

502.30 CONTRACTS - ISSUE OF BREACH-DEFENSE OF IMPOSSIBILITY
(DESTRUCTION OF SUBJECT MATTER OF CONTRACT).

The (*state number*) issue reads:

"Was the defendant's failure to [perform] [abide by] a material term of the contract excused by impossibility?"¹

(You will answer this issue only if you have answered the (*state number*)² issue "Yes" in favor of the plaintiff.)

On this issue the burden of proof is on the defendant.³ This means that the defendant must prove, by the greater weight of the evidence, three things:

First, that the subject matter of the contract was destroyed.⁴

Second, that the destruction of the subject matter of the contract was not the fault of the defendant.⁵

And Third, that the contract between the plaintiff and the defendant did not allocate the risk that the subject matter of the contract might be destroyed.⁶

Finally, as to the (*state number*) issue on which the defendant has the burden of proof, if you find by the greater weight of the evidence that the defendant's failure to [perform] [abide by] a material term of the contract was excused by impossibility, then it would be your duty to answer this issue "Yes" in favor of the defendant.

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 plaintiff.

¹ Where the "impossibility" arises out of the action of governmental authorities, it is a question of law for the court to decide. *Messer v. Laurel Hill Assocs.*, 102 N.C. App. 307, 311, 401 S.E.2d 843, 846 (1991); *see also UNCC Properties, Inc. v. Greene*, 111 N.C. App. 391, 397, 432 S.E.2d 699, 702, *disc. rev. denied*, 335 N.C. 242, 439 S.E.2d 163 (1993); *Helms v. B&L Investment Co., Inc.*, 19 N.C. App. 5, 8, 198 S.E.2d 79, 81 (1973).

NOTE WELL: Restitution is an appropriate remedy following discharge of a contract by the defenses of either frustration of purpose or impossibility. *Holmes v. Solon*

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Automated Servs., ___ N.C. App. ___, ___, 752 S.E.2d 179, 182 (2013), citing *Restatement (Second) of Contracts* § 377 (1981) ("A party whose duty of performance does not arise or is discharged as a result of impracticability of performance, frustration of purpose, non-occurrence of a condition or disclaimer of a beneficiary is entitled to restitution for any benefit that he has conferred on the other party by way of part performance or reliance."). Where the defendant asserts impossibility or frustration of purpose as a defense to a breach of contract claim, the Court still may instruct the jury on restitution as a proper remedy for the plaintiff under N.C.P.I.-Civil 503.01. See *id.* at ___, 179 S.E.2d at 183.

2 See, as appropriate, N.C.P.I.-Civil 502.00 (Contracts-Issue of Breach By Non-Performance) or N.C.P.I.-Civil 502.05 (Contracts-Issue of Breach By Repudiation), or N.C.P.I.-Civil 502.10 (Contracts-Issue of Breach By Prevention).

3 The burden of proof is on the "person charged" to show "some valid reason which may excuse the non-performance, and the burden of doing so rests on him." *Sechrest v. Forest Furniture Co.*, 264 N.C. 216, 217, 141 S.E.2d 292, 294 (1965) (quoting *Blount-Midyette & Co. v. Aeroglide Corp.*, 254 N.C. 484, 488, 119 S.E.2d 225, 228 (1961)).

4 *Sechrest*, 264 N.C. at 217, 141 S.E.2d at 293; *Tucker v. Charter Med. Corp.*, 60 N.C. App. 665, 671, 299 S.E.2d 800, 804, *disc. rev. denied*, 308 N.C. 548, 304 S.E.2d 242 (1983); *Knowles v. Carolina Coach Co.*, 41 N.C. App. 709, 714, 255 S.E.2d 576, 579, *disc. rev. denied*, 298 N.C. 298, 259 S.E.2d 913 (1979).

5 *Sechrest*, 264 N.C. at 217, 141 S.E.2d at 293.

6 Where there is language in the contract which allocates the risk of loss of the subject matter of the contract, impossibility is not a defense. *Barnes v. Ford Motor Co.*, 95 N.C. App. 367, 371-72, 382 S.E.2d 842, 844-45 (1989).