DURESS
UNDUE INFLUENCE
MISREPRESENTATION & NON-DISCLOSURE
Duress

- The History and Elements of Duress

- 1700s - To avoid agreement based on duress required actual imprisonment or loss of life or limb.

- Modern Definition - Unlawful pressure exerted upon a person which overcomes their free will and coerces that person to perform an act that he or she ordinarily would not perform.

- Subjective test is used, except when the threat is economic pressure, then objective test is used.
Restatement 2d §176. When a Threat is Improper

(1) A threat is improper if

(a) what is threatened is a crime or a tort, or the threat itself would be a crime or a tort if it resulted in obtaining property,

(b) what is threatened is a criminal prosecution,

(c) what is threatened is the use of civil process and the threat is made in bad faith, or

(d) the threat is a breach of the duty of good faith and fair dealing under a contract with the recipient.
Restatement 2d §176.
When a Threat is Improper (Cont.)

(2) A threat is improper if the resulting exchange is not on fair terms, and

(a) the threatened act would harm the recipient and would not significantly benefit the party making the threat, or

(b) the effectiveness of the threat in inducing the manifestation of assent is significantly increased by prior unfair dealing by the party making the threat, or

(c) what is threatened is otherwise a use of power for illegitimate ends.
Wrongful Acts or Threats – Abuse of Rights

1. Violence or threats of violence
2. Imprisonment or threats of imprisonment
3. Wrongful seizing or withholding, or threats to wrongfully seize or withhold, goods or lands - 1) must coerce the assent; and 2) the coerced party had no reasonable alternative but to assent. Bad faith is a key element.

Chandler v. Sanger, 114 Mass. 364 (1874)

4. Other wrongful coercive threats or acts (blackmail, threats to exercise legal rights in a coercive way)
Coerced Settlements or Contract Modifications

- A threat to breach a contract is not, in and of itself, duress, unless it meets other criteria as well or is coercively made by the government, a common carrier or a public utility.

- Pre-existing duty rule vs Duress as a basis to avoid coerced settlements

- Agreement Under Protest

- § 1-207. Performance or Acceptance Under Reservation of Rights.

- (1) A party who with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as "without prejudice", "under protest" or the like are sufficient.
Remedies for Duress – Ratification

- Normally, duress renders an agreement voidable. In situations that indicate an absence of consent rather than coerced consent, duress may render the agreement void (e.g., signing an agreement unread at gunpoint).

- Voidable agreement may be ratified, either expressly, or by party’s actions once the coercion is removed.

- Damages - Quasi Contract - difference in value or fair market value. Also constructive trust or equitable lien.
Undue Influence

- Background of Undue Influence

- Restatement 2d § 177. When Undue Influence Makes a Contract Voidable

- (1) Undue influence is unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation between them is justified in assuming that that person will not act in a manner inconsistent with his welfare.

- (2) If a party's manifestation of assent is induced by undue influence by the other party, the contract is voidable by the victim.

- (3) If a party's manifestation of assent is induced by one who is not a party to the transaction, the contract is voidable by the victim unless the other party to the transaction in good faith and without reason to know of the undue influence either gives value or relies materially on the transaction.
Elements of Undue Influence

- Non-Attorney Cases

- Undue Psychological Influence - One party uses a dominant psychological position in an unfair manner to induce the subservient party to consent to an agreement she would not otherwise have consented to.

- Misuse of Trust - One party uses her position of trust in an unfair manner to induce the trusting party to consent to an agreement she would not otherwise have consented to.
Prima Facie Circumstantial Case of Undue Influence

- Prima Facie Circumstantial Case of Undue Influence (not all jurisdictions require all four):
  
  1. Facts showing the susceptibility of the party being influenced (mental and physical weakness, psychological dependency)
  
  2. Evidence of opportunity to exercise undue influence
  
  3. Evidence of a disposition to exercise undue influence
  
  4. Evidence must show the unnatural nature of the transaction
Attorney-Client Cases

- Deals with non-retainer agreement contracts between a person and his attorney

- If transaction is called into question, lawyer must show:
  - 1. That the transaction was fairly and equitably conducted
  - 2. That the lawyer fully informed the client of the nature and consequences of the transaction
  - 3. That he fully revealed the lawyer’s own interests in the matter, and
  - 4. That the client got independent advice or the equal of independent advice from the lawyer

- Other courts - If the lawyer got the better of the deal, agreement can be invalidated.

- Rules may or may not be applicable to civil litigation.
Undue Influence: No Confidential Relationship

Undue influence is possible even in the absence of a confidential relationship. Some factors the court will look to:

1. Discussions of the transaction at an unusual or inappropriate time.
2. Consummation of the transaction in an inappropriate place.
3. Insistent demand that the business be finished at once.
4. Extreme emphasis on untoward consequences of delay.
5. The use of multiple persuaders on the dominant side against a single servient party.
6. Absence of third party advisers to the servient party.
7. Statements that there was no time to consult financial advisors or independent attorneys.
Remedies for Undue Influence

1. Cancellation

2. Quasi Contract remedies

3. Affirmative defense against enforcement or specific performance

4. Agreement may be ratified
Misrepresentation and Non-Disclosure

- Elements of Misrepresentation
  - Different than and separate from Fraud
  - Fraud = Tort
  - Misrepresentation in violation of contractual obligation = Breach of contract
- Fraud:
  1. False representation
  2. Made with knowledge of its falsity
  3. With the intent it be relied on
  4. Reliance on the representation
  5. Damage
Fact versus Opinion

- Misrepresentation of material facts render an agreement voidable; erroneous statements of opinion do not, though the line between fact and opinion may be a fine one.

- Statements of “future facts” are usually considered opinion, though they may be written as representations in an agreement.

- Exceptions exist, including (sometimes): relation of trust, experts’ statements, one with superior knowledge, opinion by interested party claiming impartiality, blatantly false statement of opinion.
Fact versus Law

- Traditional rule - misrepresentation of law does not render agreement voidable.

- Rationale:
  1) everyone is deemed to know the law
  2) As the law is based on facts, all statements are opinions

- Exceptions:
  1) Statements of a lawyer (expertise)
  2) situations of trust, confidence, superior knowledge
Fact versus Intention and Promise

- Misrepresentation of intent renders agreement voidable if intent is material to the agreement. Change of mind is not a misrepresentation.

- Non-Disclosure; Implied Warranty

- General Rule - In a bargaining transaction there is no obligation to disclose information to the other party

- Exceptions - Statute or regulation (home sale)
  - Concealment
  - Half truth

- Where change in circumstances make prior statement no longer true (if statement is being relied on)
  - Suretyship and insurance
  - Fiduciary or confidential relationship
Merger Clauses

- General rule - merger clause does not bar parol evidence of fraud/misrepresentation

- New York rule - Difference between general merger and specific merger

- “As Is” clause disclaims warranties, but does not vitiate fraud /misrepresentation

- Fraud in Performance
  - Creates both tort and contract causes of action.
  - Breach of warranty of good faith.
Fraud in the Factum or Fraud in the Inducement

- General rule - Fraud in the inducement renders an agreement voidable

- Agreements void when 1) Agreement that is executed is “radically different” from what signer had been led to believe and 2) signer is not negligent in signing

- UCC 3-305. DEFENSES AND CLAIMS IN RECOUPMENT.

  (a) Except as stated in subsection (b), the right to enforce the obligation of a party to pay an instrument is subject to the following:

  (1) a defense of the obligor based on ...(iii) fraud that induced the obligor to sign the instrument with neither knowledge nor reasonable opportunity to learn of its character or its essential terms,
Remedies

- Retain agreement and sue for damages.
- Avoid transaction and seek restitution.
- Fraud may be an affirmative defense to an action to enforce agreement.
- UCC - No election required.
  - § 2-721. Remedies for Fraud.
  - Remedies for material misrepresentation or fraud include all remedies available under this Article for non-fraudulent breach. Neither rescission or a claim for rescission of the contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy.

- Ratification extinguishes contract claims but retains tort claims.