas instruction.

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26. See *Dickson v. Delhi Seed Co.*, 26 Ark. App. 83, 760 S.W.2d 382 (1988).

27. See *Phillips v. Marist Soc'y of Wash. Province*, 80 F.3d 274 (8th Cir. 1996).

28. Cf. Form A-2.

29. MONTANA PATTERN INSTRUCTIONS, § 13.07 (Montana Supreme Court Commission on Civil Jury Instructions, Rev. 1991).

**A. CONTRACT FORMATION**  
**FORM A-14**  
**THIRD PARTY BENEFICIARY**

**Parties to a contract are presumed to contract only for themselves. However, a contract may be enforced by a person who is not a party to the contract if the person demonstrates that the parties to the contract clearly intended to benefit that person.**

[If a person is not named in the contract but is otherwise sufficiently described or designated or is a member of a class of persons sufficiently described or designated, he may enforce the contract if he demonstrates that the parties to the contract clearly intended to benefit him.]

COMMENT

This instruction states the general rule regarding third party beneficiaries.<sup>30</sup> The bracketed portion should be used when the contract either does not name the alleged third party beneficiary or when the beneficiary claims to be a member of a benefitted class.

**B. CONTRACT INTERPRETATION**  
**FORM B-1**  
**INTERPRETING CONTRACT TO GIVE EFFECT**  
**TO INTENT OF THE PARTIES**

**It is your duty to interpret the contract in order to effectuate what the parties intended when they made their agreement. You should determine the parties' intent principally from the language of the contract. If the contract is silent or unclear on a subject, you may then consider other evidence of their intent. You should give the words of a contract their plain, ordinary, and usual meaning, unless it is clear that certain words were intended to be used in a technical sense.**

COMMENT

This instruction incorporates and combines the rules found in Arkansas case law.<sup>31</sup>

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30. See *Little Rock Wastewater Util. v. Larry Moyer Trucking, Inc.*, 321 Ark. 303, 902 S.W.2d 760 (1995).

31. See *Conley Transp., Inc. v. Great Am. Ins. Co.*, 312 Ark. 317, 849 S.W.2d 494 (1993); *First Nat'l Bank v. Griffin*, 310 Ark. 164, 832 S.W.2d 816 (1992), *cert. denied*, 507 U.S. 919

**B. CONTRACT INTERPRETATION**  
**FORM B-2**  
**WORDS OF ART AND TECHNICAL TERMINOLOGY**

**You should interpret terms of art, or words associated with a particular trade or occupation, as those words are used by experienced and knowledgeable members of that trade or occupation, unless the evidence discloses that the parties used the words in a different sense.**

COMMENT

*See Les-Bil, Inc. v. General Waterworks Corp.*<sup>32</sup>

**B. CONTRACT INTERPRETATION**  
**FORM B-3**  
**DETERMINATION OF PARTIES' INTENT**

**When the language of a contract is ambiguous, you should give weight to the construction placed on the contract by the parties themselves, as shown by their conduct, subsequent statements, and acts.**

COMMENT

*See RAD-Razorback Ltd. Partnership v. B.G. Coney Co.*,<sup>33</sup> *Wynn v. Sklar & Phillips Oil Co.*,<sup>34</sup> *Northwest National Bank v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,<sup>35</sup> *Welch v. Cooper*.<sup>36</sup>

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(1993); *Les-Bil, Inc. v. General Waterworks Corp.*, 256 Ark. 905, 511 S.W.2d 166 (1974); *Hancock v. Tri-State Ins. Co.*, 43 Ark. App. 47, 858 S.W.2d 152 (1993); *Moss v. Allstate Ins. Co.*, 29 Ark. App. 33, 776 S.W.2d 831 (1989).

32. 256 Ark. 905, 511 S.W.2d 166 (1974).

33. 289 Ark. 550, 713 S.W.2d 462 (1986).

34. 254 Ark. 332, 493 S.W.2d 439 (1973).

35. 25 Ark. App. 279, 757 S.W.2d 182 (1988).

36. 11 Ark. App. 263, 670 S.W.2d 454 (1984).

**B. CONTRACT INTERPRETATION**  
**FORM B-4**  
**INTERPRETATION BY CONDUCT OF PARTIES**

**If the language of the contract is ambiguous or uncertain, the interpretation of it by the parties, as shown by their conduct before any controversy arose between them, may be considered by you as evidence of their intent.**

COMMENT

This instruction incorporates the holding in *Welch v. Cooper*.<sup>37</sup>

**B. CONTRACT INTERPRETATION**  
**FORM B-5**  
**CONSTRUCTION AGAINST ONE WHO DRAFTED CONTRACT**

**Any ambiguous terms of a written contract are to be construed against the party who drafted it. That is, if there is a reasonable doubt about the meaning of a provision in a contract, that doubt should be resolved against the party who prepared the contract.**

COMMENT

This instruction states the general rule found in many Arkansas cases.<sup>38</sup> The Committee believes the rule requiring construction against the party who drafted the contract applies only as to ambiguities in the contract, and has drafted the instruction accordingly.<sup>39</sup> The Committee also notes that this rule is subordinate to the rule that the factfinder should never adopt a construction which neutralizes a contract provision when the contract can be construed to give effect to all of its provisions.<sup>40</sup> It is also subordinate to the primary rule that the intention of the parties be ascertained and effectuated.<sup>41</sup> An instruction stating these superior rules may also be necessary when this model instruction

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37. 11 Ark. App. 263, 670 S.W.2d 454 (1984).

38. See, e.g., *Schulte v. Benton Sav. & Loan Ass'n*, 279 Ark. 275, 651 S.W.2d 71 (1983); *Elcare, Inc. v. Gocio*, 267 Ark. 605, 593 S.W.2d 159 (1980).

39. Cf. *Elcare, Inc.*, 267 Ark. 605, 593 S.W.2d 159 (1980); *Barton v. Perryman*, 265 Ark. 228, 577 S.W.2d 596 (1979); *Prepakt Concrete Co. v. Whitehurst Bros., Inc.*, 261 Ark. 814, 552 S.W.2d 212 (1977).

40. See *North v. Philliber*, 269 Ark. 403, 602 S.W.2d 643 (1980); *Barrett v. Land Mart of Am., Inc.*, 3 Ark. App. 70, 621 S.W.2d 889 (1981).

41. See *Harris v. Stephens Prod. Co.*, 310 Ark. 67, 832 S.W.2d 837 (1992).

is used. Finally, it may be inappropriate to give this instruction in the situation where both parties negotiated the written language of the contract.

**B. CONTRACT INTERPRETATION  
FORM B-6  
LANGUAGE OF THE CONTRACT SHOULD  
BE CONSTRUED AS A WHOLE**

**A contract must be construed as a whole: the different clauses of the contract must be read together and construed so that all of its parts harmonize, if possible. An interpretation which neutralizes any provision of a contract cannot be adopted if the contract can be interpreted in a way that gives effect to all of its provisions.**

COMMENT

This instruction is derived from the well-established Arkansas rule.<sup>42</sup> Where a contract consists of two or more documents, the following alternative language may be appropriate:

**You are instructed that a contract is to be considered as a whole. If the agreement of the parties is contained in two or more documents, both or all of the instruments must be considered together.**<sup>43</sup>

**B. CONTRACT INTERPRETATION  
FORM B-7  
SPECIFIC PROVISIONS CONTROL GENERAL PROVISIONS**

**If, in a contract, there is a contradiction or repugnancy between general clauses and more detailed, specific clauses, the specific provisions ordinarily qualify the meaning of the general provisions.**

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42. See, e.g., *Buchanan v. Little Rock Sch. Dist.*, 84 F.3d 1035 (8th Cir. 1996); *Travelers Indem. Co. v. Olive's Sporting Goods, Inc.*, 297 Ark. 516, 764 S.W.2d 596 (1989); *Gibson v. Pickett*, 256 Ark. 1035, 512 S.W.2d 532 (1974). See also RESTATEMENT (SECOND) OF CONTRACTS § 202(2) (1981).

43. See *Integon Life Ins. Co. v. Vandegrift*, 11 Ark. App. 270, 669 S.W.2d 492 (1984).

## COMMENT

*See Missouri Pacific Railroad Co. v. Winburn Tile Manufacturing Co.*<sup>44</sup>

**B. CONTRACT INTERPRETATION  
FORM B-8****WRITTEN OR TYPEWRITTEN PROVISIONS CONTROL PRINTED PROVISIONS**

**If a contract contains handwritten or typewritten provisions that are contradictory to typeset provisions, the handwritten or typewritten provisions control.**

## COMMENT

*See Leonard v. Merchants & Farmers Bank*,<sup>45</sup> *Stacy v. Williams*.<sup>46</sup> The Committee has elected to use the word “typeset” as opposed to “printed” in this instruction since the word “printed” may have different meanings, including handwriting which is not cursive.

**B. CONTRACT INTERPRETATION  
FORM B-9****TIME NOT EXPRESSED-REASONABLE TIME**

**When a contract is silent as to when it must be performed, the law implies that it must be performed within a reasonable time. [In determining whether the contract was performed within a reasonable time, you should consider the nature of the contract, the situation of the parties and the circumstances surrounding the performance.]**

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44. 461 F.2d 984 (8th Cir. 1972). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 203 (1981).

45. 290 Ark. 571, 720 S.W.2d 908 (1986).

46. 38 Ark. App. 192, 834 S.W.2d 156 (1992).

## COMMENT

This instruction is based upon *Laird v. Lacey*,<sup>47</sup> Arkansas statutes,<sup>48</sup> and the RESTATEMENT.<sup>49</sup> The bracketed portion of the instruction may not be appropriate in every case.

**B. CONTRACT INTERPRETATION**  
**FORM B-10**  
**GENERAL RULE - AMBIGUITY IN TERM[S]**

**The parties dispute the meaning of [a] certain term[s] in their contract and you must construe the contract to determine their intention. In determining the meaning of the term[s], you must take into consideration the circumstances surrounding the making of the contract, the subject of the contract, the situation and relation of the parties at the time the contract was made, customs and usages of trade, the parties' course of dealing, and the parties' course of performance.**

## COMMENT

This instruction, derived from Arkansas case law, provides a useful framework for introducing the instructions which follow.<sup>50</sup>

**B. CONTRACT INTERPRETATION**  
**FORM B-11**  
**CUSTOM IN THE TRADE**

**A custom in the trade is any practice or method of dealing having such regularity of observance in a place or trade as to justify an expectation that it will be observed with respect to the transaction in question.**

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47. 263 Ark. 570, 566 S.W.2d 145 (1978).

48. See ARK. CODE ANN. §§ 4-1-204 and 4-2-309(1) (Michie 1991).

49. See RESTATEMENT (SECOND) OF CONTRACTS § 204, cmt. d (1981).

50. See *Louisiana-Nevada Transit Co. v. Woods*, 393 F. Supp. 177 (W.D. Ark. 1975); *Stokes v. Roberts*, 289 Ark. 319, 711 S.W.2d 757 (1986); *Welch v. Cooper*, 11 Ark. App. 263, 670 S.W.2d 454 (1984); *Barrett v. Land Mart of Am., Inc.*, 3 Ark. App. 70, 621 S.W.2d 889 (1981).

## COMMENT

This instruction follows Arkansas statutes<sup>51</sup> and is consistent with the RESTATEMENT.<sup>52</sup>

**B. CONTRACT INTERPRETATION  
FORM B-12  
COURSE OF DEALING**

**A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.**

## COMMENT

This instruction is a restatement of title 4, chapter 1, section 205 (1) of the Arkansas Code<sup>53</sup> and is consistent with section 223 of the RESTATEMENT OF CONTRACTS.<sup>54</sup>

**B. CONTRACT INTERPRETATION  
FORM B-13  
CONSTRUCTION OF EXPRESS TERMS, COURSE OF DEALING  
AND CUSTOM IN THE TRADE**

**The express terms of an agreement and any applicable [course of dealing]/[custom in the trade] as previously defined for you, shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable, express terms control both course of dealing and custom in the trade, and course of dealing controls custom in the trade.**

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51. See ARK. CODE ANN. § 4-1-205(2) (Michie 1991). The statutes use the phrase “usage of trade.”

52. See RESTATEMENT (SECOND) OF CONTRACTS §§ 219-222 (1981).

53. ARK. CODE ANN. § 4-1-205(1) (Michie 1991).

54. RESTATEMENT (SECOND) OF CONTRACTS § 223 (1981).



## COMMENT

This instruction is a restatement of title 4, chapter 1, section 205 (4) of the Arkansas Code.<sup>55</sup> The instruction is also consistent with Arkansas law as set forth in the comment to Form B-3.

**B. CONTRACT INTERPRETATION**  
**FORM B-14**  
**CONTRACT'S IMPLIED DUTY OF GOOD FAITH**

**Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement. The duty is an implied promise between the parties that they will exercise good faith in performing their obligations under the contract. Stated another way, the duty is an implied promise between the parties that they will not do anything to injure the other party's right to enjoy the benefits of the contract. However, the duty does not obligate either party to take any action which is contrary to the express provisions of the contract.**

## COMMENT

The nature of the duty of good faith and fair dealing implied in a contract has not been well-defined by Arkansas courts.<sup>56</sup> The Committee believes this instruction to be workable until Arkansas courts give more guidance as to whether such a duty is implied in every contract and the significance of such a duty to contract interpretation by a jury. The Committee urges the members of the bar and bench to carefully review this instruction and to submit comments concerning its propriety.

The Committee's decision to place this instruction in the chapter concerning contract interpretation is based upon its belief that the issue of good faith and fair dealing is first and foremost a rule of contractual interpretation; that is, the duty of good faith and fair dealing is an implied condition which relates, at least in part, to the intent of the parties.<sup>57</sup> The issue of whether the

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55. ARK. CODE ANN. § 4-1-205(4) (Michie 1991).

56. *Cf. Affiliated Foods Southwest, Inc. v. Moran*, 322 Ark. 808, 912 S.W.2d 8 (1995) (citing ARK CODE ANN. §§ 4-1-203 and 4-1-201). *See also* TCBY Sys., Inc. v. RSP Co., 33 F.3d 925 (8th Cir. 1994).

57. *See Banco del Estado v. Navistar Int'l Transp. Corp.*, 942 F. Supp. 1176 (N.D. Ill. 1996) (holding that "'good faith' is simply a rule of contractual interpretation and cannot be alleged as a separate cause of action from the breach of contract claim."); *Bissell v. Merrill Lynch & Co.*, 937 F. Supp. 237 (S.D.N.Y. 1996) (quoting *Bank of China v. Chan*, 937 F.2d 780, 789 (2d Cir. 1991): "[a] party's actions may implicate the implied covenant of good faith

implied condition was performed is dependent upon construction of the contract in view of parameters established by recent cases. Aside from the first sentence of this instruction, the instruction simply states those parameters.<sup>58</sup>

The second sentence of the instruction is based upon *Maryland National Bank v. Traenkle*.<sup>59</sup> The third sentence of the instruction is derived from *E.B. Harper & Co. v. Nortek, Inc.*<sup>60</sup> This same idea is expressed in slightly different ways in a number of cases.<sup>61</sup> The final sentence of the instruction is based upon a concept expressed in various cases.<sup>62</sup>

The Committee notes that this instruction may not be adequate to address the issue of the interplay between the duty of good faith and fair dealing and a contract provision which allows a party discretion. While this issue has been broached in at least one case applying Arkansas law,<sup>63</sup> it has been treated more extensively in cases from other jurisdictions.<sup>64</sup>

**C. AVOIDANCE OF CONTRACT**  
**FORM C-1**  
**EXISTENCE OF CONDITION PRECEDENT**

**As a defense to the plaintiff's action, the defendant claims that his performance under the agreement was excused because it was conditional upon [a fact (or) an event] which did not occur. A condition is [a fact] [an event] the presence or occurrence of which the parties agreed would extinguish a duty on the part of the defendant. Such a condition is a part of the contract if you find from a preponderance of the evidence that the plaintiff and the defendant agreed that defendant would not have to perform a duty or duties under their agreement if or unless [the fact] [the**

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when it acts so directly to impair the value of the contract for another party that it may be assumed that they are *inconsistent with the intent of the parties.*") (emphasis added).

58. See RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).

59. 933 F. Supp. 1280 (D. Md. 1996).

60. 104 F.3d 913 (7th Cir. 1997).

61. See, e.g., *Sterling Nat'l Mortgage Co. v. Mortgage Corner*, 97 F.3d 39 (3d Cir. 1996); *Geoffrey E. MacPherson, Ltd. v. Brinecell, Inc.*, 98 F.3d 1241 (10th Cir. 1996); *Greenspan v. Allstate Ins. Co.*, 937 F. Supp. 288 (S.D.N.Y. 1996); *Bissell v. Merrill Lynch & Co.*, 937 F. Supp. 237 (S.D.N.Y. 1996).

62. See *Sterling Nat'l Mortgage Co. v. Mortgage Corner*, 97 F.3d 39 (3d Cir. 1996); *Taylor Equip., Inc. v. John Deere Co.*, 98 F.3d 1028 (8th Cir. 1996) (applying South Dakota law and holding that implied covenant does not attach to every term in the contract, or even to terms which actually appear in the contract, but is to be used to "fill gaps" in the contract) *cert. denied*, 117 S. Ct. 1553 (1997); *Maryland Nat'l Bank v. Traenkle*, 933 F. Supp. 1280 (D. Md. 1996).

63. See *Vigoro Indus., Inc. v. Crisp*, 82 F.3d 785, 791 (8th Cir. 1996).

64. See, e.g., *Westinghouse Elec. Corp. v. McLean*, 938 F. Supp. 487, 493-94 (N.D. Ill. 1996); *Barseback Kraft AB v. United States*, 36 Fed. Cl. 691 (1996).

event] occurred. Such an agreement may be express or may be implied from the conduct or words of the parties at or before the contract was entered. Whether the contract was subject to such a condition, and whether [the fact] [the event] occurred which excused the defendant from performing his duties is for you to decide on the basis of all the evidence in the case.

#### COMMENT

This instruction attempts to state the general rules regarding conditions precedent in plain language and in light of *Stacy v. Williams*.<sup>65</sup> *Stacy* may have laid to rest the familiar rule that contracts will not be interpreted so as to make their performance conditional.<sup>66</sup>

The Arkansas Court of Appeals in *Stacy* stated that whether a provision in a contract is a condition depends on the parties' intent, as adduced from the contract itself.<sup>67</sup> If the terms of a writing are ambiguous, extrinsic evidence may establish intent. Evidence that a contract is delivered conditionally is an exception to the parol evidence rule.

The propriety of giving this instruction, post-*Stacy*, may depend on the trial court's assessment of whether a given promise or writing is ambiguous. This is a question of law, initially.<sup>68</sup> If the trial court finds that the contract is ambiguous, extrinsic evidence bearing on the parties' intent may be allowed, and the meaning of the contract will be determined by the jury.<sup>69</sup>

*Stacy* is problematic in that contracts frequently contain covenants or recitals, and to construe them as conditions essentially invites the destruction of a contract by a party against whom the bargain has turned. That is, the provision in question—for example, that Buyer will look for financing—may be a mere recital expressing the fact that Buyer was not looking to Seller to finance any part of the purchase of the property. It is evident that Buyer made a bad bargain; the property later sold at a 25% discount from what Buyer agreed to pay. To what extent do we want contracting parties to make their performance of bad bargains conditioned on their ability to perform an act of secondary importance to the agreement? This issue may need further discussion which could result in the refinement of the present instruction.

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65. 38 Ark. App. 192, 834 S.W.2d 156 (1992); See also 17A AM. JUR. 2D *Contracts* §§ 465-474 (1991).

66. Cf. *DaCosse v. Ahrens*, 2 Ark. App. 61, 616 S.W.2d 777 (1981) (Corbin, J., dissenting).

67. See *Stacy*, 38 Ark. App. 192, 834 S.W.2d 156.

68. See *Cate v. Irwin*, 44 Ark. App. 39, 866 S.W.2d 423 (1993).

69. See *Agey v. Pederson*, 191 Ark. 497, 86 S.W.2d 930 (1935).

**C. AVOIDANCE OF CONTRACT  
FORM C-2**

**FAILURE OF CONDITION PRECEDENT - PERFORMANCE NOT EXCUSED**

Performance of duties under a contract will not be excused even though they are conditional if the plaintiff proves by a preponderance of the evidence:

- (a) that defendant waived the condition; or
- (b) that the condition could be fulfilled practicably by defendant; or
- (c) that defendant prevented or, without legal excuse, rendered more difficult or expensive, the plaintiff's own satisfaction of the condition; or
- (d) the condition was not such a material part of the contract that the defendant's assent to the exchange was in fact dependent upon the fulfillment of the condition.

COMMENT

Subparagraph (a) of this instruction is based upon *Hempel v. Bragg*.<sup>70</sup> Subsection (b) of the instruction is derived from *Betnar v. Rose*.<sup>71</sup> Subparagraph (c) is loosely based upon *Royal Manor Apartments v. B.J. Powell Construction Co.*<sup>72</sup> and *Dickinson v. McKenzie*.<sup>73</sup> The final subparagraph is derived from *Dongary Holstein Leasing, Inc. v. Covington*.<sup>74</sup>

**C. AVOIDANCE OF CONTRACT  
FORM C-3  
FRAUD IN INDUCEMENT**

As a defense to the plaintiff's action, the defendant states that he is not liable because his consent to the agreement was induced by fraud. To establish that the agreement was induced by fraud, the defendant must

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70. 313 Ark. 486, 856 S.W.2d 293 (1993).

71. 259 Ark. 820, 536 S.W.2d 719 (1976). See also RESTATEMENT (SECOND) OF CONTRACTS §§ 230A(2)(b), 245 (1981).

72. 258 Ark. 166, 523 S.W.2d 909 (1975).

73. 197 Ark. 746, 126 S.W.2d 95 (1939).

74. 293 Ark. 112, 732 S.W.2d 465 (1987). See also RESTATEMENT (SECOND) OF CONTRACTS § 229 (1981).

prove each of the following five elements by a preponderance of the evidence:

- (a) That the plaintiff made a false representation;
- (b) That the plaintiff knew the representation was false;
- (c) That the representation was made for the purpose of inducing the contract;
- (d) That the defendant reasonably relied on the representation; and
- (e) That the defendant would not have entered into the contract except for the false representation.

#### COMMENT

Fraud may be shown as a defense at law.<sup>75</sup> This instruction states the basic elements for a claim of fraudulent inducement.<sup>76</sup> The Committee notes that this instruction does not address the concept of waiver of the right to assert fraud as a defense.<sup>77</sup> The instruction also does not address the effect of the defendant's breach before his discovery of the alleged fraud. However, the defendant's breach before his discovery of the fraud should not preclude his assertion of fraud as a defense.<sup>78</sup>

### C. AVOIDANCE OF CONTRACT FORM C-4 UNDUE INFLUENCE

As a defense to the plaintiff's action, the defendant states that his consent to the agreement was procured by undue influence. Undue influence is the abuse of a relationship which operates to deprive a party of his free will and induces him to do that which he otherwise would not have done.

To sustain this defense, the defendant has the burden of proving by a preponderance of the evidence that defendant justifiably reposed such trust and confidence in the plaintiff that plaintiff's influence overcame defendant's own free will and that the decision to enter into the contract was not his free and voluntary act.

75. See *Abraham v. Blytheville Indus. Ass'n*, 195 Ark. 778, 114 S.W.2d 32 (1938).

76. See, e.g., *Galion Iron Works & Mfg. Co. v. Otto v. Martin Constr. Co.*, 176 Ark. 448, 460, 3 S.W.2d 310 (1928).

77. See *Williams v. City of Midland*, 932 S.W.2d 679 (Tex. App. 1996); RESTATEMENT (SECOND) OF CONTRACTS §§ 380, 381 (1981); 17A AM. JUR. 2D *Contracts* § 231 (1991).

78. 17A AM. JUR. 2D *Contracts* § 665 (1991).

## COMMENT

The Committee based this instruction on *Dent v. Wright*<sup>79</sup> and attempted to state the general rule regarding undue influence in understandable and workable language.<sup>80</sup>

The editors of AMERICAN JURISPRUDENCE note that there is a conflict as to whether undue influence is a species of constructive fraud or duress.<sup>81</sup> However, regardless of its classification, undue influence appears to be a defense which may be maintained at law, and not simply in equity.<sup>82</sup> No Arkansas cases appear to have treated the matter.

*Zeigler v. Illinois Trust & Savings Bank*<sup>83</sup> indicates that when, in an action at law, the defense is raised the burden shifts to the plaintiff to show that the defendant entered into the contract voluntarily.<sup>84</sup> Yet, in an action brought in equity to cancel a contract for undue influence, the burden is on the party seeking to cancel the obligation to prove his entitlement, and the evidence must be clear and convincing.<sup>85</sup> Given that Rule 8(b) of the Arkansas Rules of Civil Procedure lists the issue of "duress" as one which must be raised as an "affirmative defense," that is, one to be proved by defendant, it is most likely that our courts would reject *Zeigler's* analysis in actions at law.

By parity of reasoning, fraud at law is required to be proved by a preponderance of the evidence,<sup>86</sup> and in equity by clear and convincing evidence.<sup>87</sup> Generally speaking, elevated burdens of proof are peculiar to chancery practice, and foreign to law. Therefore, the Committee used the preponderance of the evidence standard as the burden of proof for this defense.

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79. 322 Ark. 256, 909 S.W.2d 302 (1995).

80. The instruction is also supported by the RESTATEMENT (SECOND) OF CONTRACTS § 177 (1981) and 17A AM. JUR. 2D *Contracts* § 237 (1991).

81. See 17A AM. JUR. 2D *Contracts* § 237 (1991).

82. See, e.g., *Wells Fargo Bank & Union Trust Co. v. Brady*, 254 P.2d 71 (Cal. 1953); *Zeigler v. Illinois Trust & Sav. Bank*, 91 N.E. 1041 (Ill. 1910).

83. 91 N.E. 1041 (Ill. 1910).

84. See *id.*

85. See *Smith v. Lamb*, 87 Ark. 344, 112 S.W. 884 (1908).

86. See *Wheeler Motor Co. v. Roth*, 315 Ark. 318, 867 S.W.2d 446 (1993).

87. See *Kleiner v. Longrader*, 189 Ark. 1171, 75 S.W.2d 1006 (1934).

**C. AVOIDANCE OF CONTRACT**  
**FORM C-5**  
**DURESS**

As a defense to the plaintiff's claim, the defendant states that his consent to the agreement was procured by duress. To establish this defense, the defendant must prove the following propositions by a preponderance of the evidence:

- (a) that he involuntarily accepted the terms of the plaintiff;
- (b) that at the time he accepted those terms, the circumstances afforded him no other reasonable alternative than to accept those terms;
- (c) that the circumstances were the result of threats or coercive acts of the plaintiff; and
- (d) defendant renounced the agreement promptly, in consideration of the circumstances, and without accepting its benefits.

COMMENT

*See Cox v. McLaughlin.*<sup>88</sup> At common law, the defense of duress to actions at law required a showing of actual imprisonment, or serious threat of grievous bodily injury sufficient to overbear the will of a man of ordinary courage.<sup>89</sup> *Cox* seemingly indicates that contracts may be avoided if one entered them on threat of serious financial hardship.<sup>90</sup>

*Cox* does not require prompt renunciation as an element of duress, but the common law did. Likewise, the RESTATEMENT (SECOND) OF CONTRACTS requires prompt communication of a party's intention to avoid the contract.<sup>91</sup> Therefore, the Committee includes this requirement as an element of the defense.

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88. 315 Ark. 338, 867 S.W.2d 460 (1993).

89. See 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 453 (Charles M. Barnes, ed., 13th ed. 1884).

90. See *Cox*, 315 Ark. at 345, 867 S.W.2d at 463 (1993) (quoting *Totem Marine Tug & Barge, Inc. v. Alyeska Pipeline*, 584 P.2d 15, 22 (Alaska 1978)).

91. See RESTATEMENT (SECOND) OF CONTRACTS § 381(1) (1981).

**C. AVOIDANCE OF CONTRACT  
FORM C-6  
WAIVER**

**As a defense to the plaintiff's claim, the defendant asserts waiver. Waiver is the voluntary abandonment or surrender by a capable person of a right known by him to exist, with the intent that he shall forever be deprived of its benefits. It may occur when one, with full knowledge of material facts, does something which is inconsistent with the right or his intention to rely on that right.**

COMMENT

This instruction is based upon the general rule of waiver announced in *Lester v. Mount Vernon-Enola School District*.<sup>92</sup>

ENDNOTE TO SECTION C

The Committee has not included an instruction on mutual mistake in these instructions. Although there is some authority to suggest that the issue of mutual mistake might be submitted to the jury,<sup>93</sup> the Committee believes the issue of mutual mistake is more properly dealt with in the context of the equitable remedies of rescission and information. However, the Committee welcomes comments to the contrary.

**D. MODIFICATION OF CONTRACT  
INTRODUCTION TO SECTION D**

In preparing the instructions in this section, the Committee considered it critical to distinguish among the legal theories presented in this section: (1) cancellation by mutual consent; (2) accord and satisfaction; (3) novation; (4) modification; and (5) release. A failure to observe the distinction may result in a multiplicity of instructions on a single basic issue or theory of defense. This is, at best, undesirable.<sup>94</sup> The following brief discussion sets forth the distinctions which served to guide the Committee in preparing instructions on these issues.

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92. 323 Ark. 728, 732, 917 S.W.2d 540 (1996).

93. See, e.g., *Mitchell v. First Nat'l Bank*, 293 Ark. 558, 739 S.W.2d 682 (1987); 4 TEXAS PATTERN JURY CHARGES, § 101.28 (State Bar of Texas 1990).

94. See, e.g., *Hutcheson v. Clapp*, 216 Ark. 517, 226 S.W.2d 546 (1950); *Furlow v. United Oil Mills*, 104 Ark. 489, 149 S.W. 69 (1912).



Taking the easiest case first, the defense of release requires a writing.<sup>95</sup> Once the writing is proved, it must be supported by consideration. A total failure of consideration will void the release,<sup>96</sup> but a partial failure of consideration only gives rise to an action for the balance owed.<sup>97</sup>

An accord and satisfaction, under the strict common law, may not arise until there has been a breach of covenant by one of the parties.<sup>98</sup> An "accord" reached before a breach would be, at common law, an "equitable defense," but not a defense cognizable at law. This distinction was described by Judge Tucker as "technical" in nature, and probably does not apply today for that reason.

Accord and satisfaction is a defense at law.<sup>99</sup> It may be oral.<sup>100</sup> It has two parts, both of which must be proved: an accord, meaning an agreement to accept a different consideration in satisfaction of the original obligation; and a satisfaction, consisting of the acceptance of the substituted consideration.<sup>101</sup> Accord and satisfaction is a defense if tender is accepted as such, but not otherwise.<sup>102</sup> Performance or execution of the accord is necessary; part performance does not constitute satisfaction.<sup>103</sup> This is distinct from release (which must be written) in that an unexecuted accord is no satisfaction at all; a partially paid release gives the releasor only a claim for the balance of the consideration, and not an action on his original claim.

Accord and satisfaction differs from a compromise and settlement, which may be enforced even if tender of performance is not accepted. Furthermore, compromise and settlement bars claims that are disputed and unliquidated; whereas an accord and satisfaction may be pleaded in bar to any claim.

Rescission by mutual agreement differs from accord and satisfaction in several particulars. First, strictly speaking, an accord and satisfaction looks toward a contract that is performed by one party, and executory in the other.

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95. See *Swan v. Benson*, 31 Ark. 728 (1877). See also RESTATEMENT (SECOND) OF CONTRACTS § 284 and cmt. a (1981).

96. See *Golf Shaft & Block Co. v. O'Keefe*, 200 Ark. 529, 139 S.W.2d 691 (1940).

97. See *White v. General Motors Corp.*, 699 F. Supp. 1485 (D. Kan. 1988), *aff'd*, 908 F.2d 669 (10th Cir. 1990), *cert. denied*, 498 U.S. 1069 (1991).

98. See 2 HENRY ST. G. TUCKER, COMMENTARY ON LAWS OF VIRGINIA 24 (1831).

99. See *Johnson v. Aylor*, 129 Ark. 82, 195 S.W. 4 (1917).

100. See *Arkansas Valley Feed Mills, Inc. v. Fox De Luxe Foods, Inc.*, 171 F. Supp. 145 (W.D. Ark. 1959), *aff'd*, 273 F.2d 804 (8th Cir. 1960).

101. See *Employers Ins. of Wausau v. Polar Express, Inc.*, 780 F. Supp. 610 (W.D. Ark. 1991).

102. See *Kelley v. Wiggins*, 291 Ark. 280, 724 S.W.2d 443 (1987).

103. See *In re McMullan*, 196 B.R. 818 (Bankr. W.D. Ark. 1996); *General Air Conditioning Corp. v. Fullerton*, 227 Ark. 278, 298 S.W.2d 61 (1957); RESTATEMENT (SECOND) OF CONTRACTS § 281 (1981).

A rescission by mutual agreement occurs when the contract, to some extent, is executory in both parties.<sup>104</sup> The rescission occurs when the parties agree to “walk away from the deal.” If such an agreement is made, it requires no separate consideration because the release by A of the performance executory in B is consideration for the release by B of the performance executory in A.<sup>105</sup>

Novation is a species of accord and satisfaction.<sup>106</sup> A novation is a contract consisting of two stipulations: first to extinguish an existing obligation; second to substitute a new one in place of the original.<sup>107</sup> An accord and satisfaction relates solely to the extinguishment of a debt or obligation. An accord must be satisfied, or it is ineffective as such.<sup>108</sup> A novation need not be executed. Thus, where a promise is exchanged, and not a performance, the parties have entered a novation; where performance is demanded alone, an accord and satisfaction.<sup>109</sup>

With the foregoing in mind, we submit the following instructions.

**D. MODIFICATION OF CONTRACT**  
**FORM D-1**  
**RECISSION BY MUTUAL CONSENT**

**As a defense to plaintiff’s claim, the defendant states that the parties agreed to rescind their obligations under their contract.**

**The parties to a contract that has not been fully performed by either one may agree to cancel their contract. If they do, the contract is at an end, and no party to it may thereafter sue on it. An agreement to cancel a contract may be oral or written, express or implied, but all parties must consent to it. A mutual agreement to rescind a contract that has not yet been fully performed by either side needs no new or independent consideration. The party claiming that a contract has been rescinded must prove by a preponderance of the evidence that he and all other parties to the contract agreed to rescind or cancel it.**

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104. See RESTATEMENT (SECOND) OF CONTRACTS § 283, cmt. a (1981).

105. For an illustration of these general propositions, see *Arkansas Valley Feed Mills v. Fox De Luxe Foods, Inc.*, 171 F. Supp. 145 (W.D. Ark. 1959).

106. See *Harris v. Wildcat Corp.*, 556 P.2d 67, 69 (Idaho 1976).

107. See *Wheeler v. Wardell*, 3 S.E.2d 377 (1939); compare *In re Sanders*, 75 B.R. 746 (Bankr. W.D. Ark. 1987); *Alston v. Bitely*, 252 Ark. 79, 477 S.W.2d 446 (1972), and *McIllwain v. Bank of Harrisburg*, 18 Ark. App. 213, 713 S.W.2d 469 (1986).

108. See *In re McMullan*, 196 B.R. 818 (Bankr. W.D. Ark. 1996).

109. See *Martin v. Breckinridge*, 14 F.2d 260 (4th Cir. 1926).

## COMMENT

*See Morgan v. Shackelford*<sup>110</sup> and *Leonard v. Downing*.<sup>111</sup>

**D. MODIFICATION OF CONTRACT  
FORM D-2  
ACCORD AND SATISFACTION**

An accord and satisfaction is an agreement by one party to a contract that he will accept from the other a different performance from the one demanded in the original contract, followed by the actual performance of the substituted obligation. An accord and satisfaction, in other words, is a new contract, the performance of which discharges the rights and obligations created by a previous contract.

There can be no accord and satisfaction unless both parties understood or should have understood as reasonable parties that by accepting the terms of the new agreement, their rights and obligations under the previous contract would be cancelled.

Defendant has the burden of proving, by a preponderance of the evidence, both the new agreement, and his actual performance of it.

## COMMENT

This instruction is based upon Arkansas case law and the RESTATEMENT (SECOND) OF CONTRACTS.<sup>112</sup> In an appropriate case, the instruction may need to be expanded to cover the situations envisioned by the drafters of subsections (2) and (3) of the RESTATEMENT.

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110. 174 Ark. 337, 295 S.W. 46 (1927).

111. 246 Ark. 397, 438 S.W.2d 327 (1969).

112. See *In re McMullan*, 196 B.R. 818 (Bankr. W.D. Ark. 1996); *Employees Ins. of Wausau v. Polar Express, Inc.*, 780 F. Supp. 610 (W.D. Ark. 1991); *Holland v. Farmers & Merchants Bank*, 18 Ark. App. 119, 711 S.W.2d 481 (1986). The instruction is also consistent with the RESTATEMENT (SECOND) OF CONTRACTS § 281 (1981), but does not go as far as subsections (2) or (3) of § 281.

**D. MODIFICATION OF CONTRACT**  
**FORM D-3**  
**RELEASE**

**A release is an agreement, in writing, that in return for valid consideration, a person having a claim or right against another surrenders it. The defendant has the burden of proving by a preponderance of the evidence that the plaintiff agreed in writing to release his claim against the defendant, for a valuable consideration.**

COMMENT

This instruction is derived from Arkansas case law and is consistent in substance with the RESTATEMENT (SECOND) OF CONTRACTS.<sup>113</sup>

**D. MODIFICATION OF CONTRACT**  
**FORM D-4**  
**MODIFICATION**

**A contract may be modified or changed by a later oral or written agreement which meets each of the elements of a valid contract. Whether or not the parties to this action have modified the original contract is for you to determine.**

COMMENT

This instruction states the rule found in Arkansas case law.<sup>114</sup> When the alleged modification is oral, the instruction should also state that the party alleging the modification has the burden of proving the modification by clear and convincing evidence.<sup>115</sup>

Modification of a portion of a contract should be distinguished from a novation which is treated in the following instruction.

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113. See *Green v. Owens*, 254 Ark. 574, 495 S.W.2d 166 (1973); *Skinner v. Fisher*, 120 Ark. 91, 178 S.W. 922 (1915); RESTATEMENT (SECOND) OF CONTRACTS § 284 (1981).

114. See *In re Honeycutt*, 198 B.R. 306 (Bankr. E.D. Ark. 1996); *Leonard v. Downing*, 246 Ark. 397, 438 S.W.2d 327 (1969); *Linda Elenia Askew Trust v. Hopkins*, 15 Ark. App. 19, 688 S.W.2d 316 (1985).

115. See *Amerdyne Indus., Inc. v. POM, Inc.*, 760 F.2d 875 (8th Cir. 1985); *Columbia Mut. Cas. Ins. Co. v. Ingraham*, 47 Ark. App. 23, 883 S.W.2d 868 (1994), *rev'd on other grounds*, 320 Ark. 408, 896 S.W.2d 903 (1995).

**D. MODIFICATION OF CONTRACT**  
**FORM D-5**  
**NOVATION**

**Parties to a contract may substitute a new agreement for all or part of an existing contract that has not been performed. This is known as a novation. The evidence must show that the parties intended to extinguish the old contract and rely entirely on the new one. The party claiming a novation has the burden of proving by clear and convincing evidence that:**

- (1) the original contract was valid; and**
- (2) all parties consented to the extinguishment of the original contract, and to the substitution of a new performance; and**
- (3) there was a sufficient consideration [which may consist of the expenses incurred by one party in preparation to perform the substituted duty]; and**
- (4) the new contract is valid.**

**COMMENT**

*See J.I. Case Threshing Machine Co. v. Road Improvement District No. 3,*<sup>116</sup> *Alston v. Bitely,*<sup>117</sup> *Boshart v. Gardner,*<sup>118</sup> *Elkins v. Henry Vogt Machine Co.*<sup>119</sup>

**E. PERFORMANCE OR BREACH**  
**FORM E-1**  
**ACTUAL AND ANTICIPATORY BREACH**

**Unless performance by a party is excused, the failure to perform the contract at the time performance is due is an actual breach. Defective performance also constitutes an actual breach unless justified.**

**An anticipatory breach occurs when a party repudiates the contract before performance is due. Repudiation may consist of a statement reasonably interpreted to mean that the party will not or cannot perform the contract. It may also consist of a voluntary affirmative act which renders the party unable to perform.**

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116. 210 F. 366 (E.D. Ark. 1914).

117. 252 Ark. 79, 477 S.W.2d 446 (1972).

118. 190 Ark. 104, 77 S.W.2d 642 (1935).

119. 125 Ark. 6, 187 S.W. 663 (1916).

**When an anticipatory breach occurs, the injured party may sue for breach immediately or he may wait to sue until performance is due.**

COMMENT

This instruction follows the holdings in *Cox v. McLaughlin*;<sup>120</sup> *Jim Orr & Assocs., Inc. v. Waters*;<sup>121</sup> *Stocker v. Hall*;<sup>122</sup> *De Lukie v. American Petroleum Co.*;<sup>123</sup> *Bank of Cabot v. Bledsoe*.<sup>124</sup>

**E. PERFORMANCE OR BREACH  
FORM E-2  
BREACH**

**The nonperformance of a contractual duty is a breach of the contract.** [A material breach is a failure to perform an essential term or condition which substantially defeats the purpose of the contract for the other party.]

COMMENT

This instruction is derived from *Zufari v. Architecture Plus*<sup>125</sup> and *TXO Production Corp. v. Page Farms, Inc.*<sup>126</sup> The Committee drafted the definition of a material breach from various sources with the intention of making it easy for the jury to use. Use the bracketed portion when there is an issue as to whether the breach was material or minor.

**E. PERFORMANCE OR BREACH  
FORM E-3  
TOTAL OR PARTIAL BREACH**

**The breach of a contract may be total or partial. If the breach of the contract is material, the breach is total. A total breach excuses the performance of the other party and allows that party to sue for damages**

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120. 315 Ark. 338, 867 S.W.2d 460 (1993).

121. 299 Ark. 526, 530-31, 773 S.W.2d 99, 102 (1989).

122. 269 Ark. 468, 472-73, 602 S.W.2d 662 (1980).

123. 170 Ark. 453, 461, 280 S.W. 669 (1926).

124. 9 Ark. App. 145, 148-49, 653 S.W.2d 144 (1983). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 235(2) & cmt. b and § 250 (1981).

125. 323 Ark. 411, 914 S.W.2d 756 (1996).

126. 287 Ark. 304, 698 S.W.2d 791 (1985). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 241 (1981).

as to the whole contract. A breach which is not material is a partial breach. A partial breach does not excuse the performance of the other party but does allow the party to seek damages for the partial breach.

#### COMMENT

This instruction follows *TXO Production Corp. v. Page Farms, Inc.*<sup>127</sup>

### E. PERFORMANCE OR BREACH FORM E-4 SUBSTANTIAL PERFORMANCE

The doctrine of substantial performance permits a party to recover in spite of his own breach of the contract if performance is sufficiently substantial. The [plaintiff][defendant] alleges that he substantially performed his contract with the [plaintiff][defendant.] Whether the contract was substantially performed is for you to determine.

Substantial performance cannot be determined by a mathematical rule relating to the percentage of the cost of completion. In determining whether performance was substantial, you should consider the following factors:

- (a) the extent to which the other party will be deprived of the benefit which he reasonably expected;
- (b) the extent to which the other party can be adequately compensated for the benefit of which he will be deprived;
- (c) the extent to which the party asserting substantial performance will suffer forfeiture;
- (d) the likelihood that the party asserting substantial performance will cure his failure, taking into account all circumstances, including any reasonable assurance; and
- (e) the extent to which the behavior of the party asserting substantial performance comports with standards of good faith and fair dealing.

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127. 287 Ark. 304, 307, 698 S.W.2d 791, 793 (1985). Cf. *Cargill, Inc. v. Storms Agri Enters., Inc.*, 46 Ark. App. 237, 242, 878 S.W.2d 786, 789-90 (1994).

## COMMENT

The Arkansas Court of Appeals has held that the doctrine of substantial performance applies to contracts of all kinds.<sup>128</sup> The Committee prepared this instruction to comport with *Stratton and Roberts & Co. v. Sergio*.<sup>129</sup> The instruction may be used in conjunction with a complaint or a counterclaim.

**E. PERFORMANCE OR BREACH**  
**FORM E-5**  
**TENDER**

**Tender consists of a party's timely and good faith offer to perform under the contract and a present ability to immediately perform. To be effective, the tender must be made in accordance with the terms of the contract and on or before the time the performance of the party making the tender is due. In addition, the tender must be communicated to the other party. [If the parties' contract does not specify a time for performance, the tender must be made within a reasonable time.] [If the parties' contract does not specify the place of performance, the tender must be made in some convenient place subject to the disposal of the other party, and the party making the tender must notify the other party of the place of tender.]**

## COMMENT

The Committee believes the concept of a tender involves both questions of law and of fact. For example, the trial court must first determine when tender is required. Tender is not required when tender would be a vain and useless effort.<sup>130</sup> Thus, tender would not be required where the other party has prevented performance, where the other party is incapable of performing or where tender has been made impossible.<sup>131</sup>

The primary issue of fact for the jury appears to be only whether any required tender was effectively made. Therefore, the Committee has drafted the instruction to deal only with that issue.<sup>132</sup>

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128. See *Prudential Ins. Co. of America v. Stratton*, 14 Ark. App. 145, 685 S.W.2d 818 (1985).

129. 22 Ark. App. 58, 733 S.W.2d 420 (1987).

130. See, e.g., *Loveless v. Diehl*, 235 Ark. 805, 364 S.W.2d 317 (1962).

131. See 17A AM. JUR. 2D *Contracts* § 614 (1991).

132. The instruction is based upon *Telcoe Credit Union v. Eackles*, 293 Ark. 149, 151, 732 S.W.2d 477, 478 (1987); *Loveless v. Diehl*, 235 Ark. 805, 364 S.W.2d 317 (1962), and 17A AM. JUR. 2D *Contracts* § 615 (1991).



The bracketed portions of the instruction should be used when appropriate. The more complicated questions relate to the waiver of the tender requirement and the waiver of a defective tender. These special situations should be handled with other instructions.

**F. EXCUSE OF PERFORMANCE OR BREACH  
FORM F-1  
IMPOSSIBILITY OF PERFORMANCE**

**As a defense to the plaintiff's complaint, the defendant asserts that performance of the contract was impossible. In order to establish the defense of impossibility of performance, the defendant must prove each of the following elements by a preponderance of the evidence:**

**First, that the defendant diligently attempted to perform his duty under the contract; and**

**Second, that performance by the defendant became impossible as a result of [describe the event on which the defendant relies, e.g., Act of God, change of law, death of essential party].**

COMMENT

The Committee based this instruction on *Frigillana v. Frigillana*<sup>133</sup> and *Christy v. Pilkinton*.<sup>134</sup> *Christy* distinguishes between objective impossibility—the thing cannot be done—and subjective impossibility—I cannot do it.<sup>135</sup> The Committee has not made this distinction in the proposed instruction, leaving it to the trial court to discern the difference between objective and subjective impossibility and to refuse to submit this instruction if there is insufficient evidence to establish a question of fact as to whether performance was objectively impossible.

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133. 266 Ark. 296, 302-03, 584 S.W.2d 30, 33 (1979).

134. 224 Ark. 407, 273 S.W.2d 533 (1954).

135. See *id.* Judge George Rose Smith discussed the distinction as follows: "The latter which is well illustrated by a promisor's financial inability to pay, does not discharge the contractual duty . . . ." *Id.* at 533.

**F. EXCUSE OF PERFORMANCE OR BREACH**  
**FORM F-2**  
**PLAINTIFF'S BREACH**

**If the plaintiff commits a material breach of the parties' contract before the breach of the defendant, the defendant's obligation to perform is discharged. If, however, the plaintiff's breach is minor, the defendant's obligation to perform under the contract is not discharged.**

COMMENT

This instruction is based upon *Dongary Holstein Leasing, Inc. v. Covington*.<sup>136</sup> The instruction should be used when there is an issue as to whether the plaintiff committed a prior material breach which excused the defendant's performance under the contract.

**F. EXCUSE OF PERFORMANCE OR BREACH**  
**FORM F-3**  
**FIRST BREACH**

**The party who first breaches the contract cannot enforce the contract against the other party who later breaches the contract, and the other party's obligation to perform under the contract is discharged. However, a minor and insubstantial breach does not discharge the other party's obligation to perform. Whether the first breach was material or minor is for you to decide based upon the evidence presented to you.**

COMMENT

This instruction should be used when there is an issue as to whether one party's prior breach excused the performance of the other party. The Committee based this instruction on *TXO Production Corp. v. Page Farms, Inc.*<sup>137</sup> The instruction states the general rule regarding the first breach whereas the previous instruction tailors the first breach rule to a breach by the plaintiff. This instruction is offered for use when there is a complaint and counterclaim alleging breach of contract.

The Committee notes that *TXO Production Corp.* recognizes that a minor first breach may provide the other party a remedy in the form of

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136. 293 Ark. 112, 732 S.W.2d 465 (1987).

137. 287 Ark. 304, 698 S.W.2d 791 (1985).

damages for a partial breach.<sup>138</sup> If the facts of a particular case permit a claim for partial breach, the Committee refers the reader to the instruction relating to total and partial breach. See Form E-3.

**F. EXCUSE OF PERFORMANCE OR BREACH  
FORM F-4  
DEATH OR DISABLING ILLNESS**

**If a party contracts to perform a service that is purely personal, then the death or disabling illness of that party will excuse his performance.**

[If the parties' contract contains [a] separate agreement[s] that [is][are] not purely personal, and the agreement[s] pertaining to non-personal matters can be severed from the agreement relating to purely personal service, then the agreement[s] relating to non-personal matters may still be enforced.]

COMMENT

This instruction incorporates the holdings in *Mullen v. Wager*<sup>139</sup> and *Collins v. Woodruff*.<sup>140</sup> We note that the instruction does not address the situation in which a disabling illness is not permanent in nature. In that situation, and one in which the time for performance might be extended, this instruction may not be appropriate. The bracketed portion should be used when appropriate.

**F. EXCUSE OF PERFORMANCE OR BREACH  
FORM F-5  
PREVENTION OF PERFORMANCE**

**The failure of a party to perform a contract is excused when that party's performance is prevented or substantially hindered by the conduct of the other party.**

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138. See *id.* at 307, 698 S.W.2d at 793 (quoting CORBIN, CONTRACTS § 1253 (1962)).

139. 252 Ark. 541, 544-45, 480 S.W.2d 332, 334 (1972).

140. 9 Ark. 463 (1849).

## COMMENT

The Committee prepared this instruction from *Royal Manor Apartments v. Powell Construction Co.*,<sup>141</sup> *Harris v. Holder*,<sup>142</sup> and *Dickinson v. McKenzie*.<sup>143</sup>

**F. EXCUSE OF PERFORMANCE OR BREACH  
FORM F-6  
WAIVER OF BREACH OF CONTRACT**

As a defense to the plaintiff's claim of breach of contract, the defendant asserts that the plaintiff waived any breach. In order to establish the defense of waiver, the defendant must prove each of the following elements by a preponderance of the evidence:

**First, that the plaintiff had knowledge of the breach by the defendant;**

**Second, that the plaintiff continued to accept benefits under the contract; and**

**Third, that the defendant continued to perform under the contract as a result of the plaintiff's continued acceptance of benefits.**

## COMMENT

This instruction follows *Renfro v. Swift Eckrich, Inc.*,<sup>144</sup> *Grady-Gould Watershed Improvement District v. Transamerica Insurance Co.*,<sup>145</sup> and *Stephens v. West Pontiac-GMC, Inc.*<sup>146</sup> The Committee notes that the interplay between the alleged fraudulent concealment of a breach and the knowledge element of a waiver claim was treated in *Renfro v. Swift Eckrich, Inc.*<sup>147</sup> The Committee also notes that this instruction is not adequate to address any waiver other than the waiver of a breach. Other instances of waiver (e.g., an allegation that the requirement of tender was waived) may be addressed with Form C-6.

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141. 258 Ark. 166, 523 S.W.2d 909 (1975).
  142. 217 Ark. 434, 230 S.W.2d 645 (1950).
  143. 197 Ark. 746, 126 S.W.2d 95 (1939).
  144. 53 F.3d 1460 (8th Cir. 1995).
  145. 570 F.2d 720 (8th Cir. 1978).
  146. 7 Ark. App. 275, 647 S.W.2d 492 (1983).
  147. 53 F.3d 1460 (8th Cir. 1995).

**F. EXCUSE OF PERFORMANCE OR BREACH  
FORM F-7  
ESTOPPEL**

**The plaintiff may not recover damages for breach of contract by the defendant if the affirmative defense of estoppel is proved. In order to prove the defense of estoppel, the defendant must prove each of the following elements by a preponderance of the evidence:**

- (1) The plaintiff knew the material facts and circumstances surrounding the alleged breach;**
- (2) By his words, conduct or silence the plaintiff led the defendant to believe he was excusing the breach;**
- (3) The plaintiff intended that the defendant would act upon his words, conduct or silence; and**
- (4) The defendant relied upon the words, conduct or silence of the plaintiff to his detriment.**

**COMMENT**

This instruction restates the holding in *State Farm Mutual Automobile Insurance Co. v. Brown*.<sup>148</sup>

**G. DAMAGES  
FORM G-1  
DAMAGES - GENERAL RULE**

**If you find in favor of the plaintiff, you must then decide how much money, if any, would fairly compensate the plaintiff for the defendant's failure to keep his promise. In order to fairly compensate the plaintiff, your award should put the plaintiff in the same position that the plaintiff would have been in if the defendant had kept his promise. The plaintiff is not entitled to be placed in a better position than he would have been placed had the breach not occurred.**

**If you find that actual damages have been proved by the plaintiff, you shall award as such actual damages:**

[Insert the proper measure of general damages for the type of contract involved.]

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148. 48 Ark. App. 136, 144, 892 S.W.2d 519, 523 (1995).

**A defendant may not be held liable for special damages unless the plaintiff proves by a preponderance of the evidence that**

- (1) The defendant knew his breach would result in special damages to the plaintiff; and**
- (2) The defendant tacitly agreed to assume responsibility for the special damages.**

**If you find that the foregoing elements have been proved by the plaintiff, you shall award as such special damages:**

[Insert the proper measure of special damages, if appropriate.]

#### COMMENT

This instruction is based upon Arkansas case law,<sup>149</sup> Alaska and Colorado jury instructions.<sup>150</sup> The Committee's intent was to incorporate Arkansas law, including the tacit agreement rule,<sup>151</sup> into one useful format. An informative example of the various measures of general damages is found in North Carolina jury instructions.<sup>152</sup>

### G. DAMAGES FORM G-2 DAMAGES - PARTIAL PERFORMANCE

**When a contract has been partially performed but all of the important parts of the contract have not been performed, the complaining party cannot recover for the partial performance of the contract if his failure to perform the balance of the contract is not excused. However, he may recover for partial performance if the contract so provides. If a party is entitled to recover for partial performance, either because his other performance was excused or because the contract so provided, he may recover the value of the benefit of his partial performance.**

#### COMMENT

This instruction is based upon *Lynch v. Stephens*.<sup>153</sup>

149. See, e.g., HOWARD W. BRILL, ARKANSAS LAW OF DAMAGES, § 17-1 (3d ed. 1996).

150. ALASKA PATTERN CIVIL JURY INSTRUCTIONS § 24.09A (Alaska Bar Assn. 1994); COLORADO JURY INSTRUCTIONS, CIVIL § 30.35 (Bancroft-Whitney, 3d ed. 1990).

151. See *Morrow v. First Nat'l Bank*, 261 Ark. 568, 550 S.W.2d 429 (1977).

152. See NORTH CAROLINA PATTERN JURY INSTRUCTIONS FOR CIVIL CASES, § 517.10 (N.C. Conference of Super. Ct. Judges 1984).

153. 179 Ark. 118, 14 S.W.2d 257 (1929). See also 17A AM. JUR. 2D *Contracts* § 636 (1991).

**G. DAMAGES  
FORM G-3  
DAMAGES - SUBSTANTIAL PERFORMANCE**

**When a party has substantially performed a contract, he may recover the contract price less the reasonable costs of completing the contract [and the reasonable costs of remedying any defects].**

COMMENT

This instruction is based upon *Prudential Insurance Co. v. Stratton*.<sup>154</sup> The bracketed portion of the instruction seems to be more appropriate in cases involving construction contracts.

**G. DAMAGES  
FORM G-4  
DAMAGES - PERFORMANCE EXCUSED**

**When a person contracts for the performance of services by that person for a stipulated period of time and is then prevented from completing the contract in full by [specify an excuse recognized by law], then he may recover reasonable compensation for the service actually rendered.**

COMMENT

*See Lynch v. Stephens*.<sup>155</sup> Excuses recognized by law might include death, acts of God, fraud and mutual mistake.<sup>156</sup>

**G. DAMAGES  
FORM G-5  
DAMAGES - LOST PROFITS**

**In order to prove that he has suffered lost profits, the plaintiff must present evidence that provides you with a reasonable basis for determining the amount of the lost profits in money. Lost profits cannot be awarded as an element of the plaintiff's damages if the evidence**

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154. 14 Ark. App. 145, 685 S.W.2d 818 (1985).

155. 179 Ark. 118, 14 S.W.2d 257 (1929).

156. See Form F-4, comment.

**presented in support of the claim requires you to speculate as to the amount of lost profits.**

COMMENT

This instruction should be used in conjunction with Form G-1 because lost profits as an element of damages are subject to the tacit agreement rule.<sup>157</sup>

**G. DAMAGES  
FORM G-6  
LIQUIDATED DAMAGES**

**If you are required to assess damages and if you also find that the parties' contract provided for an agreed amount to be paid to the plaintiff in the event of the defendant's breach, then you must award the plaintiff as damages the amount agreed upon.**

COMMENT

In presenting this instruction, the Committee envisions that arguments concerning the unconscionability or unreasonableness of provisions relating to limitation of remedies or damages will have been addressed and resolved by the Court to the extent such an issue involves at least mixed questions of law and fact.<sup>158</sup> If a liquidated damage clause presents certain fact issues, this instruction should be modified. For example, the plaintiff may argue that a sentence should be added to this instruction as follows:

However, you are not required to award the amount of damages agreed upon if you find that [insert elements relating to failure of essential purpose or unconscionability].<sup>159</sup>

The defendant may ask for a modification which states as follows:

However, you are not required to award the amount of damages agreed upon if the amount is so disproportionate to the actual amount of damage actually sustained that it would

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157. See HOWARD W. BRILL, ARKANSAS LAW OF DAMAGES § 4-6 (3d ed. 1996) and the cases cited therein.

158. See, e.g., *CIBA-Geigy Corp. v. Alter*, 309 Ark. 426, 834 S.W.2d 136 (1992).

159. See ARK. CODE ANN. § 4-2-719 (Michie 1991); *CIBA-Geigy*, 309 Ark. at 448-49, 834 S.W.2d at 147.



constitute a penalty against the defendant. In that event, you should award the actual damages that you find by a preponderance of the evidence were sustained by the plaintiff.<sup>160</sup>

**G. DAMAGES**  
**FORM G-7**  
**PROMISSORY ESTOPPEL - RELIANCE DAMAGES**

**If you find that the plaintiff has proved an enforceable promise by the defendant by a preponderance of the evidence, you must then decide how much money, if any, to award the plaintiff as restitution damages. To calculate the plaintiff's restitution damages, you must determine the value of any [benefit that the plaintiff conferred][detriment that the plaintiff incurred] in reliance on the defendant's promise then subtract any cost, expense or loss that you find the plaintiff would have suffered had the contract been performed.**

COMMENT

This instruction was derived from Alaska and Utah jury instructions.<sup>161</sup> Although there appears to be some confusion in Arkansas law as to the measure of damages on a claim for promissory estoppel, the instruction appears to be consistent with Arkansas case law.<sup>162</sup> This instruction should be used in conjunction with Form A-12.

**G. DAMAGES**  
**FORM G-8**  
**MITIGATION OF DAMAGES**

**A party must use reasonable care, effort or expenditure in minimizing, or mitigating, his damages, and may not recover for any damage that you find he reasonably could have avoided. The burden of proof on this issue is on the party asserting that damages could have been mitigated. If you find that a party has failed to mitigate damages, you**

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160. *Cf.* *Associated Press v. Southern Ark. Radio Co.*, 34 Ark. App. 211, 809 S.W.2d 695 (1991).

161. ALASKA PATTERN CIVIL JURY INSTRUCTIONS § 24.12A; MODEL UTAH JURY INSTRUCTIONS § 26.49 (Michie 1993).

162. *See, e.g., Reynolds v. Texarkana Constr. Co.*, 237 Ark. 583, 374 S.W.2d 818 (1964); *Hoffius v. Maestri*, 31 Ark. App. 13, 786 S.W.2d 846 (1990); *Country Corner Food & Drug, Inc. v. Reiss*, 22 Ark. App. 222, 737 S.W.2d 672 (1987).

**must subtract from any damages you award the amount that could have been avoided with reasonable care, effort or expenditure.**

COMMENT

This instruction is based upon *Western Grove School District v. Strain*.<sup>163</sup> The instruction states the general rule of mitigation of damages.

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163. 288 Ark. 507, 707 S.W.2d 306 (1986).

