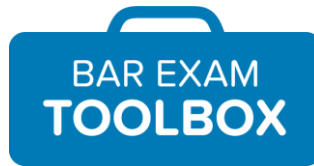


Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today, as part of our “Listen and Learn” series, we’re talking about contract defenses. This episode is part two in contracts defenses. In part one, we covered the defenses of mistake, fraud, misrepresentation, and non-disclosure. In part two, we’ll cover three more: incapacity, duress, and undue influence. Your Bar Exam Toolbox hosts are Alison Monahan and Lee Burgess, that’s me. We’re here to demystify the bar exam experience, so you can study effectively, stay sane, and hopefully pass and move on with your life. We’re the co-creators of the [Law School Toolbox](#), the [Bar Exam Toolbox](#), and the career-related website [CareerDicta](#). Alison also runs [The Girl’s Guide to Law School](#). If you enjoy the show, please leave a review on your favorite listening app, and check out our sister podcast, the [Law School Toolbox podcast](#). If you have any questions, don’t hesitate to reach out to us. You can reach us via the [contact form](#) on BarExamToolbox.com, and we’d love to hear from you. And with that, let’s get started.

Lee Burgess: Hi, and welcome back to the “Listen and Learn” series from the Bar Exam Toolbox podcast. Today, we will be looking at three more defenses to contract formation: incapacity, duress, and undue influence. Before we begin discussing how to avoid forming a contract, be sure you remember the structure of contract formation: offer, acceptance, and consideration. If you need it, we have a [previous podcast episode](#) we will link to in the show notes, that is a great refresher on the concepts involved in contract formation. And remember, this episode works in tandem with [another podcast episode](#) that covers four other defenses to a contract, so be sure to give that episode a listen if you haven’t already. We will also link to that in the show notes. When analyzing a Contracts question on an exam, you will need to have all of these tools at the ready, so be sure to listen to all three episodes.

Lee Burgess: Just to get us off on the right foot, remember that in order to form a valid contract, you need three things: (1) mutual assent (that is, an offer and an acceptance); (2) consideration; and (3) no defenses to formation. So, if any of the three defenses we discuss today apply, there is no contract; the contract cannot be enforced. This is why understanding defenses is key to understanding whether a contract was formed at all.

Lee Burgess: The first defense we’ll cover today is incapacity. In order for a contract to be formed, the parties to that contract must have the legal capacity to enter into a contract. What does it mean to have capacity to enter into a contract? I think it’s easier to talk about who doesn’t have the capacity than who does, so let’s approach it from that angle.

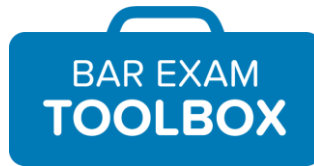


Lee Burgess: The purpose of the incapacity defense is to protect vulnerable individuals from being taken advantage of – that is, from being stuck in a contract that is not in their best interest. Who are some people that we, as a society, think should not be entering into contracts on their own? Think about some groups that the law often specifically protects. The first is minors. Children under 18-years-old legally do not have the capacity to enter into contracts. One exception to this rule is that minors are bound for contracts for necessities like food, shelter, and clothing. The second is people lacking mental capacity to enter into a contract. To fall into this category, a person must be unable to understand the meaning and effect of a contract.

Lee Burgess: So, what happens if a contract is formed with an individual that is either a minor or lacking sufficient mental capacity to enter into a contract? That contract is actually not automatically void. Instead, the contract is voidable by the person lacking capacity. The law does not go so far as to step in and void the contract. It gives the minor and individual lacking mental capacity some agency and permits them to void or not void the contract. So, that's incapacity – pretty straightforward. Let's move on to undue influence.

Lee Burgess: If a party to a contract unduly influenced another party during the formation of a contract, that contract is also voidable by the victim. What counts as undue influence, you might ask. Well, that's a good question! Persuasion is a key part of contract negotiation. Each party is trying to influence the other and convince them to give them what they want. So, just pressuring another person can't be enough. Then, what rises to the level of undue influence? Undue influence requires, (1) the unfair persuasion of a person who; (2) is either a) under the domination of a person exercising influence, or b) is justified in assuming the other person will act in their interest or welfare because of the relationship between the parties.

Lee Burgess: There is a lot going on in this rule. Essentially, we're first looking for unfair persuasion. If we have unfair persuasion, we move on to the second prong, which covers the relationship between the parties. Under that prong, we're looking for control over one of the parties, or a relationship between the parties that would typically be one that acts with the other's well-being in mind, but in this case, may not have. Why is that important? Because that demonstrates a level of trust that the victim reasonably had with the persuader – a family member, for example – and that trust was used against the victim. Think about it from the persuader's perspective: They knew they had a trust relationship and therefore a strong pull over the victim, so they used it – not to the victim's benefit, but to gain something themselves.

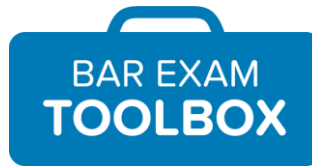


Lee Burgess: Now, that may still not be clear to you, and that's okay. Sometimes it can be easier to understand a rule if we see it play out in context, so let's look at a sample question together. As I read the question, keep in mind what we've learned so far, especially in this podcast, and practice issue spotting. Can you spot incapacity or undue influence? Note it down. And remember – and this is extremely important – when you are answering an exam question, don't be too quick to make a conclusion. If you see something that could arguably be undue influence or incapacity, note it, even if you don't think it will ultimately be a successful argument. The test graders want to see your legal reasoning skills, so explain why it won't be successful. You'll get the most points by spotting possible issues and explaining why they are or are not applicable. Don't skip something just because you don't think it's ultimately the best argument. And with that said, let's get into the question:

Lee Burgess: “Bailey is a personal assistant. Her services include cooking, cleaning, household management, and anything else her clients need to thrive. One of her clients was a young woman named Andrea. Bailey ran Andrea's household, doing her chores, running her errands, and keeping her finances. One evening, Andrea was in a terrible accident that resulted in a traumatic brain injury. Andrea's TBI meant she required much more hands-on care, including some basic medical assistance. She often had memory lapses, confusion, and migraines that would last for days. Bailey felt sorry for Andrea and thought finances would likely be tight since she would be unable to work full-time. She agreed to increase her duties and hours with Andrea but never charged her for the extra work or hours.

Lee Burgess: After a few months, Andrea said to Bailey, ‘I know this is a lot for you and I know you aren't charging what you're worth. This has been such a terrifying time, especially since I have no family to help me. You have been irreplaceable. If you would care for me and manage my house until I recover, I will give you my cabin in the woods.’ Andrea then quickly drifted to sleep, as she often did since her TBI. Since Bailey had managed Andrea's finances and never seen mention of a cabin, Bailey doubted that any cabin existed, but she didn't say anything – she left and let Andrea sleep. Two years passed without any improvement in Andrea's health. In fact, she had steadily declined.

Lee Burgess: Bailey continued to work and care for Andrea and forgot all about the cabin. One day, while going through old paperwork, Bailey discovered that Andrea did, in fact, own a cabin in the woods – but it wasn't your typical small, rustic getaway. It was a large and luxurious home worth about 5 million dollars. Bailey immediately wrote a note to Andrea, saying: ‘I accept your offer to work for you and provide you with whatever you need until you heal.’ Bailey signed the note



and placed it in Andrea’s mailbox, and went home for the evening. That night, Andrea died from complications of the traumatic brain injury. The services rendered by Bailey over the years are worth about \$75,000 more than she charged. Does Bailey have an enforceable contract for the transfer of the luxury cabin? Discuss.”

Lee Burgess: Well, what do you think? Are there any defenses to the contract between Bailey and Andrea? Remember that, on an exam, you will want to first analyze what rule applies to this purported contract. As we’ve said in prior episodes, in a Contracts essay question, we always, always start with an analysis of the governing law: Are we applying UCC Article 2 or common law? The governing law matters because it dictates some of the rules we must use. In this case, we are applying the common law because it is a service contract, not a contract regarding the sale of goods. On an exam, you would also analyze whether a valid contract was formed. Today, we have limited time so we’ll skip that part, but do not skip it on an exam!

Lee Burgess: Back to our defenses. What do you think? Did you see an argument for an incapacity defense? I don’t think there is any arguable issue with Bailey, but did Andrea lack mental capacity to enter into a contract? The question says she was a young woman, so we know she wasn’t a minor, but what about her mental capacity? Was she able, as the rule requires, to understand the meaning and effect of a contract?

Lee Burgess: I think there is a definite argument that Andrea lacked capacity to enter into a contract. Remember, Andrea had a traumatic brain injury with symptoms that included confusion, memory loss, and migraines. Depending on the severity of her confusion and memory loss, she may not have been able to understand the meaning or effect of a contract. Did she mean to enter into one? Did she know what it meant if she did? If, due to her injury, Andrea did not understand what she was doing when she offered the cabin and could not properly enter into contract, the contract will not be enforced. Though it isn’t dispositive, I think it’s also worth noting that Andrea called her luxurious, multi-million-dollar second home a “cabin in the woods”, which may be humility, or may be evidence of an inability to fully grasp the situation.

Lee Burgess: Also keep in mind that Bailey was Andrea’s assistant and did nearly everything for her. Bailey should have known that Andrea’s injury and symptoms made her incapable of contracting. She knew Andrea had a brain injury, and remember, did not even believe that she had a cabin at first. Having looked at her finances, she clearly thought Andrea was confused and unable to understand her own property, much less enter into an enforceable contract. While the defense of



incapacity does not depend on Bailey's awareness of the incapacity, her actions are additional evidence that Andrea was demonstrably incapacitated. A party that does not have capacity due to mental disease cannot be found to have entered into an enforceable contract, so the contract was not valid.

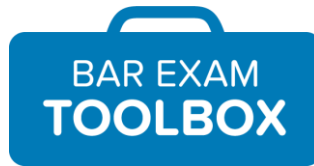
Lee Burgess: What about undue influence? Remember, we're looking for, (1) unfair persuasion; and (2) someone under the domination of another, or a relationship between the parties such that a person is justified in assuming the other person will act in their interest or welfare.

Lee Burgess: In this case, Bailey was arguably in a position of power over Andrea as her much-needed assistant who did nearly everything for her. Andrea stated that she was frightened by the prospect of not having the assistance and no family to help her. She saw Bailey as the only one caring for her and called her "irreplaceable". This argument isn't as strong as the prior one, since Bailey didn't actively use her position to sway Andrea. In fact, she agreed to do this work even before Andrea's request, and did not affirmatively accept the offer until years later. She also did not do anything to unfairly persuade Andrea. If Bailey had done something to put additional pressure on Andrea, or if she had leveraged her position in order to get the cabin, this argument would be much stronger. While I don't think this second argument is a winning one, it's a great example of how to treat viable yet weaker arguments on an exam. The graders want to see that you see the possible issue and can analyze it, even if the correct answer is that no undue influence exists.

Lee Burgess: I hope that hypothetical put these contract defenses into context and helped you picture what they might look like in the real world or on an exam. Now, let's move on to the third and final defense we'll address today – duress.

Lee Burgess: There are two types of duress to look out for – physical compulsion and economic duress. As you might imagine, physical compulsion occurs if a person physically compels another person to agree to a contract. That could be, for example, actually physically forcing someone to sign, or holding them at gunpoint until they do. If there is physical compulsion during contract formation, the contract is not just voidable, it is void.

Lee Burgess: Economic duress occurs when four things are present: (1) an improper threat is made; (2) that induces a party; (3) who has no reasonable alternative; (4) to enter into a contract. So, here, we're not only looking for an improper threat; we're looking to see if that threat caused another person to enter into a contract, and whether that person had any reasonable alternative except to enter into that contract. If economic duress exists, the contract is voidable. One



thing to keep in mind here is that a mere threat to breach a contract is generally insufficient. To find economic duress, we need to look for more than that. Let's take a look at another hypo together to see how this rule might play out:

Lee Burgess:

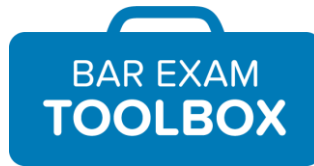
"A couple moved into a three-bed, two-bath house. The upstairs bathroom, near the bedrooms, had a walk-in shower. The downstairs bathroom, near the family room, had a bathtub that was in poor repair. The couple became pregnant with twins and decided they needed a working bathtub for their children to use. Because the current bathtub was not near the bedrooms, the couple decided to repair the existing bathtub and buy a new bathtub for the upstairs bathroom. After some negotiation, the couple entered into two contracts with a business that both repairs and sells bathtubs. Under one contract, the business agreed to repair the existing bathtub for the couple for \$1,000. The business would usually charge a higher price for a project like this, but the business agreed to this price because the couple agreed to prepay the entire amount. Under the other contract, the business agreed to sell and install a new bathtub to the couple for the other bathroom for \$6,500, which was also a lower sales price because the couple agreed to prepay. Both contracts were signed on October 22, and the couple paid the business a total of \$7,500 that day.

Lee Burgess:

Two weeks later, before the business had begun repair work on the bathtub, the business suffered serious and unanticipated financial loss. The business contacted the couple and said, 'Bad news. We had some unexpected costs and as a result are very short on cash. In fact, even though we haven't purchased your new bathtub or begun work on your existing tub, we already spent the money you paid us and are completely out of cash. We're really sorry, but we're in a bind. The only way we'll be able to perform both contracts is if you agree to pay us \$500 more for the repair and \$2,000 more for the new tub. If you do that, we should be able to finance the rest. If you don't, I doubt that we will ever be able to perform either contract, and we won't be able to refund your money.'

Lee Burgess:

After receiving this unwelcome news, the couple agreed to pay the extra amounts, provided that the extra amount on each contract would be paid only upon completion of the business's obligations under that contract. The business agreed to this arrangement, and the parties signed documents reflecting these changes to each contract. The business then repaired the existing bathtub, and delivered and installed the new bathtub. They then demanded payment of the additional \$2,500. The couple now has refused to pay the business the additional amounts for the repair and the new bathtub, citing economic duress. Is economic duress a valid defense to this contract? Discuss."



Lee Burgess: So, what do you think? Does what the business did qualify as economic duress? Remember that, to find economic duress, we need to show the business made an improper threat that induced the couple, who had no reasonable alternative, to enter into the contract.

Lee Burgess: While the business undoubtedly engaged in some distasteful business practices here, I don't think it rises to the level of economic duress, because I don't think their actions likely rise to the level of an improper threat. But, since we always need to give a full analysis of our answers on an exam, let's go through all four elements. Here, it appears that three of the four elements are likely satisfied. The business plainly made a threat that induced the couple's assent to the contract modification, and the threat was sufficiently serious to compel that assent. If the couple had not agreed to pay the business the extra amounts, the couple would have lost its entire investment and still would not have a working bathtub.

Lee Burgess: In light of this potential loss and the upcoming birth of their children, a court could conclude that the couple had no reasonable alternative. However, the business has a strong argument that its threat (indicating that it would breach the contracts unless the prices were increased) was not wrongful or improper. It was nothing more than a communication of the reality of its own perilous financial situation to the couple. Like we mentioned earlier when reviewing the rule, a mere threat to breach a contract is not, in and of itself, improper; something more is required. At the time the modification was requested, the business was not trying to extort a price increase because of the couple's vulnerability, but rather was simply stating the reality that the business had mismanaged funds and could not perform without more money.

Lee Burgess: Now, the couple certainly could have argued the business did not perform on the contract and refused to sign the new modification, but that isn't what happened here. The couple chose to go forward with the modification, and though unfortunate and poor business practice, the business's actions were not an improper threat.

Lee Burgess: Alright, that's all we have time for today. I hope you have a better sense of some of the contract defenses available and how to analyze their viability. If you enjoyed this episode of the Bar Exam Toolbox podcast, please take a second to leave a review and rating on your favorite listening app. We'd really appreciate it. And be sure to subscribe so you don't miss anything. If you have any questions or comments, please don't hesitate to reach out to myself and Alison at [lee@barexamtoolbox.com](mailto:lee@barexamtoolbox.com) or [alison@barexamtoolbox.com](mailto:alison@barexamtoolbox.com). Or you can



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