

502.12 CONTRACTS—ISSUE OF BREACH—MATERIALITY.¹

NOTE WELL: Use this instruction for breach when materiality is at issue. See N.C.P.I.—Civil 502.00 (Contracts—Issue of Breach) for the issue of breach when materiality is not at issue.

The (*state number*) issue reads:

“Did the defendant breach a material term of the contract?”

(You will answer this issue only if you have answered the (*state number*) issue “Yes” in favor of the plaintiff.)

In this case the plaintiff contends [and the defendant denies] that (*identify each alleged material term*) was a material term of the contract. The plaintiff² bears the burden of proving, by the greater weight of the evidence, that (*identify each alleged material term*) was material to the contract.

A material term is one that is essential to the transaction, that is, a term which, if omitted or modified, would have caused one of the parties to withhold assent or to bargain for a substantially different term. Not every term in a contract is material.

In determining whether a term is material, you may consider the following factors:

[the subject matter and purpose of the contract]

[the intentions of the parties]

[the scope of performance reasonably expected by each party]

[the prior dealings of the parties]

[any custom, practice or usage so commonly known to other reasonable persons, in similar situations, that the parties knew or should have known of its existence]

[*state other factors supported by the evidence*].

In this case the plaintiff contends, and the defendant denies, that defendant failed to [perform] [abide by] a material term of the contract [by] [in one or more of the following ways]:

(Read all contention(s) of breach.)

Finally, as to the *(state number)* issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the defendant breached a material term of the contract, then it would be your duty to answer this issue “Yes” in favor of the plaintiff.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue “No” in favor of the defendant.

1. The issue of materiality may be raised by either party and, in a multiple breach situation, could affect some breaches but not others. Therefore, in such cases, the judge should consider modifying this instruction to fit the needs of the case.

2. Although the case law is largely silent on who must prove that a contract term is material, it appears that the burden lies with the party who must prove materiality as an essential component of the relief he or she is seeking, either on a claim (plaintiff) or as an affirmative defense (defendant).