

CHAPTER 30

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Introductory Note

1. The instructions in this chapter have been drafted for use in contract cases generally. They have not been drafted to incorporate provisions of the Uniform Commercial Code, C.R.S., title 4, such as cases in which the plaintiff is seeking contract-like damages (as opposed to tort-like damages) for injuries or damage to persons or property allegedly caused by a breach of warranty.

2. In cases involving contracts for the sale of goods, however, several instructions in this chapter may be applicable, subject to their being appropriately modified to conform with the U.C.C. *See* § 4-1-103, C.R.S. See also instructions in Part B of Chapter 14 which may be adapted for use in cases involving claims for contract damages (as opposed to tort damages) for breach of warranty of a contract for sale of goods.

A. CONTRACT FORMATION

30:1 CONTRACT FORMATION — IN DISPUTE

A contract is an agreement between two or more persons or entities. A contract consists of an offer and an acceptance of that offer, and must be supported by consideration. If any one of these three elements is missing, there is no contract.

Notes on Use

1. See Notes on Use to Instruction 30:10.
2. The question of whether or not an alleged contract is sufficiently definite in its terms to be judicially enforceable is normally a question to be determined by the court. *See Stice v. Peterson*, 144 Colo. 219, 355 P.2d 948 (1960). For the test to be applied in cases involving contracts for the sale of goods, see section 4-2-204(3), C.R.S.
3. For the requisite manifestation of assent in contracts for the sale of goods, see section 4-1-201(3), C.R.S.
4. For the requirement of consideration, see Source and Authority to Instruction 30:7.

Source and Authority

1. This instruction is supported by **Denver Truck Exchange v. Perryman**, 134 Colo. 586, 307 P.2d 805 (1957) (For an enforceable contract to exist there must be mutual assent to an exchange between competent parties, legal consideration, and sufficient certainty with respect to the subject matter and essential terms of the agreement.). *See also Indus. Prods. Int'l, Inc. v. Emo Trans, Inc.*, 962 P.2d 983 (Colo. App. 1997).
2. “The general rule is that when parties to a contract ascribe different meanings to a material term of a contract, the parties have not manifested mutual assent, no meeting of the minds has occurred, and there is no valid contract. However, an exception to the general rule is observed when the meaning that either party gives to the document’s language was the only reasonable meaning under the circumstances. In such cases, both parties are bound to the reasonable meaning of the contract’s terms.” **Sunshine v. M. R. Mansfield Realty, Inc.**, 195 Colo. 95, 98, 575 P.2d 847, 849 (1978) (citation omitted). Moreover, when the parties to a bargain, sufficiently defined to be a contract, have not agreed to an essential term, the court may supply a term that is reasonable under the circumstances. **Costello v. Cook**, 852 P.2d 1330 (Colo. App. 1993). Also, a contract will not fail for indefiniteness if missing terms can be supplied by law, presumption, or custom. **Winston Fin. Group, Inc. v. Fults Mgmt. Inc.**, 872 P.2d 1356 (Colo. App. 1994). And, a contract is not fatally vague or indefinite simply because the parties disagree as to its meaning. **Hauser v. Rose Health Care Sys.**, 857 P.2d 524 (Colo. App. 1993); *see In re May*, 756 P.2d 362, 369 (Colo. 1988) (“The fact that the parties have different opinions about the interpretation of the contract does not of itself create an ambiguity.”). However, where a mistake is made by one party on the basic nature of a material contract provision, a resulting unconscionable contract may be avoided. **Sumerel v. Goodyear**

Tire & Rubber Co., 232 P.3d 128 (Colo. App. 2009) (where one party knew arithmetical calculation of damages was erroneous, risk of mistake did not rest with other party, and the agreement made based on that calculation was unconscionable, agreement was unenforceable (citing RESTATEMENT (SECOND) OF CONTRACTS §§ 153-54 (1981))).

3. Generally, there can be no binding contract if further negotiations are required to come to an agreement as to important and essential terms of the contract. **Sumerel**, 232 P.3d at 136-37 (discussion to resolve dispute did not include offer sufficiently definite to be capable of acceptance); **DiFrancesco v. Particle Interconnect Corp.**, 39 P.3d 1243, 1248 (Colo. App. 2001) (“Agreements to agree in the future are generally unenforceable because the court cannot force parties to come to an agreement.”).

4. Where extrinsic evidence shows that parties did not intend the contract to be a binding agreement, and where they have previously agreed that their written promises would not bind them, such contract is a mere sham and lacks any legal effect. **Landmark Towers Ass’n, Inc. v. UMB Bank, N.A.**, 2016 COA 61, ¶ 63, 436 P.3d 1126 (organizers options to purchase property to make them eligible voters were void and unenforceable sham agreements), *rev’d on other grounds*, 2017 CO 107, 408 P.3d 836.

30:2 CONTRACT FORMATION — NEED NOT BE IN WRITING

A contract does not have to be in writing. If written, it does not have to be signed by either party or dated. A contract may be partly oral and partly in writing.

Notes on Use

1. This instruction may be used where the agreement does not fall within special rules requiring a written contract, including the statute of frauds.

2. If the contract requires signatures or dating, this Instruction should not be given or should be appropriately modified.

Source and Authority

This instruction is supported by **E-21 Engineering v. Steve Stock & Associates, Inc.**, 252 P.3d 36 (Colo. App. 2010) (contracts may be formed without signatures of the parties bound by them). *See also* **Lee v. Great Empire Broad., Inc.**, 794 P.2d 1032 (Colo. App. 1989) (employment agreement); RESTATEMENT (SECOND) OF CONTRACTS § 4 (1981) (“A promise may be stated in words either oral or written, or may be inferred wholly or partly from conduct.”).

30:3 CONTRACT FORMATION — OFFER

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

Notes on Use

1. When given, this instruction must be given in conjunction with Instruction 30:6 (acceptance).
2. For possible modifications required in cases involving the sale of goods, see sections 4-2-204 to 2-206, C.R.S. *See, e.g., Scoular Co. v. Denney*, 151 P.3d 615 (Colo. App. 2006) (interpreting section 4-2-205, C.R.S.).

Source and Authority

1. This instruction is supported by **Nash v. School Board No. 3**, 49 Colo. 555, 113 P. 1003 (1911) (by implication); and **Robert E. Lee Silver Mining Co. v. Omaha & Grant Smelting & Refining Co.**, 16 Colo. 118, 26 P. 326 (1891) (same). *See also Industrial Prods. Int'l, Inc. v. Emo Trans, Inc.*, 962 P.2d 983 (Colo. App. 1997) (offer is manifestation by one party of willingness to enter into bargain).
2. In the absence of an express or implied limitation, an offer must be accepted within a reasonable time, and a reasonable time “is that which is reasonable to the offeror rather than to the offeree.” **Central Inv. Corp. v. Container Advert. Co.**, 28 Colo. App. 184, 187, 471 P.2d 647, 648 (1970).
3. To be effective an offer must be communicated. **Kuta v. Joint Dist. No. 50(J)**, 799 P.2d 379 (Colo. 1990).
4. Generally, the delivery of an insurance application by an insurer to a prospective customer does not constitute an offer of insurance; instead it is an invitation for an offer of insurance. **Griffin v. State Farm Fire & Cas. Co.**, 104 P.3d 283 (Colo. App. 2004).
5. There is no offer capable of acceptance where the circumstances show the parties intended to negotiate further on some provisions. **Sumerel v. Goodyear Tire & Rubber Co.**, 232 P.3d 128 (Colo. App. 2009).

30:4 CONTRACT FORMATION — REVOCATION OF OFFER

(Plaintiff) (Defendant) claims the offer was revoked before it was accepted.

To revoke an offer is to withdraw it. Unless otherwise specified by the terms of the offer, an offer may be revoked before it is accepted. To be effective, a revocation must be communicated before the offer is accepted.

Notes on Use

None.

Source and Authority

1. This instruction is supported by **Stortroen v. Beneficial Finance Co.**, 736 P.2d 391 (Colo. 1987); **Carlsen v. Hay**, 69 Colo. 485, 195 P. 103 (1921); **East-Larimer County Water District v. Centric Corp.**, 693 P.2d 1019 (Colo. App. 1984); **Sigrist v. Century 21 Corp.**, 519 P.2d 362 (Colo. App. 1973) (not published pursuant to C.A.R. 35(f)); **Smith v. Russell**, 20 Colo. App. 554, 80 P. 474 (1905); and 1 RICHARD A. LORD, WILLISTON ON CONTRACTS § 5:9 (4th ed. 1999).

2. Unless otherwise specified by its terms, an offer may be accepted within a reasonable time unless the offer has been revoked by the offeror or rejected by the offeree. **Minneapolis & St. Louis Ry. v. Columbus Rolling-Mill Co.**, 119 U.S. 149 (1886); *see also* **Townsend v. Daniel, Mann, Johnson & Mendenhall**, 196 F.3d 1140, 1145 (10th Cir. 1999) (“Once the offer was rejected, it must be renewed again in its entirety before it can be accepted.”); **Scoular Co. v. Denney**, 151 P.3d 615 (Colo. App. 2006); **Sigrist**, 519 P.2d at 363 (“Offers to enter into either bilateral or unilateral contracts may not be revoked after acceptance.”); **Central Inv. Corp. v. Container Adver. Co.**, 28 Colo. App. 184, 187, 471 P.2d 647, 648 (1970) (“The test for an offer’s duration in the absence of an express or implied limitation is a ‘reasonable time.’”).

30:5 CONTRACT FORMATION — COUNTEROFFER

If the person to whom an offer is made changes the offer in any way, that is a counteroffer. Unless that counteroffer is accepted, no contract is made.

Notes on Use

1. Changes or additions to an offer may be a counteroffer that may be accepted to form a contract. This instruction may be appropriately modified for cases involving issues of acceptance of counteroffers.

2. Cases involving offers and counteroffers in real estate transactions and with real estate agents may require more detailed factual findings and this instruction may need to be appropriately modified. *See* **Stortroen v. Beneficial Fin. Co.**, 736 P.2d 391 (Colo. 1987).

Source and Authority

1. This instruction is supported by **Baldwin v. Peters, Writer & Christensen**, 141 Colo. 529, 349 P.2d 146 (1960); **Van Hall v. Gehrke**, 117 Colo. 223, 185 P.2d 1016 (1947); and **Yorty v. Mortgage Finance, Inc.**, 29 Colo. App. 398, 485 P.2d 915 (1971).

2. Contract principles of offer, acceptance, and counteroffer do not control offers of settlement and counteroffers under section 13-17-202, C.R.S. **Centric-Jones Co. v. Hufnagel**, 848 P.2d 942 (Colo. 1993).

30:6 CONTRACT FORMATION — ACCEPTANCE

A contract is formed when the offer is accepted without (changes) (additions). An acceptance is an expression, by words or conduct, by the person to whom the offer was made, of agreement to the same terms stated in the offer.

Notes on Use

1. Omit any parenthesized clause that is not applicable to the evidence in the case.
2. When Instruction 30:3 (offer) is given, this instruction must also be given.
3. For modifications required in cases involving the sale of goods, see sections 4-2-206 and 4-2-207, C.R.S. *See, e.g., Scoular Co. v. Denney*, 151 P.3d 615 (Colo. App. 2006) (interpreting statute).

Source and Authority

This instruction is supported by **Nucla Sanitation District v. Rippy**, 140 Colo. 444, 449, 344 P.2d 976, 979 (1959) (“the acceptance must be in the identical terms of the offer, without any modification whatever”). *See also Baldwin v. Peters, Writer & Christensen*, 141 Colo. 529, 349 P.2d 146 (1960); **Superior Distrib. Corp. v. Points**, 141 Colo. 113, 347 P.2d 140 (1959); **Van Hall v. Gehrke**, 117 Colo. 223, 185 P.2d 1016 (1947); **Salomon v. Webster**, 4 Colo. 353 (1878); **Yorty v. Mortgage Fin., Inc.**, 29 Colo. App. 398, 485 P.2d 915 (1971).

30:7 CONTRACT FORMATION — CONSIDERATION

“Consideration” is a benefit received or something given up as agreed upon between the parties. (If you find [insert the claimed consideration], then you must find that there was consideration.)

Notes on Use

This instruction should be used when Instruction 30:1 (in dispute) is given.

Source and Authority

1. This instruction is supported by **Troutman v. Webster**, 82 Colo. 93, 96, 257 P. 262, 263-64 (1927) (“[I]t is a consideration if the promisee, in return for a promise, does anything legal which he is not bound to do, or refrains from doing anything which he has a right to do, even though there is no actual loss or detriment to him or actual benefit to the promisor.”). The court also quoted 1 WILLISTON, CONTRACTS § 102a (1924), to the effect that “[d]etriment . . . means legal detriment as distinguished from detriment in fact.” **Troutman**, 82 Colo. at 96, 257 P. at 264; *see also* **Ireland v. Jacobs**, 114 Colo. 168, 163 P.2d 203 (1945) (An agreement not supported by consideration is invalid and void.); **Cooper v. Cooper**, 112 Colo. 140, 146 P.2d 986 (1944) (recognizing the legal detriment rule).

2. This instruction was cited with approval in **Compass Bank v. Kone**, 134 P.3d 500 (Colo. App. 2006).

3. While the Colorado courts’ definition of consideration has varied somewhat, in the majority of cases the “benefit-detriment” test has been used to determine if consideration existed. *See, e.g.*, **Gertner v. Limon Nat’l Bank**, 82 Colo. 13, 257 P. 247 (1927); **Luby v. Jefferson County Bank**, 28 Colo. App. 441, 476 P.2d 292 (1970); **Fearnley v. De Mainville**, 5 Colo. App. 441, 39 P. 73 (1895).

4. Another general definition of consideration appears in **Grimes v. Barndollar**, 58 Colo. 421, 148 P. 256 (1914), in which the court stated that any damage, suspension of a right, or possibility of loss to the one to whom the promise is made is a sufficient consideration to support the promise.

5. Generally, a court will not look at the adequacy of the consideration, **Meyer v. Nelson**, 69 Colo. 56, 168 P. 1175 (1917), and, as a general rule, a statement of consideration is conclusive proof of that fact unless evidence to the contrary is introduced. **Burch v. Burch**, 145 Colo. 125, 358 P.2d 1011 (1960).

6. In several cases, courts have identified specific facts that may constitute sufficient consideration. For example, a seal in itself no longer imparts a valuable consideration. **Winter v. Goebner**, 2 Colo. App. 259, 30 P. 51 (1892), *aff’d*, 21 Colo. 279, 40 P. 570 (1895). Surrender of payment of a doubtful or a disputed claim is good consideration. **Harvey v. Denver & Rio Grande R.R.**, 44 Colo. 258, 99 P. 31 (1908); **Russell v. Daniels**, 5 Colo. App. 224, 37 P. 726 (1894). A promise for a promise is valid consideration, **Denver Indus. Corp. v. Kesselring**, 90

Colo. 295, 8 P.2d 767 (1932), as is the forbearance of a right, **Leonard v. Hallett**, 57 Colo. 274, 141 P. 481 (1914). A preexisting liability is good consideration for a new promise, as is a benefit to a third party. **W. T. Rawleigh Co. v. Dickneite**, 99 Colo. 276, 61 P.2d 1028 (1936). Where an employment contract is terminable at the will of the employee, the employer's promise to pay additional compensation is supported by consideration. **Olsen v. Bondurant & Co.**, 759 P.2d 861 (Colo. App. 1988) (promise to another promisee, supported by consideration, to pay employees additional compensation as third-party beneficiaries, also provides consideration for that promise). Continued employment, without more, is not consideration for a later noncompete agreement. The continuation of an at-will employment arrangement by the employer is sufficient consideration for a noncompetition agreement presented to the employee after his or her initial hire. **Lucht's Concrete Pumping, Inc. v. Horner**, 255 P.3d 1058 (Colo. 2011). And consideration is not insufficient merely because it comes from a third party. **Int'l Paper Co. v. Cohen**, 126 P.3d 222 (Colo. App. 2005).

7. At least one case has held that natural affection being the reason to agree to pay a loved one is sufficient consideration. **Dawley v. Dawley's Estate**, 60 Colo. 73, 152 P. 1171 (1915). *But see* **Rasmussen v. State Nat'l Bank**, 11 Colo. 301, 18 P. 28 (1888) (moral obligation alone is not sufficient consideration).

8. In general, past consideration is not always sufficient. *Compare* **Plains Iron Works Co. v. Haggott**, 68 Colo. 121, 188 P. 735 (1920) (agreement was *nudum pactum* because the consideration was past), *with* **Sargent v. Crandall**, 143 Colo. 199, 352 P.2d 676 (1960) (past consideration may be sufficient consideration if the prior conduct that constitutes the past consideration was rendered at the promisor's request).

9. If one party to an executory contract has no legally enforceable obligations or an unlimited right to determine the nature and extent of those obligations, the contract lacks mutuality of consideration and may, therefore, be unenforceable. *See* **Hauser v. Rose Health Care Sys.**, 857 P.2d 524 (Colo. App. 1993) (recognizing the rule, but concluding that where contract had been performed by one party and the claim was for compensation due for performance, lack of mutuality was immaterial). However, every contractual obligation need not be mutual as long as each party to the contract has provided consideration. **Rains v. Found. Health Sys. Life & Health**, 23 P.3d 1249 (Colo. App. 2001) (arbitration provision not unenforceable simply because it did not require both parties to contract to arbitrate).

10. For certain offers, involving the sale of goods, that may be irrevocable though not supported by consideration, see section 4-2-205, C.R.S.

11. When the basis for claiming the enforceability of a promise is the doctrine of promissory estoppel, see **Cherokee Metropolitan District v. Simpson**, 148 P.3d 142 (Colo. 2006); **Nelson v. Elway**, 908 P.2d 102 (Colo. 1995); **Kiely v. St. Germain**, 670 P.2d 764 (Colo. 1983) (enforceability under the doctrine of a promise not made in compliance with the statute of frauds); **Vigoda v. Denver Urban Renewal Authority**, 646 P.2d 900 (Colo. 1982); **G & A Land, LLC v. City of Brighton**, 233 P.3d 701 (Colo. App. 2010) (city's actions related to possible future condemnation of landowner's property did not constitute a promise for purposes of promissory estoppel); **Marquardt v. Perry**, 200 P.3d 1126 (Colo. App. 2008) (defense verdict on contract claim does not preclude judgment for liability on related promissory estoppel).

claim); **Lutfi v. Brighton Community Hospital Ass'n**, 40 P.3d 51 (Colo. App. 2001); **Floyd v. Coors Brewing Co.**, 952 P.2d 797 (Colo. App. 1997), *rev'd on other grounds*, 978 P.2d 663 (Colo. 1999); **Zick v. Krob**, 872 P.2d 1290 (Colo. App. 1993); **Chidester v. Eastern Gas & Fuel Associates**, 859 P.2d 222 (Colo. App. 1992); **Mead Associates, Inc. v. Scottsbluff Sash & Door Co.**, 856 P.2d 40 (Colo. App. 1993); **L & M Enterprises, Inc. v. City of Golden**, 852 P.2d 1337 (Colo. App. 1993); **Frontier Exploration, Inc. v. American National Fire Insurance Co.**, 849 P.2d 887 (Colo. App. 1992); **Nicol v. Nelson**, 776 P.2d 1144 (Colo. App. 1989) (claim based on promissory estoppel need only be proved by a preponderance of the evidence, in accord with section 13-25-127(1), C.R.S., not by clear and convincing evidence); and **State Department of Highways v. Woolley**, 696 P.2d 828 (Colo. App. 1984) (applying the doctrine to estop landowner from revoking a right of entry). *See also* **Univex Int'l, Inc. v. Orix Credit All., Inc.**, 914 P.2d 1355 (Colo. 1996) (section 38-10-124(3), C.R.S., precludes assertion of promissory estoppel claim to enforce unsigned credit agreement); **Vu, Inc. v. Pacific Ocean Marketplace, Inc.**, 36 P.3d 165 (Colo. App. 2001) (promissory estoppel claim failed where contract was clear, unambiguous and enforceable as written); **Pickell v. Arizona Components Co.**, 902 P.2d 392 (Colo. App. 1994) (promissory estoppel is not available if there is an enforceable contract between the parties), *rev'd on other grounds*, 931 P.2d 1184 (Colo. 1997); **Cronk v. Intermountain Rural Elec. Ass'n**, 765 P.2d 619 (Colo. App. 1988); **Galie v. RAM Assocs. Mgmt. Servs., Inc.**, 757 P.2d 176 (Colo. App. 1988); **Mead Assocs., Inc. v. Antonsen**, 677 P.2d 434 (Colo. App. 1984); **Haselden-Langley Constructors, Inc. v. D.E. Farr & Assocs., Inc.**, 676 P.2d 709 (Colo. App. 1983).

12. Promissory estoppel may be asserted against a public entity. **Dep't of Transp. v. First Place, LLC**, 148 P.3d 261 (Colo. App. 2006). A claim based on promissory estoppel lies in contract rather than tort and, therefore, is not barred by the Governmental Immunity Act. **Bd. of Cty. Comm'rs v. DeLozier**, 917 P.2d 714 (Colo. 1996). However, the doctrine of estoppel is not applied as freely against a municipal corporation as it is against an individual. **Cherry Creek Aviation, Inc. v. City of Steamboat Springs**, 958 P.2d 515 (Colo. App. 1998).

30:8 CONTRACT FORMATION — MODIFICATION

After parties enter into a contract, they may agree (orally) (or) (in writing) to change it. There must be an offer to change the contract, acceptance of that offer, and consideration for the change.

Notes on Use

1. Use whichever parenthesized words are appropriate to the evidence in the case.
2. Other instructions closely related to the subject matter of this instruction that may also be applicable or be more appropriate in certain cases are Instructions 30:25 (waiver), 30:27 (rescission or cancellation by agreement), and 30:28 (accord and satisfaction).
3. This instruction should be modified when appropriate to the evidence in the case to instruct that a written contract may be modified by later oral agreement even if the contract expressly provides that all modifications must be in writing.
4. For cases involving the sale of goods, see section 4-2-209, C.R.S.

Source and Authority

1. This instruction is supported by **Dawe v. Hoskins**, 77 Colo. 501, 238 P. 50 (1925) (necessity of all parties to assent); and **Arkansas Valley Bank v. Esser**, 75 Colo. 110, 224 P. 227 (1924) (parties to a written contract may orally alter it at will). *See also* **H. & W. Paving Co. v. Asphalt Paving Co.**, 147 Colo. 506, 364 P.2d 185 (1961) (amendment must be supported by mutual consideration); **W. Air Lines v. Hollenbeck**, 124 Colo. 130, 235 P.2d 792 (1951) (mutual assent required for an effective amendment or abrogation of an existing contract); 2 JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 7.14 (rev. ed. 1995).

2. “Despite a provision requiring that all modifications of a written contract . . . be in writing, [a] contract may be modified by oral agreement between the parties.” **Colorado Inv. Servs., Inc. v. Hager**, 685 P.2d 1371, 1376-77 (Colo. App. 1984); *see* **Agritrack, Inc. v. DeJohn Housemoving, Inc.**, 25 P.3d 1187 (Colo. 2001) (written contract may be modified by later oral agreement even if contract specifically provides that all modifications of contract must be in writing); **James H. Moore & Assocs. Realty, Inc. v. Arrowhead at Vail**, 892 P.2d 367 (Colo. App. 1994) (same). Further, a written contract may be modified by a later oral agreement even if the contract is subject to the statute of frauds, as long as the oral modification does not relate to a material condition of the contract. **Burnford v. Blanning**, 189 Colo. 292, 540 P.2d 337 (1975); **James H. Moore**, 892 P.2d at 372.

30:9 CONTRACT FORMATION — THIRD-PARTY BENEFICIARY

(Plaintiff) (Defendant) may enforce a contract if (he) (she) (it) is a beneficiary of the contract between (name) and (name), even if (plaintiff) (defendant) was not named in the contract. (Plaintiff) (Defendant) is a beneficiary of the contract when the parties to the contract intend that the (plaintiff) (defendant) directly benefit from the contract.

Notes on Use

None.

Source and Authority

1. This instruction is supported by **Jefferson County School Dist. No. R-1 v. Shorey**, 826 P.2d 830 (Colo. 1992); **Chandler-McPhail v. Duffey**, 194 P.3d 434 (Colo. App. 2008); **Everett v. Dickinson & Co.**, 929 P.2d 10 (Colo. App. 1996).

2. A person not a party to an express contract may bring an action on the contract if the parties to the agreement intended to benefit the nonparty, provided that the benefit claimed is a direct and not merely an incidental benefit of the contract. While the intent to benefit the nonparty need not be expressly recited in the contract, the intent must be apparent from the terms of the agreement, the surrounding circumstances, or both. **Parrish Chiropractic Ctrs., P.C. v. Progressive Cas. Ins. Co.**, 874 P.2d 1049 (Colo. 1994) (holding that clinic was incidental, not third party, beneficiary of the contract). It is not necessary that the third party be specifically referred to in the agreement. It is sufficient if the claimant is a member of the limited class that was intended to benefit from the contract. **Smith v. TCI Commc'ns, Inc.**, 981 P.2d 690 (Colo. App. 1999).

3. The party who actually performed the subcontract was a third-party beneficiary of the contract between the general contractor and the subcontractor and was entitled to bring an action for damages for lost profits sustained as a result of contractor's breach of such contract. **E.B. Roberts Constr. Co. v. Concrete Contractors, Inc.**, 704 P.2d 859 (Colo. 1985).

4. As to when a third-party beneficiary may be entitled to recover for breach of contract, see **Cody Park Property Owners' Ass'n v. Harder**, 251 P.3d 1 (Colo. App. 2009) (subdivision homeowners association was not third-party beneficiary of agreement for easement); **Chandler-McPhail v. Duffey**, 194 P.3d 434 (Colo. App. 2008) (defendant doctor was a third-party beneficiary of contracts between health care plan insurer, patient's employer, and physician group, and was bound by contract provision barring recovery of costs in litigation); **East Meadows Co. v. Greeley Irrigation Co.**, 66 P.3d 214 (Colo. App. 2003); **Harwig v. Downey**, 56 P.3d 1220 (Colo. App. 2002) (tenants not third-party beneficiaries of contract for sale of real property); **Smith**, 981 P.2d at 693-94 (provider of cable television channel was not third-party beneficiary of franchise agreement between city and cable television operator); **Frisone v. Deane Automotive Center, Inc.**, 942 P.2d 1215 (Colo. App. 1996) (buyer of used car was not third-party beneficiary of repair contract between previous owner of car and automotive service center); **Everett**, 929 P.2d at 12 (introducing broker was not third-party beneficiary of clearing

broker agreements); **State Farm Fire & Casualty Co. v. Nikitow**, 924 P.2d 1084 (Colo. App. 1995); **Bain v. Pioneer Plaza Shopping Center. Ltd. Liability Co.**, 894 P.2d 47 (Colo. App. 1995); **Villa Sierra Condominium Ass’n v. Field Corp.**, 878 P.2d 161 (Colo. App. 1994); and **Quigley v. Jobe**, 851 P.2d 236 (Colo. App. 1992) (plaintiff only an incidental beneficiary). If a contract is annulled, rescinded, or canceled by the parties to the contract before it is accepted by a third-party beneficiary, the contract may not be enforced by the third-party beneficiary. **Jardel Enters., Inc. v. Triconsultants, Inc.**, 770 P.2d 1301 (Colo. App. 1988); **Galie v. RAM Assocs. Mgmt. Servs., Inc.**, 757 P.2d 176 (Colo. App. 1988) (third-party beneficiary need not be in privity).

5. The strict privity rule bars third-party beneficiary actions against attorneys absent allegations of fraud, malicious conduct, or negligent misrepresentation. **Bewley v. Semler**, 2018 CO 79, ¶ 27, 432 P.3d 582, 589 (“The strict privity rule, as we defined it in **Baker**, is not as restricted as Semler contends; it ‘precludes attorney liability to non-clients absent fraud, malicious conduct, or negligent misrepresentation.’” (quoting **Baker v. Wood, Ris & Hames, P.C.**, 2016 CO 5, ¶ 1, 364 P.3d 872, 874)).

B. CONTRACT PERFORMANCE

30:10 CONTRACT PERFORMANCE — BREACH OF CONTRACT — ELEMENTS OF LIABILITY

For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) (its) claim of breach of contract, you must find (all) (both) of the following have been proved by a preponderance of the evidence:

1. The defendant entered into a contract with the plaintiff to (*insert the alleged promise on which plaintiff is suing*); and

2. The defendant failed to (*insert the alleged promise on which the plaintiff is suing*); (and)

(3. The plaintiff [“substantially performed”] [“substantially complied with”] [his] [her] [its] part of the contract) (or) (Plaintiff is excused from performance. Plaintiff is excused from performance of [his] [her] [its] part of the contract if you find that [*insert facts that, if proven, would as a matter of law justify nonperformance*]).

If you find that (either) (any one or more) of these (*number*) statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these (*number*) statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant’s affirmative defense(s) of [*insert any affirmative defense that would be a complete defense to plaintiff’s claim*]).

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

Notes on Use

1. When the existence of the contract is in issue, Instruction 30:1 and contract formation Instructions 30:2–30:9 should be considered. If the existence of the contract is not disputed, the jury may be advised that the parties do not dispute that a contract was formed, but dispute that there was a breach or the amount of damages caused by any breach, or both. *See* Chapter 2 (statement of the case to be determined).

2. This instruction should be modified as appropriate to reflect the positions of plaintiff, counter-plaintiff, defendant and counter-defendant in the case.

3. Paragraph 3 of this instruction should be used only if the plaintiff's performance or substantial performance of the contract is a condition precedent to plaintiff's right to recover under the contract.

4. This instruction may be appropriately modified in cases involving particular kinds of contracts, e.g., a suit on a promissory note, to set forth in terms more relevant to the case the facts that are in dispute and that the plaintiff must prove in order to recover. For cases involving performance of construction contracts, see Instruction 30:49 and the Notes on Use and Source and Authority to that Instruction. See Part F of this chapter for other contracts. For instructions dealing with breach of employment contract claims, see Chapter 31.

5. Depending on the facts in dispute, e.g., third party beneficiary, other paragraphs should be included which will properly present the factual issues in dispute to the jury.

6. If the defendant has put no affirmative defense in issue or there is insufficient evidence to support a defense, the last two paragraphs should be omitted.

7. Although mitigation of damages is an affirmative defense (see Instruction 5:2), only rarely, if ever, will it be a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the damages instruction appropriate to the claim and the evidence in the case.

8. For other affirmative defenses, see Instructions in Part C of this chapter.

9. In cases involving issues of the duty of good faith and fair dealing implied in every contract, see Instruction 30:16 (non-insurance contract) and Chapter 25, Bad Faith Breach of Insurance Contract.

Source and Authority

1. This instruction is supported by **Hunt v. Cates**, 61 Colo. 365, 157 P. 1162 (1916); **McDonald v. Zions First Nat'l Bank, N.A.**, 2015 COA 29, ¶ 48, 348 P.3d 957; and **Long v. Cordain**, 2014 COA 177, ¶ 19, 343 P.3d 1061 (stating elements needed to prove a contract claim). *See also* **Coors v. Sec. Life of Denver Ins. Co.**, 91 P.3d 393 (Colo. App. 2003) (to prevail on claim for breach of contract, party must show existence of contract and failure to perform some term of contract by other party), *aff'd in part, rev'd in part on other grounds*, 112 P.3d 59 (Colo. 2005); *cf.* **Smith v. Mills**, 123 Colo. 11, 225 P.2d 483 (1950) (a complaint is sufficient if it alleges the existence of a contract and the nonperformance of the promise made).

2. Principles of conditions precedent are set forth in 8 CATHERINE A. MCCAULIFF, CORBIN ON CONTRACTS § 30.7 (Joseph M. Perillo ed., rev. ed. 1999), considering the occurrence or nonoccurrence of any condition precedent (under certain circumstances). Conditions precedent must be specifically pleaded. C.R.C.P. 9(c). For authority considering conditions precedent, see **Western Distributing Co. v. Diodosio**, 841 P.2d 1053 (Colo. 1992) (defendant had received substantially all the benefit expected from the contract and therefore plaintiffs had substantially performed their obligations and could assert breach of contract claim against

defendant, even though not every obligation was performed); and **D.R. Horton, Inc.-Denver v. Bischof & Coffman Construction, LLC**, 217 P.3d 1262 (Colo. App. 2009) (trial court erred in instructing jury that general contractor could not recover damages for breach of contract from subcontractors if they found subcontractors had substantially performed). *See also Daybreak Constr. Specialties, Inc. v. Saghatoleslami*, 712 P.2d 1028, 1031 (Colo. App. 1985) (“When the obligations of a contract for sale and purchase of land are mutual and concurrent [i.e., the performance of each is a condition precedent to the obligation to perform the other], so long as one party makes no tender of deed and the other no offer of payment, neither is in default.”). Whether a breach of contract is material and therefore excuses the other party from performance is generally a question of fact. **Blood v. Qwest Servs. Corp.**, 224 P.3d 301 (Colo. App. 2009) (whether third-party plaintiff had materially breached or not substantially performed its contract with third-party defendant a question for jury), *aff’d on other grounds*, 252 P.3d 1071 (2011); **Morris v. Belfor USA Group, Inc.**, 201 P.3d 1253 (Colo. App. 2008); **Kaiser v. Market Square Discount Liquors, Inc.**, 992 P.2d 636 (Colo. App. 1999) (material breach by a party deprives that party of the right to demand performance by the other party).

3. “[W]hen the existence of a contract is in issue, and the evidence is conflicting or admits of more than one inference, it is for the jury to decide whether a contract in fact exists.” **I.M.A., Inc. v. Rocky Mountain Airways, Inc.**, 713 P.2d 882, 887 (Colo. 1986); *see also Broomfield Senior Living Owner LLC v. R.G. Brinkman Co.*, 2017 COA 31, ¶ 35, 413 P.3d 219 (whether builder was given reasonable opportunity to correct defects, and whether defects were patent or latent were disputed issues of fact for the jury); **Command Commc’ns, Inc. v. Fritz Cos.**, 36 P.3d 182 (Colo. App. 2001) (existence of contract a question of fact for jury to determine); **Fair v. Red Lion Inn**, 920 P.2d 820 (Colo. App. 1995), *aff’d on other grounds*, 943 P.2d 431 (Colo. 1997); **Tuttle v. ANR Freight Sys., Inc.**, 797 P.2d 825 (Colo. App. 1990); **Stroh v. Am. Recreation & Mobile Home Corp.**, 35 Colo. App. 196, 201, 530 P.2d 989, 993 (1975) (“the question of the existence of a warranty and whether that warranty was breached is ordinarily one for the trier of fact”).

4. Because a plaintiff is entitled to recover at least nominal damages if the plaintiff proves the existence of a contract and its breach and there is no defense, proof of general damages has not been included as one of the elements of the plaintiff’s proof of liability. **Interbank Invs., LLC v. Eagle River Water & Sanitation Dist.**, 77 P.3d 814, 818 (Colo. App. 2003) (“Proof of actual damages is not an essential element of a breach of contract claim.”); *see* Instruction 30:38 (General Damages – Measure). *But see Diodosio*, 841 P.2d at 1058; **City of Westminster v. Centric-Jones Constructors**, 100 P.3d 472 (Colo. App. 2003) (damages is element of breach of contract claim); **Montemayor v. Jacor Commc’ns, Inc.**, 64 P.3d 916 (Colo. App. 2002) (damages an element of plaintiff’s claim for breach of contract).

5. Claims for breach of contract may be made against state and municipal governmental entities. The Colorado Governmental Immunity Act (CGIA) applies to tort action but does not apply to contract actions. § 24-10-106(1), C.R.S. (“A public entity shall be immune from liability in all claims for injury which lie in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by the claimant”); **CAMAS Colorado, Inc. v. Bd. of Cty. Comm’rs**, 36 P.3d 135 (Colo. App. 2001) (public entities are not immune under CGIA for damages arising in contract). The issue under the CGIA is not whether a contract claim was properly pleaded but, instead, whether the claim could have been brought as a tort. **City of**

Arvada v. Denver Health & Hosp. Auth., 2017 CO 97, ¶ 42, 403 P.3d 609, 617 (equitable claim for recovery of medical expenses “resembles one sounding in contract and cannot lie in tort”); **Falcon Broadband, Inc. v. Banning Lewis Ranch Metro. Dist. No. 1**, 2018 COA 92, ¶ 17 (“enforcement of contractual promises through the quasi-contractual theory of promissory estoppel and the restitution theory of unjust enrichment . . . sound firmly in contract” and are not barred by the CGIA); **Foster v. Bd. of Governors**, 2014 COA 18, ¶ 15, 342 P.3d 497 (it is only when a claim cannot lie in tort that there is no immunity); **Casey v. Colo. Higher Ed. Ins. Benefits All. Trust**, 2012 COA 134, ¶ 30, 310 P.3d 196 (same).

6. This elemental instruction and notes were cited with approval in **Dorsey & Whitney LLP v. RegScan, Inc.**, 2018 COA 21, ¶ 47 (finding no error in trial court’s refusal to instruct jury in the legal fee dispute that it must find that “the contract was fair and reasonable under the circumstances”).

30:11 CONTRACT PERFORMANCE — BREACH OF CONTRACT DEFINED

A breach of contract is the failure to perform a contractual promise when performance is due.

(A material breach occurs when a party fails to (substantially perform) (or) (substantially comply with) the essential terms of a contract.)

(A breach is not material if the other party received substantially what (he) (she) (it) contracted for. In determining whether a breach is material, you may consider the nature of the promised performance, the purpose of the contract, and whether any defects in performance have defeated the purpose of the contract.)

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

Notes on Use

1. This instruction, which defines the phrase “breach of contract,” should be given whenever Instruction 30:10 is given. Use the parenthetical paragraphs when issues of material breach are present in the case.

2. Other instructions may be needed to further refine the “breach of contract” term, and should be given as needed according to the facts of the case, e.g., Instruction 30:12 (substantial performance), Instruction 30:13 (anticipatory breach), Instruction 30:15 (conditions precedent).

Source and Authority

1. This instruction is supported by **Hunt v. Cates**, 61 Colo. 365, 157 P. 1162 (1916); and **Western Distributing Co. v. Diodosio**, 841 P.2d 1053 (Colo. 1992). *Cf.* **Smith v. Mills**, 123 Colo. 11, 225 P.2d 483 (1950) (a complaint is sufficient if it alleges the existence of a contract and the nonperformance of the promise made).

2. For discussion of material breach, see **Stan Clauson Associates Inc. v. Coleman Brothers Construction, LLC**, 2013 COA 7, ¶ 9, 297 P.3d 1042 (“A party has substantially performed when the other party has substantially received the expected benefit from the contract” and “[d]eviation from contract duties in trifling particulars . . . does not constitute a material breach”); and **Coors v. Security Life of Denver Ins. Co.**, 91 P.3d 393 (Colo. App. 2003) (to prevail on claim for breach of contract, party must show existence of contract and failure to perform some term of contract by other party), *aff’d in part, rev’d in part on other grounds*, 112 P.3d 59 (Colo. 2005).

30:12 CONTRACT PERFORMANCE — SUBSTANTIAL PERFORMANCE

A party (substantially performs) (or) (substantially complies with) the terms of a contract when the party performs the essential obligations under the contract, and the other party receives substantially what (he) (she) (it) contracted for.

To determine whether the party has (substantially performed) (or) (substantially complied with) the essential obligations under the contract, you may consider the nature of the promised performance, the purpose of the contract, and whether any defects in performance have defeated the purpose of the contract.

Notes on Use

If the defendant, pursuant to C.R.C.P. 9(c), has pleaded the lack of complete performance as the nonperformance of a condition precedent, then the plaintiff must prove either complete or substantial performance. See Note 2 of the Notes on Use to Instruction 30:10. See also Note 2 of the Notes on Use to Instruction 30:46 (substantial performance by builder).

Source and Authority

1. This instruction is supported by **Reynolds v. Armstead**, 166 Colo. 372, 443 P.2d 990 (1968); and **Newcomb v. Schaeffler**, 131 Colo. 56, 279 P.2d 409 (1955). *See also* **W. Distrib. Co. v. Diodosio**, 841 P.2d 1053 (Colo. 1992); **Rohauer v. Little**, 736 P.2d 403 (Colo. 1987); **I.M.A., Inc. v. Rocky Mtn. Airways, Inc.**, 713 P.2d 882 (Colo. 1986); **McDonald v. Zions First Nat'l Bank, N.A.**, 2015 COA 29, ¶ 50, 348 P.3d 957 (“A party has substantially performed when the other party has substantially received the expected benefit of the contract.” (quoting **Stan Clauson Assocs. Inc. v. Coleman Bros. Constr., LLC**, 2013 COA 7, ¶ 9, 297 P.3d 1042)); **R.F. Carle Co. v. Biological Sciences Curriculum Study Co.**, 616 P.2d 989 (Colo. App. 1980). Where there has been a “material” breach of contract, substantial performance has not been rendered. **Interbank Invs. LLC v. Vail Valley Consol. Water Dist.**, 12 P.3d 1224 (Colo. App. 2000) (breach that is material goes to essence of contract and renders substantial performance of contract impossible). To determine whether a breach is material, “the trier of fact should consider: (1) the extent to which an injured party, absent the breach, would obtain a substantial benefit from the contract, and (2) the adequacy of compensation in damages.” **Nat'l Propane Corp. v. Miller**, 18 P.3d 782 (Colo. App. 2000); *accord* **Coors v. Sec. Life of Denver Ins. Co.**, 91 P.3d 393 (Colo. App. 2003), *aff'd in part, rev'd in part on other grounds*, 112 P.3d 59 (Colo. 2005).

2. Generally, performance or substantial performance by the plaintiff is a condition precedent to the right to recover on the contract. *See, e.g.*, **Diodosio**, 841 P.2d at 1058; **Newcomb**, 131 Colo. at 62-63, 270 P.2d at 412 (builder's failure to substantially perform excused owners' obligation to pay remaining balance on the contract); **Whiting-Turner Contracting Co. v. Guar. Co. of N. Am.**, 2019 COA 44, ¶¶ 27-28, 440 P.3d 1282 (only substantial performance with bond notice requirements is necessary to recover on a surety bond); **D.R. Horton, Inc.-Denver v. Bischof & Coffman Constr., LLC**, 217 P.3d 1262 (Colo. App. 2009) (substantial performance was not a bar to recovery of contract damages); *see also* **Blood v.**

Qwest Servs. Corp., 224 P.3d 301 (Colo. App. 2009) (whether third-party plaintiff had materially breached or not substantially performed its contract with third-party defendant a question for jury), *aff'd on other grounds*, 252 P.3d 1071 (Colo. 2011).

3. Whether a breach of contract is material and therefore excuses the other party from performance is generally a question of fact. **Morris v. Belfor USA Group, Inc.**, 201 P.3d 1253 (Colo. App. 2008); **Kaiser v. Market Square Disc. Liquors, Inc.**, 992 P.2d 636 (Colo. App. 1999) (material breach by a party deprives that party of the right to demand performance by the other party). On the other hand, the fact that one may have rendered substantial performance does not mean that that party has not breached the contract and is not, therefore, liable for any damages. *See* **Zambakian v. Leson**, 77 Colo. 183, 234 P. 1065 (1925); 8 CATHERINE A. MCCAULIFF, CORBIN ON CONTRACTS § 36.3 (Joseph M. Perillo ed., rev. ed. 1999). Rather, it means that the other party is not entitled to regard the breach as giving him or her a right to repudiate the contract and refuse to perform his or her own return promise. *See generally* **Converse v. Zinke**, 635 P.2d 882 (Colo. 1981); **Little Thompson Water Ass'n v. Strawn**, 171 Colo. 295, 466 P.2d 915 (1970); CORBIN ON CONTRACTS, *supra*, at §§ 36.1-36.11.

4. Even if a party has failed to render substantial performance and breached a contract, the party may nonetheless be entitled to recover in *quantum meruit* for the value of the benefits conferred to the extent those benefits exceed the loss caused by the party's breach. **Denver Ventures, Inc. v. Arlington Lane Corp.**, 754 P.2d 785 (Colo. App. 1988).

5. The principle and rules set out in this instruction are not limited to construction contracts. *See* **R.F. Carle Co.**, 616 P.2d at 991-92.

30:13 CONTRACT PERFORMANCE — ANTICIPATORY BREACH

A party to a contract who shows a clear and definite intention not to perform the contract before the time when (his) (her) (its) own performance (is due) (is to be completed) commits a breach of contract. The intention not to perform may be shown by words or conduct or both.

Notes on Use

1. Use whichever parenthesized words are most appropriate.
2. For possible modifications required in cases involving the sale of goods, see sections 4-2-610 and 4-2-611, C.R.S.

Source and Authority

1. This instruction is supported by **Lake Durango Water Co. v. Public Utilities Commission**, 67 P.3d 12 (Colo. 2003); **Brown v. Jefferson County School District No. R-1**, 2012 COA 98, ¶ 55, 297 P.3d 976; and **Highlands Ranch University Park, LLC v. Uno of Highlands Ranch, Inc.**, 129 P.3d 1020 (Colo. App. 2005). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 250 (1981) (cited in *Brown*, ¶ 55, 297 P.3d at 987). Among the cases that have recognized the doctrine of anticipatory breach, expressly or by implication, are **Dreier v. Sherwood**, 77 Colo. 539, 238 P. 38 (1925) (unequivocal words of repudiation); **Long v. Wright**, 70 Colo. 173, 197 P. 1016 (1921) (doctrine expressly recognized); **Mulford v. Torrey Exploration Co.**, 45 Colo. 81, 100 P. 596 (1909) (doctrine recognized where defendant voluntarily rendered himself incapable of performing prior to the time when his performance was due); **Saxonia Mining & Reduction Co. v. Cook**, 7 Colo. 569, 4 P. 1111 (1884) (repudiation by unequivocal words); **Durango Transportation, Inc. v. City of Durango**, 786 P.2d 428 (Colo. App. 1989) (manifestation of intent not to perform must be definite and unequivocal), *rev'd on other grounds*, 807 P.2d 1152 (Colo. 1991); and **Johnson v. Benson**, 725 P.2d 21 (Colo. App. 1986) (repudiation by unequivocal language).

2. The following do not alone constitute a repudiation: a negative attitude; doubtful or indefinite statements that a party may or may not perform; statements that, under certain circumstances that do not yet exist, the party will not perform; or statements showing a desire to cancel or change the terms of a contract. 10 JOHN E. MURRAY, JR., CORBIN ON CONTRACTS § 54.16 (Joseph M. Perillo ed., rev. ed. 2014).

3. Repudiation of a contract does not excuse the repudiating party from performing its part of the contract, but does allow the nonrepudiating party to terminate the contract. **Interbank Invs. LLC v. Vail Valley Consol. Water Dist.**, 12 P.3d 1224 (Colo. App. 2000).

30:14 CONTRACT PERFORMANCE — TIME OF PERFORMANCE

If a contract does not state a specific time when the parties are to perform their obligations under the contract, then the parties are to perform within a reasonable time. In deciding whether a contractual obligation has been performed within a reasonable time, you may consider all the circumstances, including the nature of the contract, the parties' diligence, and any reason why the obligation was not performed at an earlier time.

Notes on Use

This instruction may be used whenever a written contract is silent about the date or time of performance or where the evidence indicates that the parties to an oral contract did not have specific intentions about a date for performance.

Source and Authority

1. This instruction is supported by **Boggs v. McMickle**, 120 Colo. 53, 206 P.2d 824 (1949). *See also* **Geiger v. Kiser**, 47 Colo. 297, 107 P. 267 (1910); **Ranta Const., Inc. v. Anderson**, 190 P.3d 835 (Colo. App. 2008).

2. If a contract does not contain an express term setting the time for performance, then the time for performance is a reasonable time after entry into the contract. **Twin Lakes Reservoir & Canal Co. v. Bond**, 156 Colo. 433, 399 P.2d 793 (Colo. 1965).

3. What is a reasonable time for performance of a contract depends upon the particular facts and circumstances of each case and rests largely in the discretion of the finder of fact. **Larimer v. Salida Granite Corp.**, 112 Colo. 598, 153 P.2d 998 (1944).

30:15 CONTRACT PERFORMANCE — CONDITIONS PRECEDENT

A contract may include one or more conditions precedent. A condition precedent is an event that must occur before performance under a contract becomes due.

Notes on Use

See the Notes on Use to Instructions 30:10 and 30:12.

Source and Authority

1. This instruction is supported by the Restatement: “A condition is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due.” RESTATEMENT (SECOND) OF CONTRACTS § 224 (1981). *See also* **Daybreak Constr. Specialties, Inc. v. Saghatoleslami**, 712 P.2d 1028, 1031 (Colo. App. 1985) (“When the obligations of a contract for sale and purchase of land are mutual and concurrent [i.e., the performance of each is a condition precedent to the obligation to perform the other], so long as one party makes no tender of deed and the other no offer of payment, neither is in default.”); RESTATEMENT (SECOND) OF CONTRACTS § 225 (1981).

2. Principles of conditions precedent are set forth in 8 CATHERINE A. MCCAULIFF, CORBIN ON CONTRACTS § 30.7 (Joseph M. Perillo ed., rev. ed. 1999) (considering the occurrence or nonoccurrence of any condition precedent under certain circumstances). Conditions precedent must be specifically pleaded. C.R.C.P. 9(c). For authority considering conditions precedent, see **Western Distributing Co. v. Diodosio**, 841 P.2d 1053 (Colo. 1992) (defendant had received substantially all the benefit expected from the contract and therefore plaintiffs had substantially performed their obligations and could assert breach of contract claim against defendant, even though not every obligation was performed); and **D.R. Horton, Inc.-Denver v. Bischof & Coffman Construction, LLC**, 217 P.3d 1262 (Colo. App. 2009) (trial court erred in instructing jury that general contractor could not recover damages for breach of contract from subcontractors if they found subcontractors had substantially performed). Whether a breach of contract is material and therefore excuses the other party from performance is generally a question of fact. **Blood v. Qwest Servs. Corp.**, 224 P.3d 301 (Colo. App. 2009), *aff’d on other grounds*, 252 P.3d 1071 (Colo. 2011) (whether third-party plaintiff had materially breached or not substantially performed its contract with third-party defendant a question for jury); **Morris v. Belfor USA Group, Inc.**, 201 P.3d 1253 (Colo. App. 2008); **Kaiser v. Market Square Disc. Liquors, Inc.**, 992 P.2d 636 (Colo. App. 1999) (material breach by a party deprives that party of the right to demand performance by the other party).

3. Generally, unless unequivocal language mandates otherwise, a contractual clause will be interpreted as a promise rather than as a condition precedent. **Main Elec., Ltd. v. Printz Servs. Corp.**, 980 P.2d 522 (Colo. 1999).

30:16 CONTRACT PERFORMANCE — IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING — NON-INSURANCE CONTRACT

Every contract requires the parties to act in good faith and to deal fairly with each other in performing or enforcing the express terms of the contract.

A party performs a contract in good faith when (his) (her) (its) actions are consistent with the agreed common purpose and with the reasonable expectations of the parties. The duty of good faith and fair dealing is breached when a party acts contrary to that agreed common purpose and the parties' reasonable expectations.

Notes on Use

None.

Source and Authority

1. This instruction is supported by **Amoco Oil Co. v. Ervin**, 908 P.2d 493 (Colo. 1995).
2. Every contract in Colorado includes an implied duty of good faith and fair dealing. **McDonald v. Zions First Nat'l Bank, N.A.**, 2015 COA 29, ¶ 66, 348 P.3d 957; **Platt v. Aspenwood Condo. Ass'n, Inc.**, 214 P.3d 1060 (Colo. App. 2009). For a discussion as to the existence and scope of the duty of good faith and fair dealing implied in every contract, see **Wells Fargo Realty Advisors Funding, Inc. v. Uioli, Inc.**, 872 P.2d 1359 (Colo. App. 1994) (when one party uses discretion conferred by contract to act dishonestly or to act outside of accepted commercial practices to deprive the other party of the benefit of the contract, the contract is breached). *See also* **Sinclair Transp. Co. v. Sandberg**, 2014 COA 76M, ¶ 52, 350 P.3d 924 (where a contract is silent, a court may imply a reasonable term to give effect to the expectation of the parties when they entered the agreement); **Newflower Mkt., Inc. v. Cook**, 229 P.3d 1058 (Colo. App. 2010) (no breach of implied covenant of good faith for refusing to negotiate or consent to deposit money into specific account when contract did not contemplate either action); **New Design Constr. Co., Inc. v. Hamon Contractors, Inc.**, 215 P.3d 1172 (Colo. App. 2008) (implied covenant of good faith and fair dealing may be relied upon where one party has discretion with respect to performance of specific terms of the contract); *accord* **Lutfi v. Brighton Cmty. Hosp. Ass'n**, 40 P.3d 51 (Colo. App. 2001); **O'Reilly v. Physicians Mut. Ins. Co.**, 992 P.2d 644 (Colo. App. 1999); **Crown Life Ins. Co. v. Haag Ltd. P'ship**, 929 P.2d 42 (Colo. App. 1996).
3. The existence of a contract is a necessary predicate to a claim for breach of the implied duty of good faith and fair dealing. **Beal Corp. Liquidating Trust v. Valleylab, Inc.**, 927 F. Supp. 1350 (D. Colo. 1996). A party, therefore, cannot rely on the implied covenant of good faith and fair dealing as a basis for claiming that another party has wrongfully failed or refused to enter into a contract.
4. The good faith performance doctrine serves to effectuate the intentions of the parties or to honor their reasonable expectations. **Bayou Land Co. v. Talley**, 924 P.2d 136 (Colo. 1996);

Amoco Oil Co., 908 P.2d at 498; **State Farm Mut. Auto. Ins. Co. v. Nissen**, 851 P.2d 165 (Colo. 1993); **Davis v. M.L.G. Corp.**, 712 P.2d 985 (Colo. 1986); **ADT Sec. Servs., Inc. v. Premier Home Prot., Inc.**, 181 P.3d 288 (Colo. App. 2007) (no breach of duty of good faith and fair dealing where other party's conduct was not contrary to claimant's justified expectations).

5. The reasonable expectations doctrine applies to all contracts, including those free from ambiguity, in order to effectuate the parties' intentions. *See Amoco Oil Co.*, 908 P.2d at 498; **Nissen**, 851 P.2d 166-67; **Simon v. Shelter Gen. Ins. Co.**, 842 P.2d 236 (Colo. 1992); **Davis**, 712 P.2d at 988-90; *cf.* **Dupre v. Allstate Ins. Co.**, 62 P.3d 1024 (Colo. App. 2002); **Spaur v. Allstate Ins. Co.**, 942 P.2d 1261 (Colo. App. 1996); **Shean v. Farmers Ins. Exch.**, 934 P.2d 835 (Colo. App. 1996) (doctrine of reasonable expectations applies only if the contract is ambiguous).

6. Public policy considerations favor the honoring of the reasonable expectations of the parties to a contract. Honoring those expectations is consistent with numerous other interpretive rules pertaining to contracts, including: words are given effect according to their ordinary or popular meaning; the scope of the agreement is not determined in a vacuum, but instead with reference to extrinsic circumstances; the interpretation which makes a contract fair and reasonable is selected over that which yields a harsh or unreasonable result; and contracts are to be construed so as to effectuate the parties' intentions. **Davis**, 712 P.2d 990-91.

7. Application of the reasonable expectation doctrine often fails to give effect to some hornbook rules governing the construction of contracts, including the tenets that a party is presumed to know the content of a contract signed by him, that contracts free from ambiguity are to be enforced as written, and that specific clauses control the effect of general clauses. *See Amoco Oil Co.*, 908 P.2d at 498; **Davis**, 712 P.2d at 990; *cf.* **Spaur**, 942 P.2d 1265; **Shelter Mut. Ins. Co. v. Breit**, 908 P.2d 1149 (Colo. App. 1995) (doctrine of reasonable expectations supplements, but does not substitute for, the rule that insurance policies are to be construed according to well-settled principles of contract construction).

8. The test of the meaning of a word or phrase under the reasonable expectations doctrine is what an ordinary lay person would have understood it to mean. **Breit**, 908 P.2d at 1152.

9. The implied duty of good faith and fair dealing does not inject new substantive terms or conditions into a contract. **City of Boulder v. Pub. Serv. Co.**, 996 P.2d 198 (Colo. App. 1999); **Soderlun v. Pub. Serv. Co.**, 944 P.2d 616 (Colo. App. 1997); *see also Amoco Oil Co.*, 908 P.2d at 498 (“[The covenant] will not contradict terms or conditions for which a party has bargained.”); **Miller v. Bank of N.Y. Mellon**, 2016 COA 95, ¶ 46, 379 P.3d 342 (implied duty of good faith and fair dealing could not be used to require bank to negotiate changes to loan agreement.).

10. In contrast to a claim for bad faith breach of insurance contract addressed in Chapter 25, which gives rise to liability in tort and a broader range of damages, breach of the implied duty of good faith and fair dealing in a non-insurance context is a contract claim subject to the traditional limitations on contract remedies. These include the rule that punitive damages are not recoverable for breach of an ordinary contract. **Mortg. Fin., Inc. v. Podleski**, 742 P.2d 900 (Colo. 1987). *See, generally*, the instructions on damages set forth in Part E of this chapter.

11. In deciding whether a party violated the obligation to act in good faith, the court must determine whether the underlying contract provision allows for the exercise of discretion in its performance. The concept of discretion in performance refers to one party's power after contract formation to set or control the terms of performance. **Amoco Oil Co.**, 908 P.2d at 498; **Newflower Mkt., Inc.**, 229 P.3d at 1064 (refusing to consent to deposit money into specific account or negotiate for same when contract did not contemplate either action not breach of good faith duty); **New Design Constr. Co., Inc.**, 215 P.3d at 1182 (contractor given discretion in contract to schedule work of subcontractor). Discretion occurs when the parties, at formation, defer a decision regarding performance terms of the contract. **Amoco Oil Co.**, 908 P.2d at 499; *accord* **City of Golden v. Parker**, 138 P.3d 285 (Colo. 2006); **Lutfi**, 40 P.3d at 59; **O'Reilly**, 992 P.2d at 646.

12. While the good faith performance doctrine may be used to protect a "weaker" party from a "stronger" party, in this context weakness and strength do not refer to the relative bargaining power of the parties. Rather, even in arms-length transactions between sophisticated parties, there may be an agreement to confer control of performance of a contract term on one of the parties. *See, e.g.*, **City of Golden**, 138 P.3d 292-93; **Mahan v. Capitol Hill Internal Med., P.C.**, 151 P.3d 685 (Colo. App. 2006). The dependent party must then rely on the party in control to exercise good faith in the exercise of its discretion. **Amoco Oil Co.**, 908 P.2d at 498-99.

13. The duty of good faith and fair dealing may apply to the enforcement of a contract as well as its performance. When applied in the enforcement context, it bars dishonest conduct such as raising an imaginary dispute, asserting an interpretation contrary to one's own understanding, or falsification of facts. **Bayou Land Co.**, 924 P.2d at 155 n.28 (citing RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. e (1981)); *see also* **Ranta Constr., Inc. v. Anderson**, 190 P.3d 835 (Colo. App. 2008) (in case decided under UCC's good faith and fair dealing provision, buyer had no claim for breach of warranty when seller of product has right to cure defects and buyer interferes with that right by foreclosing it prematurely).

14. The implied covenant of good faith and fair dealing cannot be invoked to bar a party from bringing a claim based on a disagreement regarding contract terms. **Bayou Land Co.**, 924 P.2d at 154.

15. The implied duty of good faith and fair dealing does not apply to the termination of an at-will employment contract. **Soderlun**, 944 P.2d at 623.

16. While an implied duty of good faith and fair dealing is inherent in every contract, the parties to a contract may also include an express covenant of good faith and fair dealing as a contract term. **Decker v. Browning-Ferris Indus. of Colo., Inc.**, 931 P.2d 436 (Colo. 1997). However, absent an agreement by the parties, no industry-specific standard will be implied into a contract. **BSLNI, Inc. v. Russ T. Diamonds, Inc.**, 2012 COA 214, ¶ 22, 293 P.3d 598.

30:17 CONTRACT PERFORMANCE — ASSIGNMENT

(Plaintiff) (Defendant), who was not a party to the original contract, may bring a claim for breach of contract if rights under the contract were (intended to be) transferred to (him) (her) (it) by (insert name of authorized assignor). This transfer is referred to as an assignment.

(You may consider the entire transaction and the conduct of the parties to the assignment in determining the intent to transfer contract rights.)

(A transfer of contract rights does not have to be written. A transfer of contract rights may be oral or may be implied by the conduct of the parties to the assignment.)

Notes on Use

1. This instruction should be used only if the agreement does not specifically prohibit assignment of rights.

2. The second and third sentences should be used only if the validity of the assignment is contested.

Source and Authority

1. This instruction is supported by **Parrish Chiropractic Centers, P.C. v. Progressive Casualty Insurance Co.**, 874 P.2d 1049, 1052 (Colo. 1994) (“Contract rights generally are assignable, except where assignment is prohibited by contract or by operation of law or where the contract involves a matter of personal trust or confidence.”); **Matson v. White**, 122 Colo. 79, 84, 220 P.2d 864, 867 (1950) (“consent of the other contracting party is not essential to the validity of an assignment”); and **Temple Hoyne Buell Foundation v. Holland & Hart**, 851 P.2d 192, 197 (Colo. App. 1992) (a party may assign his obligations “only if such assignment would not impair plaintiffs’ rights” (citing RESTATEMENT (SECOND) OF CONTRACTS § 317(2) (1981))).

2. An attempt to assign rights in a *future* contract, however, is not enforceable against the obligor. **Allstate Ins. Co. v. Med. Lien Mgmt., Inc.**, 2015 CO 32, ¶ 13, 348 P.3d 943 (“a purported assignment of a right expected to arise under a contract not yet in existence operates only as a promise to assign the right when it arises and as a power to enforce it . . . [and] does not constitute an assignment of future or after-acquired rights so as to be effective against the promisor’s obligor”).

3. “An assignment of a right is a manifestation of the assignor’s intention to transfer it by virtue of which the assignor’s right to performance by the obligor is extinguished in whole or in part and the assignee acquires a right to such performance.” RESTATEMENT (SECOND) OF CONTRACTS § 317(1) (1981).

C. DEFENSES

Introductory Note

1. Mutual mistake may be grounds for rescission of a contract. Rescission is an equitable claim that generally is not presented for a jury determination. *See* **England v. Amerigas Propane**, 2017 CO 55, ¶¶ 19-22, 395 P.3d 766 (court concluded that parties were mutually mistaken about existence of scapular fracture at the time they settled the case); **Carpenter v. Hill**, 131 Colo. 553, 283 P.2d 963 (1955); **Ramstetter v. Hostetler**, 2016 COA 81, ¶ 46, 411 P.3d 1043 (affirming trial court’s judgment rescinding contract where the parties mistakenly believed that joint tenancy could be severed only by mutual agreement). The Committee therefore determined an instruction on mutual mistake is not necessary. *See generally* **Casey v. Colo. Higher Educ. Ins. Benefits All. Trust**, 2012 COA 134, ¶ 68, 310 P.3d 196; **Snow Basin, Ltd. v. Boettcher & Co.**, 805 P.2d 1151 (Colo. App. 1990).

2. A unilateral mistake of fact or law is generally not a defense to a breach of contract claim. *See* **Kuper v. Scroggins**, 127 Colo. 416, 257 P.2d 412 (Colo. 1953). *But see* **In re Marriage of Manzo**, 659 P.2d 669 (Colo. 1983) (in *dicta*, supreme court suggests a unilateral mistake may justify rescission where one party knows of the mistake and takes advantage of it); **Sumerel v. Goodyear Tire & Rubber Co.**, 232 P.3d 128 (Colo. App. 2009) (where one party knew arithmetical calculation of damages was erroneous, risk of mistake did not rest with other party, and the agreement made based on that calculation was unconscionable, agreement was unenforceable (citing RESTATEMENT (SECOND) OF CONTRACTS §§ 153-54 (1981))).

3. While equity recognizes an estoppel to claim damages, *see* **Mabray v. Williams**, 132 Colo. 523, 291 P.2d 677 (1955), the Committee determined that an instruction is not necessary. *See* **Sanger v. Larson Constr. Co.**, 126 Colo. 479, 251 P.2d 930 (1952) (plaintiff estopped to claim trespass by defendant); **Richmond v. Grabowski**, 781 P.2d 192, 195 (Colo. App. 1989) (“the party to be estopped [must know] the facts”); **Barker v. Jeremiasen**, 676 P.2d 1259 (Colo. App. 1984) (citing elements of estoppel). If there is a dispute as to whether the plaintiff had sufficient knowledge of the defendant’s breach, this instruction must be appropriately modified. *See* **Cont’l W. Ins. Co. v. Jim’s Hardwood Floor Co.**, 12 P.3d 824 (Colo. App. 2000) (party to be estopped must know facts and party asserting estoppel must be ignorant of facts).

4. For a discussion of the elements necessary to establish the equitable defense of estoppel by reason of delay or laches, *see* **Manor Vail Condominium Ass’n v. Town of Vail**, 199 Colo. 62, 604 P.2d 1168 (1980); **Lookout Mountain Paradise Hills Homeowners’ Ass’n v. Viewpoint Associates**, 867 P.2d 70 (Colo. App. 1993); and **Extreme Construction Co. v. RCG Glenwood, LLC**, 2012 COA 220, ¶ 29, 310 P.3d 246.

5. The defense of unconscionability is an equitable defense to be decided by the Court. Therefore, the Committee determined that an instruction was not necessary. For a discussion as to whether an agreement constitutes an adhesion contract, *see* **Ad Two, Inc. v. City & County of Denver**, 983 P.2d 128 (Colo. App. 1999), *aff’d on other grounds*, 9 P.3d 373 (Colo. 2000).

6. Generally, contracts in contravention of public policy are void and unenforceable. *See* **Pierce v. St. Vrain Valley Sch. Dist. RE-1J**, 981 P.2d 600 (Colo. 1999); *see also* **Bailey v.**

Lincoln Gen. Ins. Co., 255 P.3d 1039 (Colo. 2011) (insurance provision of automobile rental agreement excluding coverage for intentional criminal acts was not void as against public policy); **Wheat Ridge Urban Renewal Auth. v. Cornerstone Group XXII, L.L.C.**, 176 P.3d 737 (Colo. 2007) (contract for renewal authority to acquire certain property by eminent domain condemnation if necessary not void); **Grippin v. State Farm Mut. Auto. Ins. Co.**, 2016 COA 127, ¶ 26, 409 P.3d 529 (insurance provision limiting coverage to relatives who reside “primarily” with the named insured was void as an improper limitation on statutorily mandated coverage); **Rocky Mountain Nat. Gas, LLC v. Colo. Mountain Junior Coll. Dist.**, 2014 COA 118, ¶ 20, 385 P.3d 848 (lease, which contained term that exceeded defendant’s statutory authority, was void); **Weize Co. v. Colo. Reg’l Constr., Inc.**, 251 P.3d 489 (Colo. App. 2010) (affirmative defense of illegality of contract with unlicensed plumber); **Amedeus Corp. v. McAllister**, 232 P.3d 107 (Colo. App. 2009) (agreement to pay fees for real estate work to unlicensed party illegal and unenforceable); **Platt v. Aspenwood Condo. Ass’n**, 214 P.3d 1060 (Colo. App. 2009) (where a statute expressly forbids sale of unit without vote of other owners and imposes a penalty for entering into a forbidden contract, the contract is void ab initio); **Dinosaur Park Invs. L.L.C. v. Tello**, 192 P.3d 513 (Colo. App. 2008) (contract for installment sale was illegal for failure to name public trustee, and issue properly raised as affirmative defense); **Shotkoski v. Denver Inv. Grp., Inc.**, 134 P.3d 513 (Colo. App. 2006) (agreement to compensate unlicensed real estate broker is illegal and unenforceable); **Harding v. Heritage Health Prods. Co.**, 98 P.3d 945 (Colo. App. 2004) (equitable doctrines may not be used to enforce illegal or void agreement); **Equitex, Inc. v. Ungar**, 60 P.3d 746 (Colo. App. 2002) (neither party to a contract may waive objections based on public policy or illegality and courts will not enforce contracts that violate public policy even if failure to do so is unfair). However, a party to an illegal contract cannot rely on the illegality of a contract to defeat a claim by a nonparty to the contract. **Bebo Constr. Co. v. Mattox & O’Brien, P.C.**, 998 P.2d 475 (Colo. App. 2000) (party who entered into illegal joint venture agreement with law firm could not rely on illegality of joint venture to defeat claim by third-party). Similarly, a nonparty to a contract cannot raise the defense of illegality when sued by a party to an illegal contract. **Oppenheimer Indus., Inc. v. Firestone**, 39 Colo. App. 448, 569 P.2d 334 (1977) (suit for real estate commission).

7. Colorado Rule of Professional Conduct 1.8 is an expression of public policy, the violation of which may render an agreement unenforceable. **Calvert v. Mayberry**, 2019 CO 23, ¶ 49, 440 P.3d 424, 435 (“[W]e hold that when an attorney enters in a contract without complying with Rule 1.8(a), the contract is presumptively void as against public policy; however, the attorney may rebut that presumption by showing that, under the circumstances, the contract does not contravene the public policy underlying Rule 1.8(a).”).

8. Whether exculpatory clauses are sufficient and valid is a question of law for the court. Four factors are considered by courts when evaluating the enforceability of exculpatory clauses: (1) the existence of a duty to the public; (2) the nature of the service performed; (3) whether the contract was fairly entered into; and (4) whether the intention of the parties was expressed in clear and unambiguous language. **McShane v. Stirling Ranch Prop. Owners Ass’n, Inc.**, 2017 CO 38, ¶ 13, 393 P.3d 978; *see also* **Stone v. Life Time Fitness, Inc.**, 2016 COA 189M, ¶ 35, 411 P.3d 225 (release language in membership agreement was ambiguous and accordingly did not bar claim for injury sustained while washing hands in restroom).

9. Whether a contract disclaimer is clear and conspicuous is a question of law for the court. **Cummings v. Arapahoe Cty. Sheriff's Dep't**, 2018 COA 136, ¶ 56, 440 P.3d 1179 (“when a clear and conspicuous disclaimer informs an employee that he or she cannot reasonably rely on termination procedures or substantive restrictions on termination contained in an employee manual, a claim based on an implied contract claim ordinarily fails as a matter of law”).

10. A contract may be unenforceable in some circumstances when it is so unfair as to be unconscionable. **Davis v. M.L.G. Corp.**, 712 P.2d 985 (Colo. 1986) (rental insurance agreement excluding coverage when car used in the commission of a crime unconscionable, based on parties' expectations and overreaching by rental agency); **Planned Pethood Plus, Inc. v. KeyCorp, Inc.**, 228 P.3d 262 (Colo. App. 2010) (prepayment penalty clause in promissory note not unconscionable where amount of penalty was modest and language in note was prominent); *cf.* **Bailey**, 255 P.3d at 1057 (provision in widely used standard rental agreement avoiding coverage when car used in commission of a crime not unconscionable and did not violate the reasonable expectations of the insured).

11. A limitation of liability term in a contract is not enforceable where the party seeking to enforce the limitation has willfully and wantonly breached the contract. **Core-Mark Midcontinent, Inc. v. Sonitrol Corp.**, 2012 COA 120, ¶ 16, 300 P.3d 963 (whether a breach is willful and wanton presents a question of fact for the jury); **Taylor Morrison of Colo., Inc., v. Terracon Consultants, Inc.**, 2017 COA 64, ¶ 10, 410 P.3d 767 (jury concluded that defendant's conduct was not “willful and wanton” and court enforced clause limiting defendant's liability for breach).

12. The defense of noncooperation in an insurance context must be pleaded as either an affirmative defense or a failure of condition precedent. **Soicher v. State Farm Mut. Auto. Ins. Co.**, 2015 COA 46, ¶ 2, 351 P.3d 559 (holding that failure to cooperate may not be raised for first time in a proposed verdict form).

30:18 DEFENSE — FRAUD IN THE INDUCEMENT

The defendant, *(name)*, is not legally responsible to the plaintiff, *(name)*, on the plaintiff's claim of breach of contract if the affirmative defense of fraud is proved. This defense is proved if you find all of the following:

1. The plaintiff (concealed a past or present fact) (failed to disclose a past or present fact that the plaintiff had a duty to disclose) (made a false representation of a past or present fact);

2. The fact was material;

3. The defendant entered into the (claimed) contract relying on the assumption that the ([concealed] [undisclosed] fact did not exist or was different from what it actually was) (falsely stated fact was true);

4. The defendant's reliance was justified;

5. The defendant's reliance caused (him) (her) (damages) (losses); and

6. The defendant has returned or offered to return to plaintiff *(describe what, if anything, the defendant would be legally obligated to return to the plaintiff in order to prevent the defendant from being unjustly enriched)*.

Notes on Use

1. For cases involving contracts for the sale of goods, see section 4-2-721, C.R.S.
2. Use whichever parenthesized portions are appropriate in light of the evidence in the case.
3. Omit any numbered paragraphs, the facts of which are not in dispute.
4. If the contract is wholly executory, paragraph 6 of this instruction should be omitted. Also, in certain cases, the defendant may not be under a duty to return what he or she has received from the plaintiff or its value. In those cases, paragraph 6 should be omitted or modified appropriately, depending on the evidence in the case.
5. When this instruction is given, those instructions in Chapter 19 as would be appropriate in the light of the evidence in the case should also be given, including Instruction 19:3 (defining false representation).

Source and Authority

1. This instruction is supported by **Trimble v. City & County of Denver**, 697 P.2d 716 (Colo. 1985); **Sears v. Hicklin**, 13 Colo. 143, 21 P. 1022 (1889); and RESTATEMENT (SECOND) OF CONTRACTS §§ 159-173 (1981). *See also* **Ice v. Benedict Nuclear Pharm., Inc.**, 797 P.2d

757 (Colo. App. 1990) (unless damages resulted from alleged misrepresentation, plaintiff's fraud is not a defense to a breach of contract claim).

2. For a discussion of rescission of insurance contract by reason of fraud in an insurance application, see **Silver v. Colorado Casualty Insurance Co.**, 219 P.3d 324 (Colo. App. 2009).

3. When one has been induced to enter into a contract because of a material misrepresentation on the part of the other party, that person may have several courses of action open to him or her, depending on the particular facts. *See generally* W. PAGE KEETON, ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 105 (5th ed. 1984). Among other courses of action where both sides have fully performed the contract, the one defrauded may:

a. As a plaintiff, affirm the contract, and sue at law for damages in a tort action for deceit, *see, e.g.*, **Club Matrix, LLC v. Nassi**, 284 P.3d 93 (Colo. App. 2011), or

b. As a plaintiff, disaffirm the contract, tender back what the plaintiff has received, and sue to recover what he or she gave as performance (rescission and restitution), or

c. As a defendant in a breach of contract action, he or she may take course a or b above as a counterclaim. If the defendant chooses to rescind and seek restitution as a counterclaim, the defendant may also use the fraud as a defense to the plaintiff's claim for breach of contract. If the defendant chooses to counterclaim for deceit, the fraud may not be used as a defense to the damage claim (except as a counterclaim), since by suing for deceit the defendant affirms the contract and is liable to render to the plaintiff what is due under the contract.

4. Where the one defrauded has not fully performed, he or she may:

a. As a plaintiff, disaffirm any obligation to perform the contract further, but affirm the contract to the extent he or she has performed it and sue for damages (if any) in a common law action for deceit, *see, e.g.*, **Ackmann v. Merchants Mortg. & Trust Corp.**, 659 P.2d 697 (Colo. App. 1982), *rev'd on other grounds sub nom. Kopeikin v. Merchants Mortg. & Trust Corp.*, 679 P.2d 599 (Colo. 1984), or

b. As a plaintiff, disaffirm the contract, tender back what he or she has received, and sue for rescission and restitution as above, or

c. As a defendant in a breach of contract action, counterclaim for a or b above, or, if the contract is totally executory, simply use the fraud as a defense to any damages for breach.

5. Many cases have recognized the defrauded person's basic alternative remedies of rescission and restitution. *See* **W. Cities Broad., Inc. v. Schueller**, 849 P.2d 44 (Colo. 1993); **Martinez v. Affordable Housing Network, Inc.**, 109 P.3d 983 (Colo. App. 2004), *rev'd on other grounds*, 123 P.3d 1201 (Colo. 2005); **Sims v. Sperry**, 835 P.2d 565 (Colo. App. 1992); **Colo. Interstate Gas Co. v. Chemco, Inc.**, 833 P.2d 786 (Colo. App. 1991), *aff'd on other grounds*, 854 P.2d 1232 (Colo. 1993); *see also* **Trimble**, 697 P.2d at 723; **Neiheisel v. Malone**, 150 Colo. 586, 375 P.2d 197 (1962); **Aaberg v. H.A. Harman Co.**, 144 Colo. 579, 358 P.2d 601 (1960). On many occasions, the courts have also stated the rule that the defrauded person, having

learned of the fraud, must, if that person elects to rescind, give notice promptly of his or her intention to do so. *See, e.g., Gerbaz v. Hulsey*, 132 Colo. 359, 288 P.2d 357 (1955); **Tisdell v. Central Sav. Bank & Trust Co.**, 90 Colo. 114, 6 P.2d 912 (1931); **Elk River Assocs. v. Huskin**, 691 P.2d 1148 (Colo. App. 1984).

6. While a party electing to rescind a contract is required to give prompt notice of his or her election, a party who has been induced fraudulently to enter into two related contracts as part of the same general transaction need not elect the same remedy for both contracts. That party may elect to affirm one and sue for damages in deceit, and rescind the other and seek restitution for any consideration paid or rendered. A party should not be required to elect the same remedy for both contracts unless necessary to prevent double recovery or because the assertion of different remedies would be so inconsistent that the assertion of one would necessarily be a repudiation of the other. **Stewart v. Blanning**, 677 P.2d 1382 (Colo. App. 1984).

7. One who has been induced to enter into a contract with a third person because of the fraud of another may affirm the contract and sue the other for damages in deceit and may also sue the third person for damages for any breach of the contract by the third person. Because these remedies are not inconsistent in that they would not necessarily result in double recovery, the defrauded person need not make an election between the two. **Trimble**, 697 P.2d at 723-24.

8. Numbered paragraph 6 of this instruction states the rule of **Gerbaz**, 132 Colo. at 363, 288 P.2d at 359. When one uses fraud in the inducement as a defense to a breach of contract action that person is in effect claiming a right to “rescind” the contract and consider himself or herself discharged. The elements of proof of this defense are, therefore, the same as an action for rescission and restitution. The only difference is that if the defendant has not in any way rendered performance under the contract, he or she will not generally seek or be entitled to any restitution. *But see Murray v. Montgomery Ward Life Ins. Co.*, 196 Colo. 225, 584 P.2d 78 (1978) (applying these rules and the elements of this instruction to a life insurance contract, but requiring that the misrepresentation or concealment be made “knowingly”).

9. Even though the defendant may have received some performance from the plaintiff, the defendant is not always under a duty to return what, or the value of what, he or she received. *See* RESTATEMENT (SECOND) OF CONTRACTS § 384 (1981). While it “is the general rule that a party seeking to rescind a contract must return the opposite party to the position in which he was prior to entering into the contract . . . [that rule] is not a technical rule, but rather . . . is [an] equitable [one], and requires practicality in readjusting the rights of the parties. . . . The standard [to be] used is ‘substantial restoration of the status quo.’ . . . How [that] is to be accomplished, or indeed whether it can, is a matter . . . within the discretion of the trial court, under the facts as [they may be] found to exist by the trier of [facts].” **Smith v. Huber**, 666 P.2d 1122, 1124-25 (Colo. App. 1983).

10. Comparing the tort remedy of deceit and the remedy of rescission, whether used as a basis for a restitution action or a defense to a breach of contract action (this instruction), the basic difference in terms of what must be proved appears to be that, in a deceit action, the plaintiff must prove the defendant made the statement without an honest belief in the truth and with the intent that the plaintiff rely on the statement, whereas, in a rescission action, an innocent misrepresentation is sufficient. *See Bassford v. Cook*, 152 Colo. 136, 380 P.2d 907 (1963)

(dictum, following what now appears to be the majority rule). *But see* **Murray**, 196 Colo. at 227-28, 584 P.2d at 80; **Coon v. Dist. Court**, 161 Colo. 211, 420 P.2d 827 (1966).

30:19 DEFENSE — UNDUE INFLUENCE

The defendant, (*name*), is not legally responsible to the plaintiff, (*name*), on the plaintiff's claim of breach of contract if the affirmative defense of undue influence is proved. This defense is proved if you find both of the following:

- 1. At the time the defendant entered into the (claimed) contract, the defendant was not acting of (his) (her) own free will; and**
- 2. The plaintiff caused the defendant's lack of free will by dominating the defendant through the use of words, conduct, or both.**

The mere use of persuasion or argument to cause another to enter into a contract is not undue influence.

Notes on Use

1. This instruction should not be used in a case involving a confidential or fiduciary relationship. *See* Instructions 26:2, 26:3, and 34:16.
2. Use whichever parenthesized words are appropriate to the evidence in the case.
3. This instruction must be appropriately modified if the claimed undue influence was that of a third person. *See* RESTATEMENT (SECOND) OF CONTRACTS § 177(3) (1981).
4. The burdens of pleading and proving undue influence in an arm's length transaction are on the party asserting it. C.R.C.P. 8(c).

Source and Authority

This instruction is supported by **Lighthall v. Moore**, 2 Colo. App. 554, 31 P. 511 (1892); and RESTATEMENT (SECOND) OF CONTRACTS § 177(1) cmt. b (1981). *See also* cases cited in Source and Authority to Instruction 34:14.

30:20 DEFENSE — DURESS

The defendant, (*name*), is not legally responsible to the plaintiff, (*name*), on the plaintiff's claim of breach of contract if the affirmative defense of duress is proved. This defense is proved if you find both of the following:

1. At the time the defendant entered into the (claimed) contract, the defendant was not acting of (his) (her) own free will; and

2. The plaintiff caused the defendant's lack of free will by (*insert the wrongful act or threat that the court has determined to be legally sufficient to constitute duress*).

Notes on Use

1. This instruction should not be used in a case involving a confidential or fiduciary relationship. *See* Instructions 26:2, 26:3 and 34:16.

2. Appropriate instructions defining other terms used in this instruction must also be given, e.g., an instruction or instructions relating to causation. *See* Instructions 9:18–9:20.

3. This instruction must be appropriately modified if the claimed duress was that of a third person. *See* RESTATEMENT (SECOND) OF CONTRACTS § 175(2) (1981).

4. The burdens of pleading and proving duress in an arm's length transaction are on the party asserting it. C.R.C.P. 8(c). For this reason, the appropriate sections of Instruction 3:1 should be given reflecting the evidence in the case.

5. In cases involving the sale of goods, see section 4-2-302, C.R.S., which provides that the determination of unconscionability at the time the contract was made is a matter of law for the court. The parties may present evidence as to the commercial setting, purpose, and effect of the contract to aid the court in making its determination.

Source and Authority

1. This instruction is supported by **Barrows v. McMurry Manufacturing Co.**, 54 Colo. 432, 131 P. 430 (1913) (no evidence that threats did in fact overcome defendant's free choice). *See also* **DeJean v. United Airlines, Inc.**, 839 P.2d 1153 (Colo. 1992) (if airline had legal right to terminate employment of trainee pilots, threat to do so did not constitute duress); **Heald v. Crump**, 73 Colo. 251, 215 P. 140 (1923) (a threat to do what one may lawfully do does not constitute duress); **Miller v. Davis' Estate**, 52 Colo. 485, 122 P. 793 (1912) (defense of duress is lost if one accepts the benefits of the contract or remains silent for a considerable length of time after that person has had an opportunity to avoid or rescind the contract); **McClair v. Wilson**, 18 Colo. 82, 31 P. 502 (1892); **Adams v. Schiffer**, 11 Colo. 15, 17 P. 21 (1888) (duress exists where one person having control or possession of another's property refuses to surrender it to the owner except upon compliance with a demand that is unlawful); **Pittman v. Larson Distrib. Co.**, 724 P.2d 1379, 1384 (Colo. App. 1986) ("The threat of blacklisting an employee in an industry is a form of coercion that constitutes duress as a matter of law[.]"); **Wiesen v. Short**, 43

Colo. App. 374, 604 P.2d 1191 (1979) (insufficient evidence that any force or threats had actually subjugated the mind and will of the person against whom they were directed); RESTATEMENT (SECOND) OF CONTRACTS §§ 174-76 (1981).

2. As to what constitutes an improper threat, see **Vail/Arrowhead, Inc. v. District Court**, 954 P.2d 608 (Colo. 1998) (economic threats may give rise to duress so as to render contract voidable). *See also* **Premier Farm Credit, PCA v. W-Cattle, LLC**, 155 P.3d 504 (Colo. App. 2006) (threat by lender to call loan due if not renewed by borrower not cognizable as duress as a matter of law because lender had legal right to call loan due).

30:21 DEFENSE — MINORITY

The defendant, (*name*), is not legally responsible to the plaintiff, (*name*), on the plaintiff's claim of breach of contract if the affirmative defense of minority is proved. This defense is proved if you find both of the following:

- 1. The defendant was under the age of 18 at the time the (claimed) contract was entered into; and**
- 2. The defendant disaffirmed or rejected the [claimed] contract before becoming 18 or within a reasonable time after becoming 18.**

Notes on Use

1. For “any legal contractual obligation,” the age of competence is 18. § 13-22-101(1)(a), C.R.S.
2. The second numbered paragraph should be omitted if there is no dispute that the defendant is not yet 18 or if the only dispute is whether the defendant was 18 at the time the alleged contract was entered into.
3. If the contract is wholly executory, the second paragraph may not be applicable. *See Sipes v. Sipes*, 87 Colo. 301, 287 P. 284 (1930).
4. This instruction should be modified in cases relating to insurance, *see* § 10-4-104, C.R.S., or in cases involving contracts for the acquisition of necessities of life, *see Perkins v. Westcoat*, 3 Colo. App. 338, 33 P. 139 (1893).

Source and Authority

1. This instruction is supported by **Keser v. Chagnon**, 159 Colo. 209, 410 P.2d 637 (1966); and **Doenges-Long Motors, Inc. v. Gillen**, 138 Colo. 31, 328 P.2d 1077 (1958). *See also Fellows v. Cantrell*, 143 Colo. 126, 352 P.2d 289 (1960) (where the plaintiff was seeking to recover on a loan he had made to the defendant, the court held that the defendant's attempted disaffirmance at the age of 26 was not within a reasonable time after she reached majority).
2. Although the plaintiff may not be able to recover damages for breach of contract because of the defense of minority, the plaintiff may nonetheless be able to recover some damages on the theory of deceit, *see* Chapter 19, or on the theory of rescission and restitution. **Doenges-Long Motors, Inc.**, 138 Colo. at 38-39, 328 P.2d at 1081.

30:22 DEFENSE — MENTAL INCAPACITY

The defendant, (*name*), is not legally responsible to the plaintiff, (*name*), on the plaintiff's claim of breach of contract if the affirmative defense of lack of mental capacity is proved. This defense is proved if you find at the time the defendant entered into the (claimed) contract, (he) (she) was suffering from an insane delusion that made (him) (her) unable to understand the terms or effect of the contract or to act rationally in the transaction.

Notes on Use

1. The appropriate sections of Instruction 3:1 should be given reflecting the evidence in the case.
2. This instruction should be used in conjunction with Instruction 34:12, which defines the term "insane delusion."
3. This instruction may be given in conjunction with Instruction 3:5 regarding presumptions. There is always, in civil as well as criminal actions, a presumption of sanity. **Hanks v. McNeil Coal Corp.**, 114 Colo. 578, 168 P.2d 256 (1946).

Source and Authority

This instruction is supported by **Hanks**, 114 Colo. at 588-89, 168 P.2d at 261-62. *Accord Forman v. Brown*, 944 P.2d 559 (Colo. App. 1997).

30:23 DEFENSE — IMPOSSIBILITY OF PERFORMANCE

The defendant, (*name*), is not legally responsible to the plaintiff, (*name*), on the plaintiff's claim of breach of contract if the affirmative defense of impossibility of performance is proved. This defense is proved if you find all of the following:

1. An event, (*insert an appropriate description of the event, i.e., the Act of God, change of law, death of essential party, etc., on which the defendant relies*), occurred that could not reasonably be anticipated by the plaintiff and the defendant when they entered into the contract; and

2. The defendant did not cause the event; and

3. The event (made the defendant's performance of the contract physically impossible) (or) (made the defendant's performance impracticable because of [a change in law] or an extreme and unreasonable [difficulty,] [expense,] [risk of personal injury,] [or] [loss]).

Notes on Use

1. Omit any numbered paragraphs, the facts of which are not in dispute.
2. This instruction should not be given if the parties in their contract have impliedly or expressly dealt with the contingency giving rise to the claim of impossibility and have allocated the risk of the contingency taking place in a manner that would be inconsistent with paragraph 1 of this instruction. Neither should it be given unless the event that is claimed to have rendered the defendant's performance impossible would be sufficient for the defense as a matter of law.
3. An instruction or instructions related to causation may be used. *See* Instructions 9:18–9:20.
4. The appropriate sections of Instruction 3:1 should be given reflecting the evidence in the case.
5. For cases involving the sale of goods, see sections 4-2-613 to 4-2-616, C.R.S., which deal, *inter alia*, with goods that suffer casualty without fault of either party before the risk of loss passes to the buyer; with substitute performance; and with a delay in delivery or nondelivery if performance as agreed upon has been made impracticable by the occurrence of a contingency, the nonoccurrence of which was a basic assumption on which the contract was made, or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

Source and Authority

1. This instruction is supported by RESTATEMENT (SECOND) OF CONTRACTS §§ 261-66 (1981); **City of Littleton v. Employers Fire Insurance Co.**, 169 Colo. 104, 453 P.2d 810 (1969); and **Ruff v. Yuma County Transportation Co.**, 690 P.2d 1296 (Colo. App. 1984)

(impossibility of performance is determined by whether “an unanticipated circumstance has made performance of the promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract.”). *See also* **Town of Fraser v. Davis**, 644 P.2d 100 (Colo. App. 1982) (quoting and applying RESTATEMENT (SECOND) OF CONTRACTS § 266(2) (1981)); **Breeden v. Dailey**, 40 Colo. App. 70, 574 P.2d 508 (1977) (death of party); *see generally*, 14 JAMES P. NEHF, CORBIN ON CONTRACTS § 74.1 (Joseph M. Perillo ed., rev. ed. 2001).

2. Impossibility does not mean literal or strict impossibility but includes as well “impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved.” **City of Littleton v. Employers Fire Ins. Co.**, 169 Colo. 104, 108, 453 P.2d 810, 812 (1969), specifically applying the RESTATEMENT OF CONTRACTS § 454 (1932), definition of impossibility.

3. A change in economic conditions, reducing the value of a contract to a party, is not sufficient to constitute the defense of impossibility, particularly when the changed circumstances are not so unforeseeable as to be outside the scope of the risks assumed by the party when entering into the contract. **Magnetic Copy Servs., Inc. v. Seismic Specialists, Inc.**, 805 P.2d 1161 (Colo. App. 1990); **Ruff**, 690 P.2d at 1298. Intervening governmental regulatory action that does not prohibit performance or require the issuance of a permit that is unobtainable, but rather is one that only renders performance more costly, does not constitute impossibility. **Seago v. Fellet**, 676 P.2d 1224, 1227 (Colo. App. 1983) (“[I]ncreased costs are not grounds for rescission of a contract.”); *see* **Colo. Performance Corp. v. Mariposa Assocs.**, 754 P.2d 401 (Colo. App. 1987) (same). However, governmental action that makes the performance of a contract illegal constitutes impossibility of performance. **Barrack v. City of Lafayette**, 829 P.2d 424 (Colo. App. 1991) (city was discharged from whatever contractual obligations it might have had to deliver untreated water when untreated water could no longer be legally supplied because of public health regulations), *rev’d on other grounds*, 847 P.2d 136 (Colo. 1993).

4. Concerning the destruction of the subject matter of the contract or a thing upon which the performance of a party depends, see RESTATEMENT (SECOND) OF CONTRACTS sections 262 through 263 (1981); and CORBIN ON CONTRACTS, *supra*, at sections 75.4-75.7.

5. The defense of impossibility of performance may be waived by the conduct of the parties. **Cornerstone Grp. XXII, L.L.C. v. Wheat Ridge Urban Renewal Auth.**, 151 P.3d 601 (Colo. App. 2006), *rev’d on other grounds*, 176 P.3d 737 (Colo. 2007).

30:24 DEFENSE — INDUCING A BREACH BY WORDS OR CONDUCT

The defendant, (*name*), is not legally responsible to the plaintiff, (*name*), on the plaintiff's claim of breach of contract if the affirmative defense of inducing a breach of contract is proved. This affirmative defense is proved if you find both of the following:

1. By words or conduct, or both, the plaintiff caused the defendant not to perform (his) (her) (its) obligation as required by the (claimed) contract; and

2. The plaintiff actually knew, or knew there was a substantial likelihood, (his) (her) words or conduct, or both, would have that result.

Notes on Use

1. The appropriate sections of Instruction 3:1 should be given reflecting the evidence in the case.

2. For cases involving the sale of goods, see section 4-2-209, C.R.S., which provides that a party that has made a waiver affecting an executory portion of the contract may retract the waiver upon reasonable notification that strict performance will be required, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

Source and Authority

This instruction is supported by **Dreier v. Sherwood**, 77 Colo. 539, 238 P. 38 (1925). See also **Jones v. Adkins**, 34 Colo. App. 196, 526 P.2d 153 (1974); 13 SARAH HOWARD JENKINS, CORBIN ON CONTRACTS § 68.7 (Joseph M. Perillo ed., rev. ed. 2003).

30:25 DEFENSE — WAIVER

The defendant, (*name*), is not legally responsible to the plaintiff, (*name*), on the plaintiff's claim of breach of contract if the affirmative defense of waiver is proved. This defense is proved if you find all of the following:

1. The plaintiff knew that the defendant (was required to perform) (had not performed) (his) (her) (its) contractual promise to (*insert appropriate description, e.g., "repair the car within 15 days"*);
2. The plaintiff knew that failure of the defendant to perform this contractual promise gave (him) (her) the right to (*insert appropriate description, e.g., "sue the defendant for damages"*);
3. The plaintiff intended to give up this right; and
4. The plaintiff voluntarily gave up this right.

Notes on Use

1. The appropriate sections of Instruction 3:1 should be given reflecting the evidence in the case.
2. Whenever this instruction is given, Instruction 30:31 (parties' intent), appropriately modified, should also be given.
3. For cases involving the sale of goods, see sections 4-2-209, 4-2-605 to 4-2-608, and 4-2-720, C.R.S., which deal, *inter alia*, with modification, rescission, waiver, the acceptance of goods, and the revocation of acceptance.
4. An effective waiver may be made by an authorized agent. **Stewart v. Breckenridge**, 69 Colo. 108, 169 P. 543 (1917). In such circumstances, this instruction must be modified appropriately. See Chapter 7 instructions as appropriate.

Source and Authority

1. The basic requirements of a waiver as set out in this instruction are supported by **Associates of San Lazaro v. San Lazaro Park Properties**, 864 P.2d 111 (Colo. 1993); **Ewing v. Colorado Farm Mutual Casualty Co.**, 133 Colo. 447, 296 P.2d 1040 (1956); **General Accident Fire & Life Assurance Corp. v. Mitchell**, 128 Colo. 11, 259 P.2d 862 (1953); **Melssen v. Auto-Owners Insurance Co.**, 2012 COA 102, ¶ 39, 285 P.3d 328; **People ex rel. Metzger v. Watrous**, 121 Colo. 282, 215 P.2d 344 (1950); **Glover v. Innis**, 252 P.3d 1204 (Colo. App. 2011); **Universal Resources Corp. v. Ledford**, 961 P.2d 593 (Colo. App. 1998); **Tarco, Inc. v. Conifer Metropolitan District**, 2013 COA 60, ¶ 36, 316 P.3d 82 (bond requirement could not be waived by special district); **James H. Moore & Associates Realty, Inc. v. Arrowhead at Vail**, 892 P.2d 367 (Colo. App. 1994); **Lookout Mountain Paradise Hills Homeowners' Ass'n v. Viewpoint Associates**, 867 P.2d 70 (Colo. App. 1993); **Tripp v.**

Parga, 847 P.2d 165 (Colo. App. 1992) (waiver may be implied from conduct of party); **Grimm Construction Co. v. Denver Board of Water Commissioners**, 835 P.2d 599 (Colo. App. 1992); **Western Cities Broadcasting, Inc. v. Schueller**, 830 P.2d 1074 (Colo. App. 1991) (no waiver of breach of lease provision), *aff'd on other grounds*, 849 P.2d 44 (Colo. 1993); **Ebrahimi v. E.F. Hutton & Co.**, 794 P.2d 1015 (Colo. App. 1989) (waiver of interest on promissory note); **Richmond v. Grabowski**, 781 P.2d 192 (Colo. App. 1989) (conduct not sufficiently free from ambiguity nor a clear enough manifestation of an intent to waive a benefit for there to have been a waiver as a matter of law); **Magliocco v. Olson**, 762 P.2d 681 (Colo. App. 1987) (waiver by tenant of right to receive certain notice under lease; intent to waive may be shown by conduct); **Vogel v. Carolina International, Inc.**, 711 P.2d 708 (Colo. App. 1985) (waiver of right to repossess collateral); **Barker v. Jeremiasen**, 676 P.2d 1259 (Colo. App. 1984); and **World of Sleep, Inc. v. Seidenfeld**, 674 P.2d 1005 (Colo. App. 1983).

2. Other cases recognizing the defense of waiver to an action for breach of contract are **Seale v. Bates**, 145 Colo. 430, 359 P.2d 356 (1961); **Gillett v. Young**, 45 Colo. 562, 101 P. 766 (1909); **McIntire v. Barnes**, 4 Colo. 285 (1878); and **Widner v. Walsh**, 3 Colo. 548 (1877). *See also Sung v. McCullough*, 651 P.2d 447 (Colo. App. 1982) (dealing with waiver of right to terminate a lease upon happening of certain condition).

3. If the plaintiff's claim is for a liquidated sum of money and the alleged waiver goes to the obligation to pay the debt, then, unless the act of waiver also constituted an estoppel by inducing reasonable detrimental reliance on the defendant's part, it appears necessary for an effective waiver that the plaintiff must also have been relieved of some obligations that he or she still owed under the contract. *See* 13 SARAH HOWARD JENKINS, CORBIN ON CONTRACTS § 67.10 (Joseph M. Perillo ed., rev. ed. 2003).

4. Parties may agree to waive statutory rights or benefits, in the absence of statutory prohibitions or countervailing public policy. **Armed Forces Bank, N.A. v. Hicks**, 2014 COA 74, ¶ 28, 365 P.3d 378.

30:26 DEFENSE — STATUTE OF LIMITATIONS

The defendant, (*name*), is not legally responsible to the plaintiff, (*name*), on the plaintiff's claim of breach of contract if the affirmative defense of the expiration of the statute of limitations is proved. This defense is proved if you find both of the following:

1. (*Describe the events that constituted the claimed breach*) occurred before (*insert the appropriate date*); and

2. Plaintiff knew, or should have known, with the exercise of reasonable diligence, of the existence of the (*claimed*) breach before (*insert the appropriate date*).

Notes on Use

1. This instruction should only be given if there is a disputed question of fact that would be proper to submit to the jury, e.g., when the alleged breach occurred. However, when the material facts are undisputed and reasonable persons could not disagree about their import, the questions of when a claim accrues and, consequently, whether a claim is barred by the statute of limitations may be decided by the court as a matter of law. **Jackson v. Am. Family Mut. Ins. Co.**, 258 P.3d 328 (Colo. App. 2011).

2. If an event is claimed to have occurred that would toll the applicable statute and the facts are disputed, this instruction should be appropriately modified. *See, e.g.*, **First Interstate Bank of Denver, N.A. v. Berenbaum**, 872 P.2d 1297 (Colo. App. 1993) (burden on plaintiff to show that statute had been tolled).

Source and Authority

1. This instruction is supported by section 13-80-108, C.R.S.; **Stice v. Peterson**, 144 Colo. 219, 355 P.2d 948 (1960); and **Koon v. Barmettler**, 134 Colo. 221, 301 P.2d 713 (1956).

2. Generally, in breach of contract actions, the statute of limitations is three years. § 13-80-101(1)(a), C.R.S.; *see* **Hersh Cos. Inc. v. Highline Village Assocs.**, 30 P.3d 221 (Colo. 2001) (breach of express warranty governed by three year statute for contracts); **Neuromonitoring Assocs. v. Centura Health Corp.**, 2012 COA 136, ¶ 20, 351 P.3d 486 (claim for amounts not liquidated or determinable within the meaning of § 13-80-103.5(1)(a) governed by the three year statute); **CAMAS Colo., Inc. v. Bd. of Cty. Comm'rs**, 36 P.3d 135 (Colo. App. 2001) (contractor's claims for breach of contract, *quantum meruit*, rescission and restitution for mistake were all governed by three year statute of limitations for contracts). *But see* **Portercare Adventist Health Sys. v. Lego**, 2012 CO 58, ¶ 19, 286 P.3d 525 (six year statute regarding liquidated debt applied to action for unpaid balance for medical services); **BP Am. Prod. Co. v. Patterson**, 185 P.3d 811 (Colo. 2008) (six year limit applies to royalty obligations due under contract, and claim accrues on date the debt is due, not the date breach is discovered); **Jackson**, 258 P.3d at 331 (equitable action for reformation of a contract governed by the three year statute). The statute of limitations for contracts involving the sale of goods is the same. *See*

§ 4-2-725(1), C.R.S. (incorporating the period of limitation set out in section 13-80-101(1)(a), C.R.S.).

3. The defense of statute of limitations is an affirmative defense and the party asserting it has the burdens of pleading and proof. C.R.C.P. 8(c). *But see Berenbaum*, 872 P.2d at 1300-01 (when complaint shows on its face that a claim for fraud was brought more than three years after the alleged fraud and defendant has affirmatively pled the statute of limitations, the burden is on the plaintiff to show the statute has been tolled).

4. A new promise to pay may remove a defense based on the statute of limitations. “Since early common law, it has been universally accepted that a new promise to pay effectively removes the bar of any applicable statute of limitations by creating a new debt, with a new due date, and that a partial payment constitutes an implicit promise to pay.” **Hutchins v. La Plata Mountain Res., Inc.** 2016 CO 45, ¶ 10, 373 P.3d 582, 585; *see also Van Diest v. Towle*, 116 Colo. 204, 179 P.2d 984 (1947).

5. In some instances, a demand or notice may be a condition precedent to creating a cause of action for breach of contract. *See, e.g., Stice*, 144 Colo. at 226-27, 355 P.2d at 953.

30:27 DEFENSE — CANCELLATION BY AGREEMENT

The defendant, (*name*), is not legally responsible to the plaintiff, (*name*), on the plaintiff's claim of breach of contract if the affirmative defense of cancellation by agreement is proved. This defense is proved if you find both of the following:

1. The plaintiff and the defendant had entered into a contract; and
2. Before any party to the contract fully performed all (his) (her) (its) obligations under the contract, (the plaintiff and the defendant) (all the parties to the contract) agreed to cancel the contract.

An agreement to cancel a contract may be oral or in writing, or it may be implied from conduct of the parties.

Notes on Use

1. This instruction should not be used when one party has fully performed or the contract is unilateral (promise for an act), rather than bilateral (mutual promises).
2. Use whichever parenthesized words are appropriate.
3. This instruction must be appropriately modified if either the plaintiff or the defendant was not an original party to the contract. Also, appropriate modifications must be made if the contract involved third-party beneficiaries. *See* 13 SARAH HOWARD JENKINS, CORBIN ON CONTRACTS § 67.8 (Joseph M. Perillo ed., rev. ed. 2003).
4. A rescission by mutual consent may be established by showing that the parties, by their conduct, impliedly agreed to abandon their contract. When there is sufficient evidence of such an implied agreement, this instruction should be appropriately modified. For abandonment, the acts and conduct of the parties must be positive, unequivocal, and inconsistent with any intent to continue to be bound by the contract, for example, by one party's regularly acquiescing in acts of the other party that are inconsistent with the continued existence of the contract. **In re Marriage of Young**, 682 P.2d 1233 (Colo. App. 1984) (discussing earlier cases and holding that the rules of abandonment are as applicable to antenuptial agreements as they are to other contracts); *see also* **Harrison v. Albright**, 40 Colo. App. 227, 577 P.2d 302 (1977) (evidence of abandonment insufficient; parties' conduct consistent with the continued existence of their contract).

Source and Authority

1. This instruction is supported by **Western Air Lines v. Hollenbeck**, 124 Colo. 130, 235 P.2d 792 (1951) (citing earlier cases); and **Wallick v. Eaton**, 110 Colo. 358, 134 P.2d 727 (1943) (the discharge by one party of the other's obligation under a contract is sufficient consideration for the other's promise to discharge him). *See also* **Esecson v. Bushnell**, 663 P.2d 258, 261 (Colo. App. 1983) ("Mutual rescission requires assent . . . by *both* parties. . . . One party to an executory contract, in the absence of fraud or a special reason, cannot rescind. . . . [A]n agreement to rescind . . . requires a 'meeting of the minds' with 'the clear knowledge and

understanding of the parties’ . . . Where mutual rescission is founded on the acts and conduct of the parties, . . . such acts must be ‘inconsistent with the existence of the contract.’” (quoting **Western Air Lines**, 124 Colo. at 137-38, 235 P.2d at 796, and **Cruse v. Clawson**, 352 P.2d 989, 994 (Mont. 1960))).

2. In determining whether there is an agreement to rescind a contract, a meeting of the minds to rescind is evidenced by the objective acts, conduct and words of the parties and the subjective intent of the parties is immaterial. **Avemco Ins. Co. v. N. Colo. Air Charter, Inc.**, 38 P.3d 555 (Colo. 2002) (where insured voluntarily cashed premium check with knowledge that purpose of check was to effectuate a rescission of insurance policy, the subjective intent of insured not to rescind policy was immaterial and a rescission of the policy occurred); *see also* **Equitable Life Ins. Co. of Iowa v. Verploeg**, 123 Colo. 246, 227 P.2d 333 (1951).

3. For cases involving the sale of goods, see sections 4-2-209 (rescission, modification, and waiver) and 4-2-720, C.R.S. (effect of “cancellation” or “rescission” on claims for antecedent breach).

4. An agreement of rescission is an affirmative defense for which the party asserting it has the burdens of pleading and proof. C.R.C.P. 8(c).

5. For special requirements for a claim of renunciation of negotiable instruments, see **Glover v. Innis**, 252 P.3d 1204 (Colo. App. 2011) (defense of renunciation of a negotiable instrument under section 4-3-604, C.R.S., includes elements similar to but not the same as those of the affirmative defense of waiver).

30:28 DEFENSE — ACCORD AND SATISFACTION (LATER CONTRACT)

The defendant, (*name*), is not legally responsible to the plaintiff, (*name*), on the plaintiff's claim of breach of contract if the affirmative defense of accord and satisfaction ("later contract") is proved. This defense is proved if you find all of the following:

1. After the defendant and the plaintiff had entered into the (claimed) contract in this case, they entered into a later contract;

2. The plaintiff and the defendant knew or reasonably should have known that the later contract cancelled or changed their remaining rights and duties under the (claimed) earlier contract(s); and

3. The defendant has fully performed the (duty) (duties) (he) (she) (it) agreed to perform under the later contract.

Notes on Use

1. Use whichever parenthesized words are appropriate to the evidence in the case.

2. Accord and satisfaction is an affirmative defense for which the party asserting it has the burdens of pleading and proof. C.R.C.P. 8(c). For ease of jury understanding of the affirmative defense of accord and satisfaction, the term "later contract" is suggested by the Committee.

3. Other instructions closely related to the subject matter of this instruction that may also be applicable or be more appropriate in certain cases are Instructions 30:8 (modification); 30:24 (inducing breach); 30:25 (waiver); and 30:27 (cancellation by agreement).

4. An executory accord, that is, a situation where the satisfaction promised under the new contract has not been rendered, does not bar recovery on the original obligation unless there is specific wording to that effect in the new contract. **Hinkle v. Basic Chem. Corp.**, 163 Colo. 408, 431 P.2d 14 (1967); **Bakehouse & Assocs., Inc. v. Wilkins**, 689 P.2d 1166, 1168 (Colo. App. 1984) ("An agreement to modify an existing agreement, i.e., an executory accord, does not extinguish the original obligation, but suspends performance of that obligation until the accord is breached or satisfied."). Consequently, in those cases, this instruction should not be given unless the instruction is appropriately modified, and, as modified, there is sufficient supporting evidence. *But see* **Caldwell v. Armstrong**, 642 P.2d 47 (Colo. App. 1981) (because accord and satisfaction substantially performed, plaintiff only entitled to damages for remaining part of performance due under the accord). "The general rule is that the underlying duty or debt is not discharged until there is satisfaction on the accord. That is, the accord is executory." *Id.* at 49.

5. This instruction has been drafted to cover the defense of accord and satisfaction generally. In many cases, however (see, e.g., cases cited below in Source and Authority), the situation will be one where it is claimed that the defendant made a payment to the plaintiff with the parties' understanding that it was to be in full satisfaction of the contractual claim the plaintiff was asserting against the defendant. In those cases the more specific instruction,

appropriately modified if necessary, approved by the court in **Gardner v. Mid-Continent Coal & Coke Co.**, 149 Colo. 122, 368 P.2d 204 (1962), should be used rather than this instruction.

6. This instruction is not applicable where the claim allegedly satisfied was for a liquidated debt and the only thing given in accord was a lesser sum of money. *See* 13 SARAH HOWARD JENKINS, CORBIN ON CONTRACTS § 69.1 (Joseph M. Perillo ed., rev. ed. 2003).

Source and Authority

1. This instruction is supported by **United States Welding, Inc. v. Advanced Circuits, Inc.**, 2018 CO 56, ¶ 11, 420 P.3d 278, 281 (“A party to a contract may, of course, make an offer for an accord which, if accepted and satisfied, would absolve it of its obligations under the original contract.”); **Hudson v. American Founders Life Insurance Co.**, 151 Colo. 54, 377 P.2d 391 (1962) (citing earlier cases); **Pospicil v. Hammers**, 148 Colo. 207, 365 P.2d 228 (1961); and **Pitts v. National Independent Fisheries Co.**, 71 Colo. 316, 318, 206 P. 571, 571 (1922) (“In order to constitute an accord and satisfaction, it is necessary that the money should be offered in full satisfaction of the demand, and be accompanied by such acts and declarations as amount to a condition that the money, if accepted, is accepted in satisfaction; and it must be such that the party to whom it is offered is bound to understand therefrom that, if he takes it, he takes it subject to such conditions.”). *See also* **Anderson v. Rosebrook**, 737 P.2d 417 (Colo. 1987) (holding that section 4-1-207, C.R.S., of the Uniform Commercial Code, dealing with reservation of rights, does not alter the common-law rule of accord and satisfaction quoted above); **R.A. Reither Constr., Inc. v. Wheatland Rural Elec. Ass’n**, 680 P.2d 1342 (Colo. App. 1984) (same).

2. This instruction is also supported by CORBIN ON CONTRACTS, *supra*, at § 69; and RESTATEMENT (SECOND) OF CONTRACTS § 281 (1981).

3. An accord and satisfaction based on a mistaken belief as to a material fact is not effective. **Metro. State Bank v. Cox**, 134 Colo. 260, 302 P.2d 188 (1956).

4. For cases involving the sale of goods, see sections 4-2-209 (modification, rescission, and waiver) and 4-2-720, C.R.S. (effect of “cancellation” or “rescission” on claims for antecedent breach).

30:29 DEFENSE — NOVATION

A novation is a new (valid) contract that replaces (a previous valid contract) (an existing obligation with a new obligation) (an original party with a new party). For there to be a novation, the original (obligation) (party) must be completely replaced.

Notes on Use

1. Use whichever parenthesized words are appropriate to the evidence in the case.
2. Other instructions closely related to the subject matter of this instruction that may also be applicable or be more appropriate in certain cases are Instructions 30:8 (modification), 30:24 (inducing breach), 30:25 (waiver), and 30:27 (cancellation by agreement).

Source and Authority

1. This instruction is supported by **Phoenix Power Partners, L.P. v. Colorado Public Utilities Commission**, 952 P.2d 359 (Colo. 1998); **Moffat County State Bank v. Told**, 800 P.2d 1320 (Colo. 1990); **Haan v. Traylor**, 79 P.3d 114 (Colo. App. 2003); and **In re Buwana**, 338 B.R. 441 (Bankr. D. Colo. 2004).
2. Modification of a contract without the intent to replace the previous contract or obligation is not enough for novation. **Told**, 800 P.2d at 1323.
3. The parties need not expressly manifest their intent to accomplish novation, but novation may be inferred from facts and circumstances surrounding transaction. “It is not necessary that all these elements be established in writing or evidenced by express words but they may be proved as inferences from the acts and conduct of the parties and from other acts and circumstances.” **Cardwell Inv. Co. v. United Supply & Mfg. Co.**, 268 F.2d 857, 859 (10th Cir. 1959).

D. CONTRACT INTERPRETATION

Introductory Note

1. Generally, the interpretation of a written contract is a question of law for the court. **Klun v. Klun**, 2019 CO 46, ¶ 18, 442 P.3d 88, 92 (“contract interpretation presents a question of law that we review de novo”); **Sch. Dist. No. 1 v. Denver Classroom Teachers Ass’n**, 2019 CO 5, ¶ 14, 433 P.3d 38, 41 (“If the contract is complete and free from ambiguity, we deem it to represent the parties’ intent and enforce it based on the plain and generally accepted meaning of the words used.”); **Rocky Mountain Expl., Inc. v. Davis Graham & Stubbs LLP**, 2018 CO 54, ¶ 59, 420 P.3d 223; **Ad Two, Inc. v. City & County of Denver**, 9 P.3d 373 (Colo. 2000); **Radiology Prof’l Corp. v. Trinidad Area Health Ass’n**, 195 Colo. 253, 577 P.2d 748 (1978). The primary goal of interpreting a contract is to determine and give effect to the intent of the parties. **USI Props. East, Inc. v. Simpson**, 938 P.2d 168 (Colo. 1997). Where possible, the intent of the parties is to be determined from the language of the written contract itself. *Id.*

2. However, extrinsic evidence may be conditionally admitted to determine whether a contract is ambiguous. **Lazy Dog Ranch v. Telluray Ranch Corp.**, 965 P.2d 1229 (Colo. 1998) (rejecting rigid application of “four corners” rule); *accord* **East Ridge of Fort Collins, LLC v. Larimer & Weld Irrigation Co.**, 109 P.3d 969 (Colo. 2005); **Lobato v. Taylor**, 71 P.3d 938 (Colo. 2002) (fact that extrinsic evidence may reveal ambiguities in contract is especially true when interpreting ancient document). Moreover, a contract must be interpreted in light of the context and circumstances of the transaction. **First Christian Assembly of God v. City & County of Denver**, 122 P.3d 1089 (Colo. App. 2005).

3. An insurance policy is a contract, and courts must enforce the plain language of a policy if it is unambiguous. **Craft v. Philadelphia Indem. Ins. Co.**, 2015 CO 11, ¶ 34, 343 P.3d 951. But ambiguous language must be construed in favor of the insured. **Renfandt v. N.Y. Life Ins. Co.**, 2018 CO 49, ¶ 18, 419 P.3d 576, 580 (“Where general language in an insurance contract is ambiguous, we construe it against the insurer.”).

4. The determination of whether an ambiguity exists in a written contract is also a question of law for the court. **Nat’l Cas. Co. v. Great Sw. Fire Ins. Co.**, 833 P.2d 741 (Colo. 1992). The provisions of a contract are ambiguous when they are susceptible to more than one reasonable interpretation. **Am. Family Mut. Ins. Co. v. Hansen**, 2016 CO 46, ¶ 23, 375 P.3d 115 (listing of names of insureds on declarations page was unambiguous); **Union Ins. Co. v. Houtz**, 883 P.2d 1057 (Colo. 1994); **Ballow v. PHICO Ins. Co.**, 875 P.2d 1354 (Colo. 1993). The fact that the parties may have different opinions regarding the interpretation of a contract does not itself mean that the contract is ambiguous, *see* **Filatov v. Turnage**, 2019 COA 120, ¶ 14 (“While the parties agree that these provisions are unambiguous, they disagree as to how they should be interpreted.”); **Mashburn v. Wilson**, 701 P.2d 67 (Colo. App. 1984), but the court may conclude that a contract is ambiguous even if the parties did not so argue. **Gagne v. Gagne**, 2014 COA 127, ¶¶ 50, 60, 338 P.3d 1152 (holding that terms in a disputed contract were subject to “a myriad of reasonable interpretations”). The court “should not allow a hyper-technical reading of the language in a contract to defeat the intention of the parties.” **Ad Two, Inc.**, 9 P.3d at 377.

5. Consequently, the instructions in this Part D apply only in cases involving written contracts that are ambiguous, where reasonable persons might reasonably differ as to how the ambiguity should be resolved, or where the provisions of an oral contract are in dispute. Once a contract term is found to be ambiguous, its meaning is a question of fact to be determined in the same manner as other questions of fact. **Sch. Dist. No. 1**, 2019 CO 5, ¶ 14 (“‘[I]f it is fairly susceptible to more than one interpretation,’ [a] contract is ambiguous and ‘the meaning of its terms is generally an issue of fact to be determined in the same manner as other disputed factual issues.’” (quoting **Dorman v. Petrol Aspen, Inc.**, 914 P.2d 909, 912 (Colo. 1996))); **Dorman**, 914 P.2d at 912; **Preserve at the Fort, Ltd. v. Prudential Huntoon Paige Assocs.**, 129 P.3d 1015 (Colo. App. 2004); **D.C. Concrete Mgmt., Inc. v. Mid-Century Ins. Co.**, 39 P.3d 1205 (Colo. App. 2001). In those cases, it is the court’s function to determine what legal significance should be given to the various possible reasonable meanings from which the jury might determine the correct one, and the court should inform the jury in other instructions what they are to do if they find that the parties meant one interpretation as opposed to another.

6. The primary aim in contract interpretation is to determine what the parties intended, and every word in an instrument is to be given meaning if at all possible. **Fed. Deposit Ins. Corp. v. Fisher**, 2013 CO 5, ¶ 11, 292 P.3d 934.

7. For a discussion as to whether an objective or subjective standard should be applied to a contract that is to be completed to the satisfaction of one of the parties, see **Crum v. April Corp.**, 62 P.3d 1039 (Colo. App. 2002).

8. For a discussion of contractual conditions implied in fact or by law, see **Lane v. Urgitis**, 145 P.3d 672 (Colo. 2006).

30:30 CONTRACT INTERPRETATION — DISPUTED TERM

(Plaintiff) (Defendant) disputes the meaning of the following term contained in the contract:

(insert text of the term)

(Plaintiff) (Defendant) claims that the term means *(insert proposed interpretation of the term)*. **On the other hand, (plaintiff) (defendant) claims that the term means** *(insert proposed interpretation of the term)*.

Notes on Use

1. When the court has determined the contract term is ambiguous or there is an oral contract where the terms are disputed, this instruction should be used. *See* Introductory Note to Part D of this Chapter; *see also* C.R.C.P. 38(a) (“all issues of fact shall be tried by a jury”).

2. This instruction supplements Instruction 2:1 in that it provides an introduction to the specific issues of the disputed terms of the contract and introduces the instructions to the jury for deciding those issues.

3. Instruction 30:31 (parties’ intent), must be given with this Instruction. Other instructions contained in Part D of this Chapter should be considered and used as necessary to instruct on the interpretation of the contract.

Source and Authority

This instruction is supported by **School District No. 1 v. Classroom Teachers Ass’n**, 2019 CO 5, ¶ 23, 433 P.3d 38, 43 (“We conclude that the court of appeals correctly decided that it was proper to submit the interpretation of the CBAs as an issue of fact to the jury because the CBAs are ambiguous regarding payment for ELA training.”); and **Dorman v. Petrol Aspen, Inc.**, 914 P.2d 909 (Colo. 1996) (the meaning of ambiguous contractual terms is generally an issue of fact).

30:31 CONTRACT INTERPRETATION — PARTIES' INTENT

The statements or conduct of the parties before any dispute arose between them is an indication of what the parties intended at the time the contract was formed.

To determine what the parties intended the terms of the contract to mean, you may also consider the language of the written agreement, the parties' negotiations of the contract, any earlier dealings between the parties, any reasonable expectations the parties may have had because of the promises or conduct of the other party, and any other facts or circumstances that existed at the time that the contract was formed.

Notes on Use

1. When the court has determined that a contract term is ambiguous or there is an oral contract where the terms are in dispute, contract interpretation is a jury issue and this instruction should be used. *See* Introductory Note to Part D of this Chapter.

2. If there is evidence in the case on other issues that would be improper for the jury to consider on the issue of interpretation, this instruction must be appropriately modified.

Source and Authority

1. This instruction is supported by **Condo v. Connors**, 266 P.3d 1110 (Colo. 2011) (in interpreting a contract the court's primary goal is to determine and effectuate the reasonable expectations of the parties); and **Draper v. DeFrenchi-Gordineer**, 282 P.3d 489 (Colo. App. 2011) (the primary goal of contract interpretation is to give effect to the intent of the parties, which is to be determined primarily from the language of the agreement). *See also* **Nahring v. City & County of Denver**, 174 Colo. 548, 484 P.2d 1235 (1971); **Thompson v. McCormick**, 149 Colo. 465, 370 P.2d 442 (1962); **Hammond v. Caton**, 121 Colo. 7, 212 P.2d 845 (1949) (any evidence showing the parties' intent is important in interpreting their contract); **Cohen v. Clayton Coal Co.**, 86 Colo. 270, 281 P. 111 (1929); **Erdenberger, Inc. v. Partek N. Am., Inc.**, 865 P.2d 850 (Colo. App. 1993); **Colo. Interstate Gas Co., Inc. v. Chemco, Inc.**, 833 P.2d 786 (Colo. App. 1991), *aff'd on other grounds*, 854 P.2d 1232 (Colo. 1993); **Smith v. Long**, 40 Colo. App. 531, 578 P.2d 232 (1978); **Palipchak v. Kent Constr. Co.**, 38 Colo. App. 146, 554 P.2d 718 (1976); 5 MARGARET N. KNIFFIN, CORBIN ON CONTRACTS § 24.16 (Joseph M. Perillo ed., rev. ed. 1998).

2. Extrinsic evidence of the parties' performance under a contract before any controversy arose is indicative of their intent at the time of contracting. **Klun v. Klun**, 2019 CO 46, ¶ 29, 442 P.3d 88, 94 ("Plaintiffs' contemporaneous actions and course of performance speak louder than their post-judgment words."); **Pepcol Mfg. v. Denver Union Corp.**, 687 P.2d 1310 (Colo. 1984).

3. Where the face of the contract shows a change, such as strike-outs, the terms may be proven by evidence outside the contract. **Hildebrand v. New Vista Homes II, LLC**, 252 P.3d 1159 (Colo. App. 2010). In cases involving an ambiguity in a written contract, the jury's

function is to determine the intention of the parties as a question of fact. **Fire Ins. Exch. v. Rael**, 895 P.2d 1139 (Colo. App. 1995). Determining the parties' intent from the circumstances surrounding the execution of a contract is the primary method for determining the meaning of an ambiguous term.

4. The conduct of the parties may not be used to contradict the contract's plain, unambiguous meaning. **Great W. Sugar Co. v. White**, 47 Colo. 547, 108 P. 156 (1910).

5. Insurance policies are contracts, the unambiguous terms of which must be enforced as written, unless doing so would violate public policy. **Travelers Prop. Cas. Co. of Am. v. Stresscon Corp.**, 2016 CO 22M, ¶ 12, 370 P.3d 140; **Allstate Ins. Co. v. Huizar**, 52 P.3d 816 (Colo. 2002) (insurance contracts must be construed according to well-settled principles of contract interpretation); **Novell v. Am. Guar. & Liab. Ins. Co.**, 15 P.3d 775 (Colo. App. 1999); **Mt. Hawley Ins. Co. v. Casson Duncan Constr. Inc.**, 2016 COA 164, ¶ 15, 409 P.3d 619 (policy provision requiring insurer to pay "all costs" when defending a suit against its insured under reservation of rights was not ambiguous; insurer was required to pay taxable costs regardless of duty to indemnify). However, if an insurance contract is ambiguous, it must be construed against the insurer. **Cary v. United of Omaha Life Ins. Co.**, 108 P.3d 288 (Colo. 2005); **Cruz v. Farmers Ins. Exch.**, 12 P.3d 307 (Colo. App. 2000); **Bengtson v. USAA Prop. & Cas. Ins.**, 3 P.3d 1233 (Colo. App. 2000); **Novell**, 15 P.3d at 778. *See* Instruction 30:35 (construction against drafter).

6. Generally, unless unequivocal language mandates otherwise, a contractual clause will be interpreted as a promise rather than as a condition precedent. **Main Elec., Ltd. v. Printz Servs. Corp.**, 980 P.2d 522 (Colo. 1999).

7. A fundamental rule of contract interpretation is that the latest iteration of contractual terms controls. *See* **Fed. Deposit Ins. Corp. v. Fisher**, 2013 CO 5, ¶ 11, 292 P.3d 934.

30:32 CONTRACT INTERPRETATION — CONTRACT AS A WHOLE

The entire agreement (with any attachments) is to be considered in determining the existence or nature of the contractual duties. You should consider the agreement as a whole and not view clauses or phrases in isolation.

Notes on Use

1. When the court has determined the contract term is ambiguous or there is an oral contract where the terms are in dispute, contract interpretation is a jury issue and this instruction should be used. *See* Introductory Note to Part D of this Chapter.

2. Instruction 30:30 (disputed term) and Instruction 30:31 (parties' intent) should be given with this instruction, along with any other instructions in this chapter that are appropriate for the case.

Source and Authority

1. This instruction is supported by **Federal Deposit Insurance Corp. v. Fisher**, 2013 COA 5, ¶ 11, 292 P.3d 934; **Allstate Insurance Co. v. Huizar**, 52 P.3d 816, 819 (Colo. 2002) (“[T]he meaning of a contract must be determined by examination of the entire instrument, and not by viewing clauses or phrases in isolation.”); and **Randall & Blake, Inc. v. Metro Wastewater Reclamation District**, 77 P.3d 804, 806 (Colo. App. 2003) (“[D]ocuments executed together as part of a single transaction should be considered together in ascertaining the intent of the parties.”).

2. Covenants and other recorded instruments, like contracts, should be construed as a whole “seeking to harmonize and give effect to all provisions so that none will be rendered meaningless.” **Pulte Home Corp. v. Countryside Cmty. Ass’n, Inc.**, 2016 CO 64, ¶ 23, 382 P.3d 821, 826.

30:33 CONTRACT INTERPRETATION — ORDINARY MEANING

Words or phrases not defined in a contract should be given their plain, ordinary, and generally accepted meaning.

Notes on Use

1. When the court has determined the contract term is ambiguous or there is an oral contract where the terms are in dispute, contract interpretation is a jury issue and this instruction should be used. *See* Introductory Note to Part D of this Chapter.

2. Instruction 30:30 (disputed term) and Instruction 30:31 (parties' intent) should be given with this instruction, along with any other instructions in this Chapter that are appropriate for the case.

Source and Authority

This instruction is supported by **Columbus Investments v. Lewis**, 48 P.3d 1222 (Colo. 2002); **Allstate Insurance Co. v. Huizar**, 52 P.3d 816 (Colo. 2002) (interpretation of insurance contracts); **Copper Mountain, Inc. v. Industrial Systems, Inc.**, 208 P.3d 692 (Colo. 2009); and **Smith v. State Farm Mutual Automobile Insurance Co.**, 2017 COA 6, ¶ 21, 399 P.3d 771, 776 (“The plain meaning therefore does not support limiting the policy definition to vehicles ‘primarily’ designed for driving on streets or highways.”).

30:34 CONTRACT INTERPRETATION — USE OF TECHNICAL WORDS IN A CONTRACT

When a contract uses words or phrases from a trade or technical field, those words or phrases should be given their usual meaning in that trade or technical field.

Notes on Use

1. When the court has determined the contract term is ambiguous or used in a special or technical sense, contract interpretation is a jury issue and this instruction should be used. *See* Introductory Note to Part D of this Chapter.

2. Instruction 30:30 (disputed term) and Instruction 30:31 (parties' intent) should be given with this instruction, along with any other instructions in this Chapter that are appropriate for the case.

Source and Authority

1. This instruction is supported by **Washington County Board of Equalization v. Petron Development Co.**, 109 P.3d 146 (Colo. 2005); **KN Energy, Inc. v. Great Western Sugar Co.**, 698 P.2d 769 (Colo. 1985) (a trial court may not look beyond the plain words of a contract to interpret the parties' underlying intent unless the contract terms are ambiguous or used in a special or technical sense not defined by in the contract); **Town of Silverton v. Phoenix Heat Source System, Inc.**, 948 P.2d 9 (Colo. App. 1997); and RESTATEMENT (SECOND) OF CONTRACTS § 202 (1981).

2. When parties are engaged in a trade or technical field, “[u]nless a different intention is manifested . . . technical terms and words of art are given their technical meaning when used in a transaction within their technical field.” RESTATEMENT (SECOND) OF CONTRACTS § 202(3)(b) (1981); *see* **Bledsoe Land Co. LLLP v. Forest Oil Corp.**, 277 P.3d 838 (Colo. App. 2011); David E. Pierce, *Defining the Role of Industry Custom and Usage in Oil & Gas Litigation*, 57 SMU L. REV. 387, 402 (2004).

3. Technical meanings refer to terms with a unique definition within a specific industry, or to legal terms of art. *See, e.g.*, **Petron Dev. Co.**, 109 P.3d at 153 (“wellhead” has technical meaning in oil and gas industry); **Armentrout v. FMC Corp.**, 842 P.2d 175 (Colo. 1992) (“defective” has technical meaning in product liability cases); **People v. Macrander**, 828 P.2d 234 (Colo. 1992) (“attorney of record” is a legal term of art), *overruled on other grounds by* **People v. Novotny**, 2014 CO 18, ¶ 2, 320 P.3d 1194; **DISH Network Corp. v. Altomari**, 224 P.3d 362 (Colo. App. 2009) (nothing in the record or the statute suggests that “management personnel” has a technical meaning as a word of art in its field that may conflict with its common usage).

30:35 CONTRACT INTERPRETATION — CONSTRUCTION AGAINST DRAFTER

Any dispute over the meaning of any unclear terms must be decided against the party who prepared the contract if the other party had no opportunity to select the words written in the contract.

Notes on Use

1. When the court has determined the contract term is ambiguous or there is an oral contract where the terms are in dispute, contract interpretation is a jury issue and this instruction should be used. *See* Introductory Note to Part D of this Chapter.

2. Instruction 30:30 (disputed term) and Instruction 30:31 (parties' intent) should be given with this instruction, along with any other instructions in this Chapter that are appropriate for the case.

3. This instruction should not be given unless it appears other rules of interpretation about which the jury is instructed are likely to be unavailing. **Patterson v. Gage**, 11 Colo. 50, 16 P. 560 (1888).

Source and Authority

This instruction is supported by **Christmas v. Cooley**, 158 Colo. 297, 406 P.2d 333 (1965). *See also* **Compass Ins. Co. v. City of Littleton**, 984 P.2d 606 (Colo. 1999); **Elliott v. Joyce**, 889 P.2d 43 (Colo. 1994); **U.S. Fid. & Guar. Co. v. Budget Rent-A-Car Sys., Inc.**, 842 P.2d 208 (Colo. 1992); **Am. Family Mut. Ins. Co. v. Johnson**, 816 P.2d 952 (Colo. 1991); **Kuta v. Joint Dist. No. 50(J)**, 799 P.2d 379 (Colo. 1990); **Converse v. Zinke**, 635 P.2d 882 (Colo. 1981); **Grossman v. Sherman**, 198 Colo. 359, 599 P.2d 909 (1979); **Sherman Agency v. Carey**, 195 Colo. 277, 577 P.2d 759 (1978); **Sunshine v. M.R. Mansfield Realty, Inc.**, 195 Colo. 95, 575 P.2d 847 (1978); **Perl-Mack Enters. Co. v. City & County of Denver**, 194 Colo. 4, 568 P.2d 468 (1977); **Gardner v. City of Englewood**, 131 Colo. 210, 282 P.2d 1084 (1955); **Owners Ins. Co. v. Dakota Station II Condo. Ass'n**, 2017 COA 103, ¶ 21 (*cert. granted* Feb. 20, 2018); **D.C. Concrete Mgmt., Inc. v. Mid-Century Ins. Co.**, 39 P.3d 1205 (Colo. App. 2001); **Valdez v. Cantor**, 994 P.2d 483 (Colo. App. 1999); **State Farm Mut. Auto. Ins. Co. v. Bencomo**, 873 P.2d 47 (Colo. App. 1994); **Bassett v. Eagle Telecomms., Inc.**, 708 P.2d 812 (Colo. App. 1985) (this instruction correctly states the law; proper to give the instruction when necessary to resolve a fact question and it is supported by sufficient evidence).

30:36 CONTRACT INTERPRETATION — SPECIFIC AND GENERAL CLAUSES

Where there is an inconsistency between general and specific provisions in a contract, the specific provisions express more exactly what the parties intended.

Notes on Use

1. When the court has determined the contract term is ambiguous or there is an oral contract where the terms are in dispute, contract interpretation is a jury issue and this instruction should be used. *See* Introductory Note to Part D of this Chapter.

2. Instruction 30:30 (disputed term) and Instruction 30:31 (parties' intent) should be given with this instruction, along with any other instructions in this Chapter that are appropriate for the case.

Source and Authority

This instruction is supported by **Denver Joint Stock Land Bank v. Markham**, 106 Colo. 509, 107 P.2d 313 (1940); and **Holland v. Board of County Commissioners**, 883 P.2d 500 (Colo. App. 1994).

E. DAMAGES

Introductory Note

1. Generally the measure of damages is a question of fact for the jury, and once the fact of damages has been proved, uncertainty as to amount will not bar recovery if there is a reasonable basis for computation. **Tull v. Gundersons, Inc.**, 709 P.2d 940 (Colo. 1985) (once the fact of damage has been proved, uncertainty as to the amount will not bar recovery, and the burden of proof of the fact of damage is by a preponderance of the evidence); **Colo. Nat'l Bank v. Ashcraft**, 83 Colo. 136, 263 P. 23 (1927); **Westesen v. Olathe State Bank**, 75 Colo. 340, 225 P. 837 (1924); **Richner v. Plateau Live Stock Co.**, 44 Colo. 302, 98 P. 178 (1908); **City of Westminster v. Centric-Jones Constructors**, 100 P.3d 472 (Colo. App. 2003); **Roberts v. Adams**, 47 P.3d 690 (Colo. App. 2001) (for damages to be recoverable, the evidence must provide a reasonable basis for their computation); **Wilson & Co. v. Walsenburg Sand & Gravel Co., Inc.**, 779 P.2d 1386 (Colo. App. 1989); **Overland Dev. Co. v. Marston Slopes Dev. Co.**, 773 P.2d 1112 (Colo. App. 1989) (to be recoverable, losses must have been caused by the breach); **Bennett v. Price**, 692 P.2d 1138 (Colo. App. 1984) (prices at which similar residential property is listed on the market is insufficient evidence to establish market value); **Tighe v. Kenyon**, 681 P.2d 547 (Colo. App. 1984).

2. Future damages may be awarded if there exists sufficient evidence to provide a reasonable basis for computation. **Pomeranz v. McDonald's Corp.**, 843 P.2d 1378 (Colo. 1993) (in breach of contract action involving future damages, rule of certainty requires that plaintiff prove that damages will in fact accrue in the future and provide sufficient admissible evidence to enable trier of fact to compute a fair approximation of loss); **Interbank Invs. L.L.C. v. Vail Valley Consol. Water Dist.**, 12 P.3d 1224 (Colo. App. 2000); *see also* **Riggs v. McMurtry**, 157 Colo. 33, 400 P.2d 916 (1965) (evidence must provide reasonable basis for computation of damages); **McDonald's Corp. v. Brentwood Ctr., Ltd.**, 942 P.2d 1308 (Colo. App. 1997) (lost profits may not be awarded if they are speculative, remote, imaginary, or impossible to ascertain).

3. If future damages cannot be proven with a reasonable certainty, the jury may award a measure of damages that would place the injured party in the same position had the contract never been made, limited by the contract price. **HMO Sys., Inc. v. Choicecare Health Servs., Inc.**, 665 P.2d 635 (Colo. App. 1983). A jury may not award both types of damages if the result would be to put the injured person in a better position than the injured person would have been in had the contract been performed. RESTATEMENT (SECOND) OF CONTRACTS § 349 (1981) (“As an alternative to the measure of damages stated in section 347, the injured party has the right to damages based on his reliance interest, including expenditures made in preparation for performance or in performance, less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed.”).

4. Where the jury awards damages for a breach, any set-offs for amounts received from other parties should first be deducted before any adjustments are made to enforce contractual limitations on liability. **Taylor Morrison of Colo., Inc. v. Terracon Consultants, Inc.**, 2017 COA 64, ¶¶ 31-35, 410 P.3d 767.

5. As to when a plaintiff may be entitled to recover interest on damages for breach of contract, and at what rate, see generally sections 5-12-102 and 5-12-103, C.R.S. To be entitled to interest, the damages on which interest may be calculated need not necessarily be liquidated. *See* § 5-12-102(1)(a), (3); **Jasken v. Sheehy Constr. Co.**, 642 P.2d 58 (Colo. App. 1982) (construing and applying section 5-12-102(1)(a)); *see also* **Ferrellgas, Inc. v. Yeiser**, 247 P.3d 1022 (Colo. 2011) (analyzing setoff and interest calculation under section 5-12-102); **Ballow v. PHICO Ins. Co.**, 878 P.2d 672, 684 (Colo. 1994) (“Section 5-12-102(1)(b) is to be liberally construed to permit recovery of prejudgment interest on money or property wrongfully withheld.”); **Safeco Ins. Co. v. Westport Ins. Corp.**, 214 P.3d 1078 (Colo. App. 2009) (section 5-12-102(1) applies to equitable claim for contribution by insurer against other carriers that had wrongfully withheld their fair share of total due to insured); **Kennedy v. Gillam Dev. Corp.**, 80 P.3d 927 (Colo. App. 2003) (buyers who succeeded on claim to rescind contract to purchase home were entitled to recover prejudgment interest and sellers were entitled to offset value of buyers’ use of property); **Logixx Automation, Inc. v. Lawrence Michels Family Trust**, 56 P.3d 1224 (Colo. App. 2002) (interest calculation begins at time breach of contract occurs rather than at time damages accrue).

6. Under section 5-12-102(1)(a) and (b), unless there is an agreement as to the rate of interest, the statutory rate of interest applies to prejudgment interest on damages recovered for money or property wrongfully withheld, in the absence of proof under section 5-12-102(1)(a) that a greater gain or benefit was realized by the person withholding the money or property. *See* **Goodyear Tire & Rubber Co. v. Holmes**, 193 P.3d 821 (Colo. 2008) (in strict liability case, interest due from time homeowner replaced defective heating system); **Mesa Sand & Gravel Co. v. Landfill, Inc.**, 776 P.2d 362 (Colo. 1989) (also interpreting statutory phrase “wrongfully withheld”); **Harris Grp., Inc. v. Robinson**, 209 P.3d 1188 (Colo. App. 2009) (amount of prejudgment interest on lost profits through the verdict date must be ascertained with reasonable certainty, though difficult where verdict form does not separate past and future losses); **Butler v. Lembeck**, 182 P.3d 1185 (Colo. App. 2007) (analyzing interest on damages awarded tenant in dispute with landlord); **Alfred Brown Co. v. Johnson-Gibbons & Reed W. Paving-Kemper**, 695 P.2d 746 (Colo. App. 1984); **Prospero Assocs. v. Redactron Corp.**, 682 P.2d 1193 (Colo. App. 1983). “Conventional interest as a matter of contract and statutory prejudgment interest on particular kinds of damage awards are to be distinguished from moratory interest. Moratory interest is an element of damage in itself which is allowed as compensation for the detention and use of money . . . [and its allowance] is a matter committed to the sound discretion of [the] court in consideration of the equities of [the] case.” **E.B. Jones Constr. Co. v. City & County of Denver**, 717 P.2d 1009, 1014-15 (Colo. App. 1986). *But see* § 5-12-102(1)(a)–(b) (appearing to authorize moratory interest, so defined, as statutory interest); **Farmers Reservoir & Irr. Co. v. City of Golden**, 113 P.3d 119 (Colo. 2005) (whether attorney fees are classified as “costs” or “damages” for purpose of awarding moratory interest depends on context of case and rests within discretion of trial court); **Great W. Sugar Co. v. KN Energy, Inc.**, 778 P.2d 272 (Colo. App. 1989) (discussing legislative purpose in enacting section 5-12-102(1)(a)).

7. To constitute a “wrongful withholding” of money or property under section 5-12-102, the withholding need not be tortious or in bad faith but rather a failure to pay or deliver property when there is a legal obligation to do so. **Mesa Sand & Gravel Co.**, 776 P.2d at 364 (citing **Cooper v. Peoples Bank & Trust**, 725 P.2d 78 (Colo. App. 1986)); *see also* § 24-91-103, C.R.S. (Colorado’s prompt payment statute, mandating penalty interest rate when a general

contractor fails to timely pay a subcontractor); **New Design Constr. Co., Inc. v. Hamon Contractors, Inc.**, 215 P.3d 1172 (Colo. App. 2008).

8. For a comprehensive discussion of the rules relating to the recovery of interest in contract cases, see J. Kent Miller, *Recovery of Interest: Part II – Other than Personal Injury*, 18 COLO. LAW. 1307 (1989).

9. The economic loss rule provides a defense to tort claims that are based on duties bargained for and existing in a contract. Cases applying the economic loss rule to particular situations are collected in the Introductory Note to Chapter 9.

10. Colorado follows the “American Rule” with respect to the award of attorney fees in actions for breach of contract; that is, “[i]n the absence of a statute, court rule, or private contract to the contrary, attorney fees are not recoverable by a prevailing party. . . .” **Adams v. Farmers Ins. Grp.**, 983 P.2d 797, 801 (Colo. 1999); *accord* **Allstate Ins. Co. v. Huizar**, 52 P.3d 816 (Colo. 2002); **Agritrack, Inc. v. DeJohn Housemoving, Inc.**, 25 P.3d 1187 (Colo. 2001).

11. A claim brought upon a contract provision for equitable adjustment seeks an equitable remedy. **Parker Excavating, Inc. v. City & County of Denver**, 2012 COA 180, ¶ 18, 303 P.3d 1222.

30:37 DAMAGES — INTRODUCTION

If you find in favor of the plaintiff, (*name*), on (his) (her) (its) claim of breach of contract, then you must award (him) (her) (it) (general) (special) (liquidated) (nominal) damages.

To award (general) (special) (liquidated) damages, you must find by a preponderance of the evidence that the plaintiff had damages as a result of the breach, and you must determine the amount of those damages.

If you find in favor of the plaintiff, but do not find any (general) (special) (liquidated) damages, you shall award plaintiff nominal damages.

Notes on Use

1. Except when the amount of damages is not in dispute, e.g., liquidated damages (see Instruction 30:40), the amount due on a promissory note, etc., the instruction should not state the amount of damages sought. *See Rodrigue v. Hausman*, 33 Colo. App. 305, 519 P.2d 1216 (1974).

2. Instructions for the particular damages involved in the case should be used with this instruction: Instruction 30:38 (general), Instruction 30:39 (special), Instruction 30:40 (liquidated), or Instruction 30:41 (nominal).

3. When supported by sufficient evidence and applicable to the damages being claimed by the plaintiff, Instruction 5:2, dealing with mitigation of damages, should be given with this instruction.

Source and Authority

1. This instruction is supported by **Giampapa v. American Family Mutual Insurance Co.**, 64 P.3d 230, 237 n.3 (Colo. 2003) (“‘General damages’ are those that flow naturally from the breach of contract, whereas ‘special’ or ‘consequential damages’ are other foreseeable damages within the reasonable contemplation of the parties at the time the contract was made.”).

2. An aggrieved party is not obligated to mitigate damages by giving up its rights under a contract. **U.S. Welding, Inc. v. Advanced Circuits, Inc.**, 2018 CO 56, ¶ 11, 420 P.3d 278, 281 (“[I]n the absence of impossibility, frustration of purpose, or some other reason not involving the fault of any party, for which a contract is no longer capable of being fulfilled, the other party is never obligated to accept an offer of an accord.”).

30:38 DAMAGES — GENERAL

“General damages” means the amount required to compensate the plaintiff for losses that are the natural and probable consequence of the defendant’s breach of the contract.

Losses that are a “natural” result of a breach are those losses that an ordinary person of common experience would expect to follow from a breach.

Losses are “probable” if the losses were reasonably foreseeable when the contract was made and would likely occur if the contract were breached.

If general damages have been proved, you shall award:

(Insert the types of general damages that have been proved depending on the kind of contract involved.)

Notes on Use

1. See Notes on Use and Source and Authority to Instruction 30:37 (introduction).
2. Instruction 30:37 (introduction) should be used with this instruction, along with instructions for any other particular damages involved in the case: Instruction 30:39 (special), Instruction 30:40 (liquidated), or Instruction 30:41 (nominal).
3. The court has a duty to instruct the jury on the proper measure of damages for the kind of contract at issue. The measures of damages appropriate for several particular kinds of contract breaches are contained in Instructions 30:42 to 30:53.
4. This instruction should be modified where the defendant has counterclaimed and alleged that the plaintiff breached contract promises.
5. If special damages are also alleged and proven the jury also may receive instruction 30:39, so long as awarding both categories of damages does not result in any double recovery. *See General Steel Domestic Sales, LLC v. Hogan & Hartson, LLP*, 230 P.3d 1275 (Colo. App. 2010).

Source and Authority

1. This instruction is supported by **Pomeranz v. McDonald’s Corp**, 843 P.2d 1378 (Colo. 1993) (The general measure of damages for breach of contract cases is that sum that places the non-defaulting party in the position the party would have enjoyed had the breach not occurred.). *See also Smith v. Farmers Ins. Exch.*, 9 P.3d 335 (Colo. 2000); **Colo. Nat’l Bank v. Friedman**, 846 P.2d 159 (Colo. 1993); **Core-Mark Midcontinent Inc., v. Sonitrol Corp.**, 2016 COA 22, ¶ 35, 370 P.3d 353 (discussing foreseeability and types of losses that naturally and probably flow from a breach); **Morris v. Belfor USA Group, Inc.**, 201 P.3d 1253 (Colo. App. 2008); **Clough v. Williams Prod. RMT Co.**, 179 P.3d 32 (Colo. App. 2007); **Kaiser v. Market**

Square Disc. Liquors, Inc., 992 P.2d 636 (Colo. App. 1999); **Husband v. Colo. Mtn. Cellars, Inc.**, 867 P.2d 57 (Colo. App. 1993); **Colo. Interstate Gas Co., Inc. v. Chemco, Inc.**, 833 P.2d 786 (Colo. App. 1991), *aff'd on other grounds*, 854 P.2d 1232 (Colo. 1993); **Mesa Sand & Gravel Co. v. Landfill, Inc.**, 759 P.2d 757 (Colo. App. 1988), *rev'd on other grounds*, 776 P.2d 362 (Colo. 1989); **Total Condo. Mgmt., Inc. v. Lester J. Lambert & Co.**, 716 P.2d 146 (Colo. App. 1985); **Smith v. Hoyer**, 697 P.2d 761, 765 (Colo. App. 1984).

2. Recovery of damages is limited by the requirement of probability — the loss must have been a foreseeable consequence of the breach at the time the contract was made. **Core-Mark Midcontinent**, 2016 COA 22, ¶ 52 (a plaintiff must prove that that the loss was a probable — more likely than not — result of the breach).

30:39 DAMAGES — SPECIAL

“Special damages” means damages, other than general damages, that the defendant knew or should have known when the contract was made probably would be incurred by the plaintiff if the defendant breached the contract.

If special damages have been proved, you shall award:

(Insert the types of special damages that have been proved depending on the kind of contract involved.)

Notes on Use

1. See the Notes on Use to Instruction 30:37 (introduction).
2. Instruction 30:37 (introduction) should be used with this instruction, along with instructions for any other particular damages involved in the case: Instruction 30:38 (general), Instruction 30:40 (liquidated), or Instruction 30:41 (nominal).
3. Special damages must be pled with particularity. C.R.C.P. 9(g).
4. This instruction should be modified where the defendant has counterclaimed and alleged that plaintiff breached contract promises.
5. If general damages are claimed the jury also may receive Instruction 30:38, so long as awarding both categories of damages does not result in any double recovery. *See General Steel Domestic Sales, LLC v. Hogan & Hartson, LLP*, 230 P.3d 1275 (Colo. App. 2010).
6. If lost profits are claimed, the jury should be instructed that they may be awarded only if: they are established with reasonable certainty; the term “net profits” is defined; and a list of the factors the jury should consider in determining any loss of “net profits” is provided. *See Lee v. Durango Music*, 144 Colo. 270, 355 P.2d 1083 (1960) (gross profits alone are not sufficient evidence and proof of business loss must also include expenses); *Carder, Inc. v. Cash*, 97 P.3d 174 (Colo. App. 2003) (to establish net profits, expenses of business must be shown).

Source and Authority

1. This instruction is supported by *Denny Construction, Inc. v. City & County of Denver*, 199 P.3d 742, 751 (Colo. 2009) (The foreseeability “requirement is objective, focusing on whether at the time the parties entered into the contract the defendant knew or should have known that these lost profit damages would probably be incurred by the plaintiff if the defendant breached the contract.”); and *Giampapa v. Am. Family Mut. Ins. Co.*, 64 P.3d 230, 237 n.3 (Colo. 2003) (“‘General damages’ are those that flow naturally from the breach of contract, whereas ‘special’ or ‘consequential damages’ are other foreseeable damages within the reasonable contemplation of the parties at the time the contract was made.”); *Core-Mark Midcontinent Inc. v. Sonitrol Corp.*, 2016 COA 22, ¶ 32, 370 P.3d 353 (“the nonbreaching party may also recover damages for loss that was ‘such as may reasonably be supposed to have

been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it” (quoting **Hadley v. Baxendale**, (1854) 156 Eng. Rep. 145, 151)).

2. For special damages to be recoverable, they must have been within the reasonable contemplation of the parties. **Uinta Oil Ref. Co. v. Ledford**, 125 Colo. 429, 244 P.2d 881 (1952); **W. Union Tel. Co. v. Trinidad Bean & Elevator Co.**, 84 Colo. 93, 267 P. 1068 (1928) (citing earlier cases); *see also* **Gen. Steel Domestic Sales, LLC**, 230 P.3d at 1285 (contract damages are limited to those arising from risks considered and bargained for by parties); **Fountain v. Mojo**, 687 P.2d 496 (Colo. App. 1984); RESTATEMENT (SECOND) OF CONTRACTS § 351 (1981).

3. Loss of future profits (as distinct from profits already lost) may be recovered in a breach of contract action where they are established with reasonable certainty. **Denny Constr.**, 199 P.3d at 751 (“lost profits due to impaired bonding capacity, like all claims for lost profits, must be established with reasonable certainty”); **Acoustic Mktg. Research, Inc. v. Technics, LLC** 198 P.3d 96, 97 (Colo. 2008) (“future damages, including lost future royalties, may be awarded in a breach of contract action if they are demonstrated with reasonable certainty”); **Belfor USA Grp., Inc. v. Rocky Mtn. Caulking & Waterproofing, LLC**, 159 P.3d 672 (Colo. App. 2006); *see also* **Colo. Nat’l Bank of Denver v. Friedman**, 846 P.2d 159 (Colo. 1993); **Lee**, 144 Colo. at 278, 355 P.2d at 1087; **Nevin v. Bates**, 141 Colo. 255, 347 P.2d 776 (1959) (lost profits claimed for breach of a lease denied as being too speculative); **Uinta Oil Ref. Co.**, 125 Colo. at 434, 244 P.2d at 884-85 (where existence of loss is established, plaintiff can recover loss of net profits even though the exact amount may be difficult to ascertain); **Carlson v. Bain**, 116 Colo. 526, 182 P.2d 909 (1947) (lost profits allowed when rancher did not get possession of ranch property and was unable to raise crops and livestock on the property); **Colo. Nat’l Bank v. Ashcraft**, 83 Colo. 136, 263 P. 23 (1927) (the court did not err in giving an instruction that allowed jury to consider lost profits in assessing damages, and the fact that the amount could not be determined with exact certainty was not a valid basis for denial); **Boyle v. Bay**, 81 Colo. 125, 254 P. 156 (1927) (loss of net profits recoverable if, because of circumstances at time contract entered into, the loss is reasonably within the contemplation of the parties); **Corcoran v. Sanner**, 854 P.2d 1376 (Colo. App. 1993); **Denver Publ’g Co. v. Kirk**, 729 P.2d 1004 (Colo. App. 1986) (where contract terminable at will upon notice being given within certain time, lost profits are recoverable upon termination, but only for the period of time for which notice should have been given but was not); **L.U. Cattle Co. v. Wilson**, 714 P.2d 1344, 1348 (Colo. App. 1986) (lost profits recoverable “if they are reasonably ascertainable based on past experience and not too speculative, remote, or contingent”); **Fagerberg v. Webb**, 678 P.2d 544, 548 (Colo. App. 1983) (“Once the fact of damage has been proven, uncertainty as to amount will not prevent recovery.”), *rev’d on other grounds sub nom. Webb v. Dessert Seed Co., Inc.*, 718 P.2d 1057 (Colo. 1986); **Stone v. Caroselli**, 653 P.2d 754 (Colo. App. 1982) (lost profits sufficiently foreseeable to be recovered by manufacturer where distributors breached contract to promote the product and expand the market and difficulty in ascertaining exact amount of those damages does not preclude their recovery).

4. Whether lost profits were reasonably foreseeable at the time the contract was made is measured by an objective standard. **Denny Constr.**, 199 P.3d at 743 (“the question is . . . whether [the defendant] knew *or should have known* that such loss would probably occur”); **H.M.O. Sys., Inc. v. Choicecare Health Servs., Inc.**, 665 P.2d 635 (Colo. App. 1983); *see also*

Lawry v. Palm, 192 P.3d 550 (Colo. App. 2008). If the fact of future losses is a certainty, the amount of the damages may be a reasonable approximation. **Denny Constr.**, 199 P.3d at 746 (lost profit damages attributable to impaired bonding capacity for construction company not speculative as a matter of law); **Acoustic Mktg. Research, Inc.**, 198 P.3d at 99 (loss of future royalties proved with reasonable certainty); **Logixx Automation, Inc. v. Lawrence Michels Family Trust**, 56 P.3d 1224 (Colo. App. 2002) (evidence supported jury's determination of damages for lost profits); **Rocky Mtn. Rhino Lining, Inc. v. Rhino Linings USA, Inc.**, 37 P.3d 458 (Colo. App. 2001) (trial court's calculation of damages for lost profits was reasonable and supported by evidence), *rev'd on other grounds*, 62 P.3d 142 (Colo. 2003); **Wojtowicz v. Greeley Anesthesia Servs., P.C.**, 961 P.2d 520 (Colo. App. 1997) (damages for lost profits are measured by loss of net profits). However, "[t]he absence of prior profits in a newly established business does not create a 'per se' exclusion of loss of profit as an item of damage if sufficient competent evidence is proffered." **Int'l Tech. Instruments, Inc. v. Eng'g Measurements Co.**, 678 P.2d 558, 563 (Colo. App. 1983); *see also* **Terrones v. Tapia**, 967 P.2d 216 (Colo. App. 1998) (summary judgment precluding plaintiff from recovering damages for lost profits proper where evidence offered by plaintiff to establish these damages was speculative); **Wilson & Co. v. Walsenburg Sand & Gravel Co.**, 779 P.2d 1386, 1388 (Colo. App. 1989) (where the evidence of lost profits was insufficient, any such damages would therefore be "speculative and, thus, unrecoverable").

5. In computing damages for lost profits, the factfinder should consider both discount and inflation rates if competent evidence of these rates is presented. **McDonald's Corp. v. Brentwood Ctr., Ltd.**, 942 P.2d 1308 (Colo. App. 1997).

6. For cases involving the sale of goods, see sections 4-2-715 and 4-2-719, C.R.S. *See also* **Int'l Tech. Instruments, Inc.**, 678 P.2d at 563.

30:40 DAMAGES — LIQUIDATED

If you find in favor of the plaintiff, (*name*), and if you also find the parties agreed on an amount to be paid to the plaintiff in the event of a breach by the defendant, (*name*), then you shall award the agreed amount as the plaintiff’s damages.

Notes on Use

1. See Notes on Use to Instruction 30:37 (introduction).
2. Instruction 30:37 (introduction) should be used with this instruction.
3. This instruction should not be given if the court has determined that the contractual provision is an improper penalty rather than a provision for liquidated damages.
4. If, in addition to the kind of breach for which the defendant has agreed to pay liquidated damages, the defendant has committed another breach not covered by a liquidated damages clause, the plaintiff may also be entitled to recover general damages sustained as a result of such breach. *See* Instruction 30:37.

Source and Authority

1. This instruction is supported by **Perino v. Jarvis**, 135 Colo. 393, 312 P.2d 108 (1957); and **Bilz v. Powell**, 50 Colo. 482, 117 P. 344 (1911). *See also* **Powder Horn Constructors, Inc. v. City of Florence**, 754 P.2d 356 (Colo. 1988) (lack of mutual intent to liquidate damages); **Rohauer v. Little**, 736 P.2d 403 (Colo. 1987); **O’Hara Grp. Denver, Ltd. v. Marcor Housing Sys., Inc.**, 197 Colo. 530, 595 P.2d 679 (1979); **Grooms v. Rice**, 163 Colo. 234, 429 P.2d 298 (1967); **Yerton v. Bowden**, 762 P.2d 786 (Colo. App. 1988); **Mgmt. Recruiters of Boulder, Inc. v. Miller**, 762 P.2d 763 (Colo. App. 1988); **Emrich v. Joyce’s Submarine Sandwiches, Inc.**, 751 P.2d 651 (Colo. App. 1987); **Kirkland v. Allen**, 678 P.2d 568 (Colo. App. 1984) (liquidated damages clause held to be an unenforceable penalty); **H.M.O. Sys., Inc. v. Choicecare Health Servs., Inc.**, 665 P.2d 635 (Colo. App. 1983) (same); **P & M Vending Co. v. Half Shell of Boston, Inc.**, 41 Colo. App. 78, 579 P.2d 93 (1978); **Oldis v. N.W. Grosse-Rhode**, 35 Colo. App. 46, 528 P.2d 944 (1974).

2. Liquidated damages provisions must be a reasonable estimate of presumed actual damages. **Klinger v. Adams Cty. Sch. Dist. No. 50**, 130 P.3d 1027, 1034 (Colo. 2006) (a liquidated damages provision is valid and enforceable if three elements are met: (1) “the parties intended to liquidate damages”; (2) “the amount of liquidated damages, when viewed as of the time the contract is made, was a reasonable estimate of the *presumed actual damages* that the breach would cause”; and (3) “when viewed again as of the date of the contract, it was difficult to ascertain the amount of *actual damages* that would result from a breach”).

3. The party contending that a damages clause is an improper penalty carries the burden of proving that contention. **Jobe v. Writer Corp.**, 34 Colo. App. 240, 242, 526 P.2d 151, 152 (1974) (“[u]nless it patently appears from the contract itself that the liquidated damages agreed upon are out of proportion to any possible loss . . . the party asserting that the damages clause

constitutes a penalty has the burden of proving that contention”); *see also* **Rohauer**, 736 P.2d at 410; **Yerton**, 762 P.2d at 788 (if a single amount is stipulated for several possible breaches, the provision is invalid as a penalty if it is unreasonably disproportionate to the expected loss of the specific breach being sued for); **Wojtowicz v. Greeley Anesthesia Servs., P.C.**, 961 P.2d 520 (Colo. App. 1997) (liquidated damages provision so disproportionate to actual damages as to constitute an unenforceable penalty as a matter of law). In some cases, there may be an issue of law as to whether a contract provision is a liquidated damages provision subject to the rule that such provisions must be reasonable. *See* **Planned Pethood Plus, Inc. v. KeyCorp, Inc.**, 228 P.3d 262 (Colo. App. 2010) (prepayment penalty in promissory note is not liquidated damages clause).

4. The mere presence of an option to seek either liquidated damages or actual damages does not render the liquidated damages clause invalid as a matter of law. **Ravenstar LLC v. One Ski Hill Place LLC**, 2017 CO 83, ¶ 15, 401 P.3d 552. But the option must be exclusive. If a non-breaching party elects to pursue liquidated damages as allowed by the contract, the non-breaching party may not also seek actual damages. “Otherwise, an election to pursue liquidated damages would function as an invalid penalty.” *Id.* at ¶ 16.

5. The party attempting to avoid a liquidated damage provision of a contract has the burden of proving that the provision is an unenforceable penalty. **Bd. of Cty. Comm’rs v. City & County of Denver**, 40 P.3d 25 (Colo. App. 2001). A liquidated damage provision is valid and enforceable if (1) at the time the contract was entered into, anticipated damages in case of a breach were difficult to ascertain, (2) the parties mutually agreed to liquidate damages in advance, and (3) the amount of the liquidated damages, when viewed at the time the contract was made, was a reasonable estimate of the potential general damages that a breach would cause. *Id.*; *see also* **Klinger**, 130 P.3d at 1034 (listing factors used to determine whether a liquidated damages provision constitutes a penalty).

6. For sales contracts governed by the Uniform Commercial Code, the determination of whether a provision is a penalty or a valid liquidated damages clause should be made on the basis of the criteria set out in section 4-2-718, C.R.S. For other contracts, in determining whether a liquidated damages clause is valid, the court should consider whether a) the amount stipulated was at the time a reasonable estimate of any damages which might result from a breach; b) the anticipated damages in the event of a breach would have been uncertain or difficult to prove; and c) the parties intended to liquidate damages in advance. **Butler v. Lembeck**, 182 P.3d 1185 (Colo. App. 2007).

7. “[A] liquidated damages clause addressing delay in a performance contract will not be enforced where such delay is due in whole or in part to the fault of the party claiming the clause’s benefit.” **Medema Homes, Inc. v. Lynn**, 647 P.2d 664, 667 (Colo. 1982); *accord* **City of Westminster v. Centric-Jones Constructors**, 100 P.3d 472 (Colo. App. 2003).

8. A non-competition provision in an employment contract with a physician that provides for liquidated damages in the event of a breach is governed by section 8-2-113(3), C.R.S. *See, e.g.,* **Wojtowicz**, 961 P.2d 521-22.

9. As to a plaintiff's right to recover interest on liquidated damages for breach of contract, see the introductory note to this Chapter and **Board of County Commissioners**, 40 P.3d at 35.

30:41 DAMAGES — NOMINAL

If you find in favor of the plaintiff, but do not award any general, special, or liquidated damages, you shall award the plaintiff nominal damages in the sum of one dollar.

Notes on Use

1. See the Notes on Use to Instruction 30:37 (introduction).
2. Instruction 30:37 (introduction) should be used with this instruction, along with instructions for any other particular damages involved in the case: Instruction 30:38 (general), Instruction 30:39 (special), or Instruction 30:40 (liquidated).

Source and Authority

1. This instruction is supported by **Hoehne Ditch Co. v. John Flood Ditch Co.**, 76 Colo. 500, 233 P. 167 (1925); **Patrick v. Colorado Smelting Co.**, 20 Colo. 268, 38 P. 236 (1894); **City of Westminster v. Centric-Jones Constructors**, 100 P.3d 472 (Colo. App. 2003); and RESTATEMENT (SECOND) OF CONTRACTS § 346(2) (1981). As a matter of law, nominal damages are one dollar. **City of Westminster**, 100 P.3d at 481; **Overland Dev. Co. v. Marston Slopes Dev. Co.**, 773 P.2d 1112 (Colo. App. 1989); **Colo. Inv. Servs., Inc. v. Hager**, 685 P.2d 1371 (Colo. App. 1984) (quoting the language of a former version of this instruction with approval).

2. In the absence of sufficient proof of general damages, the plaintiff is nonetheless entitled to nominal damages. *See* **Pomeranz v. McDonald's Corp.**, 843 P.2d 1378 (Colo. 1993) (in breach of contract action involving future damages, rule of certainty requires that plaintiff prove that damages will in fact accrue in the future and provide sufficient admissible evidence to enable trier of fact to compute a fair approximation of loss); **Interbank Invs. L.L.C. v. Vail Valley Consol. Water Dist.**, 12 P.3d 1224 (Colo. App. 2000); *see also* **Riggs v. McMurtry**, 157 Colo. 33, 400 P.2d 916 (1965) (evidence must provide reasonable basis for computation of damages); **McDonald's Corp. v. Brentwood Ctr., Ltd.**, 942 P.2d 1308 (Colo. App. 1997) (lost profits may not be awarded if they are speculative, remote, imaginary, or impossible to ascertain).

30:42 DAMAGES — PURCHASER’S FOR BREACH OF LAND PURCHASE CONTRACT

(The amount of damages, if any, is the market value of the property at the time of the breach minus the contract price, plus all payments made by the plaintiff on the contract.)

Notes on Use

1. When applicable, this instruction should be used as the insertion in Instruction 30:38.
2. If the plaintiff has not claimed to have made any payments on the contract, the last clause relating to such payments should be omitted.
3. When necessary, the definition of market value set out in the second paragraph of Instruction 36:3 may be given with this instruction.

Source and Authority

This instruction is supported by **Medema Homes, Inc. v. Lynn**, 647 P.2d 664 (Colo. 1982) (citing a former version of this instruction); **Minshall v. Case**, 148 Colo. 12, 364 P.2d 868 (1961); and **Bennett v. Price**, 692 P.2d 1138 (Colo. App. 1984) (also adopts as the definition of market value the definition set out in the second paragraph of Instruction 36:3).

30:43 DAMAGES — SELLER’S FOR BREACH OF LAND PURCHASE CONTRACT

(The amount of damages, if any, is the contract price minus the market value of the property at the time of the breach, minus any payments made by the defendant on the contract.)

Notes on Use

1. When applicable, this instruction should be used as the insertion in Instruction 30:38.
2. If there is no dispute that the defendant in fact made no payments on the contract, the clause relating to such payments should be omitted.
3. When necessary, the definition of market value set out in the second paragraph of Instruction 36:3 may be given with this instruction.

Source and Authority

This instruction is supported by **Watrous v. Hilliard**, 38 Colo. 255, 88 P. 185 (1906). *See also* **Higbie v. Johnson**, 626 P.2d 1147 (Colo. App. 1980); **Sorenson v. Connelly**, 36 Colo. App. 168, 536 P.2d 328 (1975); **F. Poss Farms, Inc. v. Miller**, 35 Colo. App. 152, 529 P.2d 1343 (1974).

30:44 DAMAGES — EMPLOYER’S FOR EMPLOYEE’S BREACH OF PERSONAL SERVICE CONTRACT

(The amount of damages, if any, is the reasonable cost of comparable services minus the amount the plaintiff originally agreed to pay the defendant.)

Notes on Use

When applicable, this instruction should be used as the insertion in Instruction 30:38.

Source and Authority

This instruction is supported by **Cannon Coal Co. v. Taggart**, 1 Colo. App. 60, 27 P. 238 (1891).

30:45 DAMAGES — BUILDER’S FOR BREACH OF CONSTRUCTION CONTRACT BY OWNER PRIOR TO COMPLETION

(The contract price agreed upon by the parties:

(a) minus any payments made by the defendant on the contract; and

(b) minus what it would have cost the plaintiff if [he] [she] had completed the [describe the subject matter of the contract] according to the contract.)

Notes on Use

1. When applicable, this instruction should be used as the insertion in Instruction 30:38.
2. If there is no dispute that the defendant has made no payments on the contract, clause (a) should be omitted.
3. If necessary, Instruction 30:47 defining “agreed-upon contract price” should be given with this instruction.
4. Also, if necessary, another instruction stating what factors should be considered in determining the builder’s cost of completion should be given.
5. In a few cases, the builder’s damages may be the amount of the builder’s reasonable expenditures incurred prior to the time of the breach by the owner. In those cases, the instruction should be modified accordingly. Two such situations are when (a) the owner has repudiated the contract or the owner’s breach was such as to amount to a repudiation, thereby giving the builder the alternative restitutorial remedy of *quantum meruit*, or (b) the plaintiff is unable to prove the cost of completing the contract. *See* 11 JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 60.6 (rev. ed. 2005); MCCORMICK, DAMAGES §§ 164-166 (1935).
6. When the builder has fully performed the contract, the builder’s measure of damages is the agreed-upon contract price. CORBIN ON CONTRACTS, *supra*, at § 60.6. The measure of damages when the builder has substantially performed is set out in Instruction 30:46.

Source and Authority

This instruction is supported by **Gundersons, Inc. v. Tull**, 678 P.2d 1061 (Colo. App. 1983) (in proving lost profits in the form of the out-of-bargain measure of contract damages, once the fact of damage has been proved, uncertainty as to amount of damages will not bar recovery), *rev’d on other grounds*, 709 P.2d 940 (Colo. 1985); **Bruce Hughes, Inc. v. Ingels & Associates, Inc.**, 653 P.2d 88 (Colo. App. 1982) (citing and approving the giving of this instruction); **Jasken v. Sheehy Construction Co.**, 642 P.2d 58 (Colo. App. 1982) (subcontractor entitled to same measure of damages for wrongful termination by contractor of construction subcontract); and **Comfort Homes, Inc. v. Peterson**, 37 Colo. App. 516, 549 P.2d 1087 (1976) (citing former version of this instruction and applying the rule stated).

30:46 DAMAGES — BUILDER’S FOR SUBSTANTIAL THOUGH NOT COMPLETE PERFORMANCE OF CONSTRUCTION CONTRACT

(The contract price agreed to by the parties:

(a) minus any payments made by the defendant, and

(b) minus the reasonable cost to the defendant of putting the [describe the subject matter of the contract] in the condition it would have been in had the contract been performed according to its terms.)

Notes on Use

1. When applicable, this instruction is to be used as the insertion in Instruction 30:38.
2. Normally, in a construction contract, the full or at least substantial performance by the builder is a condition precedent to the builder’s right to recover against the owner on the contract. If the owner, pursuant to C.R.C.P. 9(c), has pleaded the lack of complete performance as the nonperformance of such a condition precedent, then the builder must prove either complete or substantial performance. *See* Note 1 of the Notes on Use to Instruction 30:10 and Instruction 30:11 (defining “substantial performance”). This instruction is applicable to these cases and may be given as worded if there is no dispute as to the fact that the plaintiff, at most, rendered only substantial performance. However, if the plaintiff claims full performance and there is supporting evidence for the plaintiff’s claim, then this instruction should be appropriately modified so that it is clear to the jury that clause (b) applies only if they find the plaintiff rendered substantial performance as opposed to complete or full performance. Also, where clause (b) is applicable, while the burden of proving at least substantial performance is on the plaintiff, the burden of proving the cost of completing performance may in certain circumstances be on the defendant. In these circumstances, an additional instruction on this point should be given to the jury. *See* **Zambakian v. Leson**, 79 Colo. 350, 246 P. 268 (1926); **Morris v. Hokosona**, 26 Colo. App. 251, 143 P. 826 (1914).
3. Even though the builder may not have rendered substantial performance and, therefore, cannot recover on the express contract, the builder may nonetheless be entitled to recover for the reasonable value of his or her services on the theory of *quantum meruit*, less any damages resulting to the other party because of the builder’s breach. *See* **Reynolds v. Armstead**, 166 Colo. 372, 443 P.2d 990 (1968); **Denver Ventures, Inc. v. Arlington Lane Corp.**, 754 P.2d 785 (Colo. App. 1988).
4. If there is no dispute that the defendant has made no payments on the contract, clause (a) should be omitted.
5. If the application of clause (b) by the jury would result in unreasonable economic waste, for example, the cost of substituting the specified brand of water pipe for that which the plaintiff did install, that was virtually identical, this instruction must be appropriately modified. *See* **Campbell v. Koin**, 154 Colo. 425, 391 P.2d 365 (1964).

Source and Authority

This instruction is supported by **Campbell**, 154 Colo. at 429-30, 391 P.2d at 367 (citing several earlier cases). *See also* **Houy v. Davis Oil Co.**, 175 Colo. 180, 486 P.2d 18 (1971); **Little Thompson Water Ass'n v. Strawn**, 171 Colo. 295, 466 P.2d 915 (1970) (involving a service contract rather than a construction contract).

30:47 DEFINITION — CONTRACT PRICE AGREED UPON

The contract price agreed upon by the parties means the price originally agreed to in the contract, plus or minus adjustments for any later changes agreed to by the parties.

Notes on Use

When necessary, this instruction is to be used with such Instructions as 30:48 and 30:49.

Source and Authority

This instruction is supported by **Granberry v. Perlmutter**, 147 Colo. 474, 364 P.2d 211 (1961) (by implication); **Hottel v. Poudre Valley Reservoir Co.**, 41 Colo. 370, 92 P. 918 (1907); and **Sisters of Charity v. Burke**, 22 Colo. App. 230, 124 P. 472 (1912).

30:48 DAMAGES — BUILDER’S FOR OWNER’S PARTIAL BREACH — FAILURE TO MAKE INSTALLMENT PAYMENT

(The amount of any installment payment[s] due the plaintiff under the contract.)

Notes on Use

When applicable, this instruction should be used as the insertion in Instruction 30:38.

Source and Authority

This instruction is supported by 11 JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 60.4 (rev. ed. 2005).

30:49 DAMAGES — OWNER’S FOR BREACH OF CONSTRUCTION CONTRACT BY BUILDER

(The reasonable cost to the plaintiff of completing the [describe the subject matter of the contract] according to the contract, minus any unpaid balance of the contract price.)

Notes on Use

1. When applicable, this instruction should be used as the insertion in Instruction 30:38.
2. In addition to the damages covered by this instruction, the plaintiff may also be entitled to recover damages for delay. *See* Instruction 30:50.
3. In cases in which unreasonable economic waste would result if this instruction were given, the following should be substituted: “The market value of the (describe the subject matter of the contract) had the contract been fully performed less the market value of the (describe the subject matter of the contract) as it now exists.” *See* **Gold Rush Invs., Inc. v. G.E. Johnson Constr. Co.**, 807 P.2d 1169 (Colo. App. 1990); *see also* **Campbell v. Koin**, 154 Colo. 425, 391 P.2d 365 (1964); **Sanford v. Kobey Bros. Constr. Corp.**, 689 P.2d 724 (Colo. App. 1984); **Worthen Bank & Trust Co. v. Silvercool Serv. Co.**, 687 P.2d 464 (Colo. App. 1984). The phrase “as it now exists” may not always be appropriate, and should be modified if necessary, e.g., if the building had been damaged after the plaintiff took control of it from the defendant, or the plaintiff, after taking control, made improvements, thereby increasing its value.
4. “If the defect is remedial, recovery will be based on the [reasonable] cost to repair the defect,” even though that cost may significantly exceed the original contract price. **Olson Plumbing & Heating, Inc. v. Douglas Jardine, Inc.**, 626 P.2d 750, 752 (Colo. App. 1981). “Where . . . part of the deficiencies can be repaired [or completed] at reasonable cost and part cannot, the cost of repair [or completion] can be assessed as the measure of damages [as] to the former and the difference in market value can be used as to the latter.” **Summit Constr. Co. v. Yeager Garden Acres, Inc.**, 28 Colo. App. 110, 121, 470 P.2d 870, 875 (1970); *see* **Sanford**, 689 P.2d at 726. In those cases an appropriate instruction combining the principal instruction and the alternate instruction should be given.
5. Where a builder-developer breaches a “promise to construct general amenities located on property not owned by the promisee, commonly referred to as ‘off-site’ facilities[.]” the proper measure of damages is “the diminution in value of the property purchased” by the promisee, rather than the cost of completing such off-site work. **Kniffin v. Colo. W. Dev. Co.**, 622 P.2d 586, 591 (Colo. App. 1980); *accord* **Seago v. Fellet**, 676 P.2d 1224 (Colo. App. 1983). In those circumstances, an instruction setting forth this “difference in market value” measure of damages should be given, rather than this instruction. *See, e.g.*, Instruction 6:11, appropriately modified.

Source and Authority

1. This instruction is supported by **Fleming v. Scott**, 141 Colo. 449, 348 P.2d 701 (1960); **Newcomb v. Schaeffler**, 131 Colo. 56, 279 P.2d 409 (1955); and **McKinley v. Willow Construction Co., Inc.**, 693 P.2d 1023 (Colo. App. 1984).

2. Generally, the measure of damages for breach of a construction contract by the contractor is an amount that would put the owner “in the same position he would have been had the breach not occurred.” **Pomeranz v. McDonald’s Corp.**, 843 P.2d 1378, 1381 (Colo. 1993); *see* **City of Westminster v. Centric-Jones Constructors**, 100 P.3d 472 (Colo. App. 2003) (applying benefit-of-bargain rule).

3. Under section 5-12-102(1)(a) and (3), C.R.S., prejudgment interest may be awarded on damages for breach of a construction contract, as money wrongfully withheld, even though the amount of such damages was unliquidated at the time of the breach. **Hott v. Tillotson-Lewis Constr. Co.**, 682 P.2d 1220 (Colo. App. 1983). Under section 5-12-102(1)(b), where damages for costs to replace a defective heating system are appropriate, interest accrues from the time of the replacement. **Goodyear Tire & Rubber Co. v. Holmes**, 193 P.3d 821 (Colo. 2008) (strict liability case).

30:50 DAMAGES — OWNER’S FOR DELAY IN COMPLETION OF CONSTRUCTION CONTRACT

(The reasonable net rental value, that is, the gross rental value of the [describe the subject matter of the contract] minus all reasonable expenses that normally would be incurred in connection with the occupancy of the [describe the subject matter of the contract] during the period for which the completion was delayed.)

Notes on Use

1. When applicable, this instruction should be used as the insertion in Instruction 30:38. A delay may result in certain special damages that may also be recoverable. *See, e.g.*, CHARLES T. MCCORMICK, LAW OF DAMAGES § 170 (1935); *see also* **Tricon Kent Co. v. Lafarge N. Am., Inc.**, 186 P.3d 155 (Colo. App. 2008) (In a suit by a subcontractor against a general contractor, the “no damages for delay” clause was valid and enforceable, but construed against the general contractor and invalidated on the basis of the general contractor’s affirmative and willful interference with the subcontractor’s performance. In dicta, the court stated that the general rule also applies to contracts with owners.).

2. This instruction is applicable whether or not the owner intended to rent the building upon completion. 11 JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 60.4 (rev. ed. 2005).

3. If the damages for delay have been covered by a liquidated damages provision, Instruction 30:40 will normally be the appropriate instruction rather than this instruction.

Source and Authority

This instruction is supported by **McIntire v. Barnes**, 4 Colo. 285 (1878).

30:51 DAMAGES — BROKER’S FOR BREACH OF REAL ESTATE COMMISSION CONTRACT

(That percentage of the sales price the defendant agreed to pay the plaintiff as [his] [her] commission.)

Notes on Use

1. When applicable, *see* Instruction 30:56 (listing elements of liability for a real estate commission claim), this instruction should be used as the insertion in Instruction 30:38.

2. This instruction has been drafted for what is believed to be the typical situation, namely, that the defendant did consummate the sale to the purchaser. When that is not the case, this instruction should be appropriately modified. For example, in a case where the plaintiff found a buyer to purchase on the defendant’s original terms and then the defendant refused to sell, the following would generally be more appropriate: “that percentage of the selling price the defendant agreed to pay the plaintiff as [his] [her] commission if the property were sold at that or a better price.”

3. If the parties agreed to a different measure for the commission, this instruction should be modified accordingly.

Source and Authority

This instruction is supported by **Watson v. United Farm Agency, Inc.**, 165 Colo. 439, 439 P.2d 738 (1968) (broker’s commission is dependent upon terms of the listing agreement). *See also* Notes on Use and Source and Authority to Instruction 30:56.

30:52 DAMAGES — OWNER’S FOR WRONGFUL DEPRIVATION OF USE OF A CHATTEL

(Loss of use may be measured by either lost profits or reasonable rental value.)

Notes on Use

When applicable, this instruction should be used as the insertion in Instruction 30:38.

Source and Authority

This instruction is supported by **Koenig v. PurCo Fleet Services, Inc.**, 2012 CO 56, ¶ 16, 285 P.3d 979 (the loss of use damages can be measured by either lost profits or reasonable rental value without proof of probable rental income).

30:53 DAMAGES — OWNER’S FOR BREACH OF A COVENANT AGAINST ENCUMBRANCES

(The difference between the fair market value of the property with and without the encumbrance.)

Notes on Use

When applicable, this instruction should be used as the insertion in Instruction 30:38.

Source and Authority

This instruction is supported by **Loveland Essential Group, LLC v. Grommon Farms, Inc.**, 251 P.3d 1109 (Colo. App. 2010) (where the encumbrance at issue is a lease, and the lease is not the highest and best use of the property, the measure of damages is the difference between the fair market value of the property with the lease and the fair market value without the lease).

F. PARTICULAR CONTRACTS

30:54 CLAIM — BUILDING CONTRACTOR’S BREACH OF IMPLIED WARRANTY — ELEMENTS OF LIABILITY

For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) claim of breach of implied warranty, you must find both of the following have been proved by a preponderance of the evidence:

1. (As a business venture, the) (The) defendant (entered into a contract with the plaintiff to build [*insert an appropriate description, e.g., “a house for the plaintiff”*]) ([built] [or] [had built] [*insert an appropriate description, e.g., “a house”*]) which [he] [she] [sold to the plaintiff]); and

2. When the defendant (gave possession of) (sold) the (*insert appropriate description, e.g., “house”*) to the plaintiff, the (*insert appropriate description, e.g., “house”*) did not comply with one or more of the warranties the law implies as part of such a (construction contract) (contract of sale).

If you find that either one or both of these statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that both of these statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant’s affirmative defense(s) of [*insert any affirmative defense that would be a complete defense to plaintiff’s claim*]).

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

Notes on Use

1. Whenever this instruction is given, Instruction 30:55 (building contractor’s implied warranties) must also be given or, in lieu of giving that instruction, this instruction may be appropriately modified to describe specifically the implied warranty or warranties the plaintiff claims (and has presented sufficient evidence of) the defendant failed to comply with, e.g., a building set-back requirement set out in the local zoning ordinance.

2. Omit either numbered paragraph, the facts of which are not in dispute, and revise the other portions of the instruction as necessary.

3. Use whichever parenthesized or bracketed words and phrases are most appropriate, and omit the last two paragraphs if the defendant has put no affirmative defense in issue or there is insufficient evidence to support any defense.

4. Though mitigation of damages is an affirmative defense, *see* Instruction 5:2, only rarely, if ever, will it be a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case.

Source and Authority

1. This instruction is supported by **Carpenter v. Donohoe**, 154 Colo. 78, 388 P.2d 399 (1964), in which the court also held that the warranties applied whether the house was sold while under construction or after it had been completed. *See also* **Mulhern v. Hederich**, 163 Colo. 275, 430 P.2d 469 (1967); **Glisan v. Smolenske**, 153 Colo. 274, 387 P.2d 260 (1963); **Wall v. Foster Petroleum Corp.**, 791 P.2d 1148 (Colo. App. 1989) (allowing rescission and restitution as an alternative remedy for breach of warranty damages).

2. The failure to correct defects caused by hazards of soil, weather, labor, and other like conditions that are the responsibility of the builder is a failure to construct the building in a workmanlike manner. **Newcomb v. Schaeffler**, 131 Colo. 56, 279 P.2d 409 (1955).

3. Privity is an essential element of claims for breach of implied warranties arising from transactions involving real property. **Forest City Stapleton Inc. v. Rogers**, 2017 CO 23, ¶ 7, 393 P.3d 487, 489 (“We hold that, because breach of the implied warranty of suitability is a contract claim, privity of contract is required to prevail on such a claim.”). The implied warranty of fitness for habitation does not extend to a purchaser against a seller of a house which had previously been occupied. *See* **H.B. Bolas Enters., Inc. v. Zarlengo**, 156 Colo. 530, 400 P.2d 447 (1965); *see also* **Gallegos v. Graff**, 32 Colo. App. 213, 215, 508 P.2d 798, 799 (1973) (“implied warranty . . . is available to the buyer of a newly constructed house against the builder-vendor . . . [but] this . . . warranty . . . does not extend to purchasers of a used home from [the original purchasers and occupiers] who were not the builders”); **Utz v. Moss**, 31 Colo. App. 475, 478, 503 P.2d 365, 367 (1972) (where “construction company knows, or should know, that the intended purchaser and first occupant will not be the realty company [having the house built], but rather the initial home owner, the implied warranty . . . extends to that first purchaser”). *But see* **Duncan v. Schuster-Graham Homes, Inc.**, 194 Colo. 441, 578 P.2d 637 (1978) (implied warranty does run to second buyer where builder repurchased from first buyer, refurbished the home, and resold it as a new home to second buyer).

4. The implied warranty of suitability arises when a commercial developer improves and sells land for the express purpose of residential construction. **Rusch v. Lincoln-Devore Testing Lab., Inc.**, 698 P.2d 832 (Colo. App. 1984). The warranty of suitability has three elements: (1) land is improved and sold for a particular purpose; (2) a vendor has reason to know that the purchaser is relying upon the skill or expertise of the vendor in improving the parcel for that particular purpose; and (3) the purchaser does in fact rely.

5. In actions or proceedings filed on or after April 25, 2003, asserting a “claim, counterclaim, cross-claim, or third party claim for damages or loss to, or the loss of use of, real or personal property or personal injury caused by a defect in the design or construction of an improvement to real property,” see the Construction Defect Action Reform Act, §§ 13-20-801 to -808, C.R.S. § 13-20-802.5(1). In particular, with respect to claims based on breach of warranty, especially those based on express warranty, see section 13-20-807.

6. As an alternative remedy to a contract action for breach of implied warranties under this instruction, a subsequent purchaser may sue on the theory of negligence to recover property damage to the structure caused by the negligence of the home builder. Further, because “Colorado has recognized recovery of damages for negligence without the parties being in privity of contract,” a remote subsequent purchaser, not in privity of contract with the home builder, may maintain such a negligence action. **Weller v. Cosmopolitan Homes, Inc.**, 44 Colo. App. 470, 471, 622 P.2d 577, 578 (1980), *aff’d*, 663 P.2d 1041 (Colo. 1983) (limiting the rule of the case “to latent defects which the purchaser was unable to discover prior to purchase”); *see also* **Johnson v. Graham**, 679 P.2d 1090 (Colo. App. 1983) (undiscovered failure to install drain or properly compact soil could be considered latent defects), *rev’d in part on other grounds sub nom. Tri-Aspen Constr. Co. v. Johnson*, 714 P.2d 484 (Colo. 1986).

7. To be liable as a builder under this instruction the defendant must have been a person regularly engaged in the “business of building” so that the sale is commercial in nature, rather than casual or personal. **Mazurek v. Nielsen**, 42 Colo. App. 386, 599 P.2d 269; *accord* **Erickson v. Oberlohr**, 749 P.2d 996 (Colo. App. 1987). Even though a builder-vendor may have begun construction of a house as a personal residence, if, before completion, he or she puts the house on the market in the capacity of a builder-vendor, a subsequent sale is a “commercial” one to which the implied warranties set out in this instruction attach. **Sloat v. Matheny**, 625 P.2d 1031 (Colo. 1981); *see also* **Davies v. Bradley**, 676 P.2d 1242 (Colo. App. 1983) (fact that purchasers were unaware the seller was also the builder does not preclude purchaser’s claim for breach of warranty).

8. To recover on the theory of breach of the implied warranty of habitability, a purchaser need not first have made an inspection of the property. Moreover, the willful concealment of defects obviates any requirement of inspection, even for obvious defects, because in a case of concealment the purchaser need only have been ignorant of the facts concealed. *Id.*

9. An implied warranty comparable to the warranties covered by this instruction may arise from the sale of land by a commercial developer who improves land and sells it for an express purpose. *See, e.g.*, **Rusch**, 698 P.2d at 835 (recognizing an implied warranty of fitness for a particular purpose).

10. A builder or developer of residential construction must “provide the purchaser with a copy of a summary report of the analysis and the site recommendations” concerning soils and land hazards. § 6-6.5-101(1), C.R.S. In addition to “any other liability or penalty,” the failure to provide such a report renders the developer or builder liable to the purchaser for a \$500.00 civil penalty. § 6-6.5-101(2).

30:55 DEFINITION — BUILDING CONTRACTOR’S IMPLIED WARRANTIES

A person who enters into a contract to build a building or structure for another or who, as a business venture, builds or has built a structure or building and sells that structure or building to another impliedly warrants, that is, impliedly promises, that:

1. All relevant provisions of the (*describe any relevant codes*) applicable to the construction of the structure or building have been complied with;

2. All work on the structure or the building has been done in a workmanlike manner; and

3. The building or structure is suitable for the ordinary purposes for which it might reasonably be used.

Notes on Use

1. Note 1 of the Notes on Use to Instruction 30:54 (listing elements of liability for building contractor’s breach of implied warranty claim) is also applicable to this instruction.

2. Omit any numbered subparagraph or other portions of this instruction that are not appropriate to the evidence in the case.

Source and Authority

1. This instruction is supported by **Carpenter v. Donohoe**, 154 Colo. 78, 388 P.2d 399 (1964).

2. A builder of a new house impliedly warrants the house has been built in a workmanlike manner and that it is fit for habitation. This implied warranty includes a garage “built and sold as an integral part of the purchase of the house.” **Roper v. Spring Lake Dev. Co.**, 789 P.2d 483, 486 (Colo. App. 1990) (foul odor in attached garage rendered townhouse unfit for its intended use). The implied warranty that the structure was built in a workmanlike manner includes the workmanlike grading of the surrounding premises when the construction of the structure cannot be divorced from that work and the responsibility for doing that work has been undertaken by the contractor. **Shiffers v. Cunningham Shepherd Builders Co.**, 28 Colo. App. 29, 470 P.2d 593 (1970). The implied warranty of habitability of a house (i.e., “suitable for its intended use”) also includes a water supply sufficient in quantity and quality for its useful occupancy. **Mazurek v. Nielsen**, 42 Colo. App. 386, 599 P.2d 269 (1979). It does not include, “[h]owever, a claim based solely on the lack of a certificate of occupancy . . . [because the] warranty protects against construction defects, not procedural defects.” **Dann v. Perrotti & Hauptman Dev. Co.**, 670 P.2d 448, 451 (Colo. App. 1983). In cases involving these and similar situations, this instruction should be modified according to the particular facts.

3. “These warranties may be limited by an express provision in the contract between the parties. However, such limitation must be accomplished by clear and unambiguous language.” **Belt v. Spencer**, 41 Colo. App. 227, 230, 585 P.2d 922, 925 (1978); *accord* **Sloat v. Matheny**,

625 P.2d 1031 (Colo. 1981) (ambiguous language held insufficient to constitute disclaimer); **Davies v. Bradley**, 676 P.2d 1242 (Colo. App. 1983) (“as is” language may not be sufficient to disclaim an implied warranty).

4. In **Town of Alma v. AZCO Construction, Inc.**, 985 P.2d 56 (Colo. App. 1999), *aff’d on other grounds*, 10 P.3d 1256 (Colo. 2000), the court declined to recognize a claim for breach of implied warranty of sound workmanship on a public works contract.

30:56 CLAIM — REAL ESTATE COMMISSION — ELEMENTS OF LIABILITY

For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) claim to recover a real estate commission, you must find all of the following have been proved by a preponderance of the evidence:

- 1. The plaintiff held a valid license as a real estate broker under the laws of Colorado;**
- 2. The plaintiff, acting as a real estate broker, entered into a listing agreement with the defendant to sell the defendant's property;**
- 3. [*insert the performance or occurrence of any conditions precedent the defendant has denied under C.R.C.P. 9(c)*];**
- 4. The plaintiff produced a purchaser who was ready, willing and able to complete the purchase of the property according to the terms of the listing agreement; and**
- 5. The sale of the property was (completed between the defendant and the purchaser) (prevented by the defendant's refusal or neglect to complete the sale).**

If you find that any one or more of these (*number*) statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these (*number*) statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [*insert any affirmative defense that would be a complete defense to plaintiff's claim*]).

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have not) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

Notes on Use

1. Use whichever parenthesized phrase in numbered paragraph 5 of the instruction is more appropriate.

2. Omit any numbered paragraphs, the facts of which are not in dispute, and omit the last two paragraphs if the defendant has put no affirmative defense in issue or there is insufficient evidence to support any defense.

3. Though mitigation of damages is an affirmative defense, *see* Instruction 5:2, only rarely, if ever, will it be a complete defense. For this reason, mitigation should not be identified

as an affirmative defense in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case.

4. When necessary, other appropriate instructions defining such terms as “real estate broker” must also be given with this instruction.

Source and Authority

1. This instruction is supported by **Fletcher v. Garrett**, 167 Colo. 60, 445 P.2d 401 (1968) (supports numbered paragraph 4 of the instruction and also holds contract required in numbered paragraph 2 may be implied from the circumstances); **Osborn v. Razatos Realty Co.**, 158 Colo. 446, 407 P.2d 342 (1965) (oral contract of employment as an agent sufficient); **Stavely v. Johnson**, 157 Colo. 56, 400 P.2d 922 (1965) (contract between plaintiff and defendant essential); **Circle T Corp. v. Crocker**, 155 Colo. 263, 393 P.2d 744 (1964) (actual consummation of the sale not a condition to broker’s right to commission); **Garrett v. Richardson**, 149 Colo. 449, 369 P.2d 566 (1962) (“exclusive” listing becomes irrevocable for the period of time agreed upon where broker expends money or renders services in reliance); **Hayutin v. De Andrea**, 139 Colo. 40, 337 P.2d 383 (1959) (not necessary that broker be the sole cause of the sale, but he must be a predominating effective cause and not merely indirect, incidental, or contributing cause); **Carpenter v. Francis**, 136 Colo. 494, 319 P.2d 497 (1957) (states rules of numbered paragraphs 2 and 4); **McCullough v. Thompson**, 133 Colo. 352, 295 P.2d 221 (1956) (consummation of the sale not a condition to broker’s right to recover); **Benham v. Heyde**, 122 Colo. 233, 221 P.2d 1078 (1950) (supports the requirement set out in numbered paragraph 1); **Dunton v. Stemme**, 117 Colo. 327, 187 P.2d 593 (1947) (proof of one of the statutory conditions set out in numbered paragraph 5 essential to broker’s right to recover commission); **Mapes v. City of Walsenburg**, 151 P.3d 574 (Colo. App. 2006) (broker entitled to commission once qualified buyer produced even though seller refuses to consummate transaction); and **Denver 1500, Inc. v. Wall**, 43 Colo. App. 282, 602 P.2d 903 (1979) (under paragraph 5, a broker who thwarts the closing of a sale is not entitled to a commission on the basis of the claim that the seller refused or neglected to make the sale).

2. “It has long been the law in Colorado that a broker who breaches his fiduciary duty forfeits his right to a commission.” **T-A-L-L, Inc. v. Moore & Co.**, 765 P.2d 1039, 1041 (Colo. App. 1988), *aff’d in part, rev’d in part on other grounds*, 792 P.2d 794 (Colo. 1990); *accord Mabry v. Tom Sanger & Co.*, 33 P.3d 1206 (Colo. App. 2001).

3. The requirement in paragraph 1 of the instruction that the plaintiff be a licensed broker is based on sections 12-61-102, 12-61-117, and 12-61-119, C.R.S. See **Kerr v. Australia Pac. Res., Ltd.**, 841 P.2d 401 (Colo. App. 1992); *see also* **Barton v. Sittner**, 723 P.2d 153 (Colo. App. 1986); **Brakhage v. Georgetown Assocs., Inc.**, 33 Colo. App. 385, 523 P.2d 145 (1974). This requirement applies in an action for a commission for the sale of a business if the sale includes a transfer of any interest in real estate, even though the latter is not a dominant feature of the whole transaction. See **Broughall v. Black Forest Dev. Co.**, 196 Colo. 503, 593 P.2d 314 (1978) (overruling **Cary v. Borden Co.**, 153 Colo. 344, 386 P.2d 585 (1963), in effect, because of an intervening change in the statutory definition of real estate broker); *see also* **Lieff v.**

Medco Prof'l Servs. Corp., 973 P.2d 1276 (Colo. App. 1998) (licensure requirements of statute apply where entire stock of corporation which holds leasehold interest in property is sold).

4. While a broker licensed in another state may receive a share of a commission on a cooperative transaction with a broker licensed in Colorado, *see* § 12-61-101(2)(b)(XIV), C.R.S., such a broker may not, because of the provisions of section 12-61-102, recover the commission (or a share of the commission) directly in his or her own right in an action against the seller. Notwithstanding this restriction, such a broker may, however, sue the seller directly as an assignee of the rights of the broker licensed in Colorado or on the basis of his or her own right to recover on the theory of unjust enrichment. **Backus v. Apishapa Land & Cattle Co.**, 44 Colo. App. 59, 615 P.2d 42 (1980). The fact that a broker, otherwise properly licensed, is operating out of a branch office for which a duplicate license has not been obtained does not render commission contracts entered into through such office void. **Holter v. Moore & Co.**, 681 P.2d 962 (Colo. App. 1983) (analyzing a former version of section 12-61-103(2), C.R.S., that required a separate license for each branch office). A corporation acting on its own behalf through its agent to acquire an interest in real property for itself and another as partners is not required to be licensed as a real estate broker. **Am. W. Motel Brokers, Inc. v. Wu**, 697 P.2d 34 (Colo. 1985) (citing and applying former section 12-61-101(4)(d), C.R.S.).

5. For the definition of a real estate broker, see section 12-61-101(2)(a). When the contract of employment was allegedly entered into by an authorized agent of the broker, numbered paragraph 2 of the instruction should be appropriately modified.

6. "Oral listing contracts for the sale of real estate are valid, and may be implied from surrounding circumstances." **Hayes v. N. Table Mtn. Corp.**, 43 Colo. App. 467, 469, 608 P.2d 830, 831 (1979).

7. Numbered paragraph 4 of the instruction sets out the first basic condition required by section 12-61-201, C.R.S.

8. If more than one broker was employed to find a buyer, the plaintiff must establish that he or she was the first to find a buyer who was ready, willing, and able to make the purchase, and numbered paragraph 4 in such circumstances should be appropriately modified. *See* **City of Pueblo v. Leach Realty Co.**, 149 Colo. 92, 368 P.2d 195 (1962). This rule does not apply, however, if the parties in their contract have provided otherwise, as, e.g., with an "exclusive" listing contract. *See, e.g.,* **Cooley Inv. Co. v. Jones**, 780 P.2d 29, 31 (Colo. App. 1989) ("Generally, under an exclusive right to sell contract, if the property is sold within the time prescribed, the broker is entitled to a commission, irrespective of how the sale came about.").

9. The plaintiff has proved that he or she "produced" a purchaser when the plaintiff has established that he or she or his or her employee or agent was the efficient agent or procuring cause of the sale, *see* **Dickey v. Waggoner**, 108 Colo. 197, 114 P.2d 1097 (1941), or that the plaintiff had found a purchaser who was willing to purchase on the terms and conditions originally prescribed by the defendant or on terms the defendant subsequently agreed were acceptable. *See* **City of Pueblo v. Leach Realty Co.**, 149 Colo. 92, 368 P.2d 195 (1962); **Bradley Realty Inv. Co. v. Shwartz**, 145 Colo. 65, 357 P.2d 638 (1960); *see also* **Sherman Agency v. Carey**, 195 Colo. 277, 577 P.2d 759 (1978); **Circle T Corp. v. Deerfield**, 166 Colo.

238, 444 P.2d 404 (1968); **Shands v. Wm R. Winton, Ltd.**, 91 P.3d 416 (Colo. App. 2003) (broker entitled to commission even though property sold to entity that seller did not know had been formed by parties with whom broker had been negotiating); **Real Equity Diversification, Inc. v. Coville**, 744 P.2d 756 (Colo. App. 1987).

10. It is not necessary for the plaintiff to prove the defendant actually entered into a contract of sale with the purchaser. **Leach Realty Co.**, 149 Colo. at 94, 368 P.2d at 196; **Brewer v. Williams**, 147 Colo. 146, 362 P.2d 1033 (1961) (by implication); **Mapes**, 151 P.3d at 578 (broker entitled to commission once qualified buyer produced even though seller refuses to consummate transaction); **Mack v. McKanna**, 687 P.2d 1326 (Colo. App. 1984). “To be considered an ‘able’ purchaser, one . . . need not have cash in hand equivalent to the entire purchase price at the time the offer is made. . . . Rather the offeror must be shown to have had the financial ability to complete the purchase within the time permitted by the offer.” **McGill Corp. v. Werner**, 631 P.2d 1178, 1180 (Colo. App. 1981); *see also* **Daybreak Constr. Specialties, Inc. v. Saghatoleslami**, 712 P.2d 1028, 1032 (Colo. App. 1985) (same definition of “able”). Depending on the circumstances of the particular case, another instruction defining “produced” in numbered paragraph 4 may be necessary or the paragraph should be modified to state the requirement in terms more relevant to the particular facts in dispute between the parties. *See* **Winston Fin. Grp., Inc. v. Fults Mgmt., Inc.**, 872 P.2d 1356 (Colo. App. 1994) (where broker sets in motion a chain of events that, without break in continuity, results in lease of commercial property, broker is the procuring cause of lease and is entitled to a commission). *But see* § 12-61-201 (broker is not entitled to commission until the sale is consummated or defeated by the refusal or neglect of the owner to consummate the sale); § 12-61-202, C.R.S. (broker is not entitled to commission when a proposed purchaser fails to complete the purchase because of title defects).

11. Numbered paragraph 5 sets out the second basic condition required by section 12-61-201. *See also* **Colo. Inv. Servs., Inc. v. Hager**, 685 P.2d 1371 (Colo. App. 1984).

12. Where the defendant’s neglect is the failure to bring legal proceedings to correct title defects to which the purchaser objects, section 12-61-202 and section 12-61-203, C.R.S., are applicable. In such circumstances, numbered paragraph 4 and, if necessary, paragraph 5 must be appropriately modified.

13. “[A] seller may not defeat a broker’s right to a commission by rejecting an offer solicited by his broker, without explanation, when the variations between [the terms and conditions of] the listing and the offer are of a minor nature [T]he broker should be given the opportunity to rectify minor variations However, where . . . the variation between the offer and the listing is substantial, a seller [may] reject the offer without explanation, and the broker may not use the failure to state specific objections as grounds for claiming a commission.” **Horton-Cavey Realty Co. v. Reese**, 34 Colo. App. 323, 328, 527 P.2d 914, 917 (1974); *see* **McGill Corp. v. Werner**, 631 P.2d 1178 (Colo. App. 1981) (minor and immaterial variations). Also, the “broker is charged with knowledge that the substantial variation exists when he submits the offer.” **Colo. City Dev. Co. v. Jones-Healy Realty, Inc.**, 195 Colo. 114, 116-17, 576 P.2d 160, 162 (1978); *see* **Brady v. Hoepfner**, 38 Colo. App. 495, 558 P.2d 1009 (1977) (broker not entitled to commission when sale fails because of a defect of title or a contingency of which the broker was aware when he was employed); *see also* **Re/Max**

Suburban, Inc. v. Widener, 633 P.2d 530 (Colo. App. 1981) (broker not entitled to commission when sale failed to close due to fault of broker).