

FORMATION DEFENSES

This Chapter explores situations in which a party can avoid an entire agreement, or parts of it, even though it was supported by consideration and resulted from an accepted offer, due to significant defects present at the time of formation. These defects include a lack of capacity to enter into a contract, content that is illegal or against public policy, contracts based on significant factual mistakes or misrepresentations of facts, those made under duress or that are unconscionable, and those that are oral when they are required to be in writing. Throughout this Chapter, we examine how a contract formed under such fundamental defects allows the aggrieved party to assert one of the formation defenses.

Because most of these defects challenge the parties' acceptance of the contract or its adherence to fundamental public policies, the parties are typically not free to create their own arrangement and negotiate around the formation defenses (though, like more legal rules, this one has exceptions as well, which we will discuss).

Successfully invoking a formation defense can lead to three potential outcomes. In some instances, it results in *non-enforceability*, where a court will refuse to enforce the contract or parts of it. This is common when a contract provision is found to be unconscionable or against public policy. In other cases, the formation defense renders the contract *voidable*. This means that one party (or, rarely, both parties) has the power to terminate the contract (a process also known as rescission, avoidance, or disaffirmance). As explored in this Chapter, this power must be exercised within a reasonable timeframe, but until then, the contract remains fully enforceable. Contracts formed under a mistake or misrepresentation, or where one party lacked legal capacity, are typically considered voidable. Finally, in rare circumstances, a defect in formation can be so severe that it leads to a void contract. In such cases, the law does not recognize that any offer was accepted, effectively meaning the contract never existed and no legal obligations were created. For instance, while a contract with a 16-year-old is generally voidable, allowing the minor to rescind it, a contract with a 2-year-old is void, meaning it never existed and requires no further action on behalf of the minor.

We will revisit these terms and their applications throughout the Chapter.

