



Section VI

contracts

“The business of the law is to make sense of the confusion of what we call human life—to reduce it to order but at the same time to give it possibility, scope, even dignity.”

– Archibald MacLeish

The law defines a contract as nothing more than “a promise the law will enforce.” However, this simple definition is deceptive, because the law will enforce some promises but not others. As will be seen, the law of contracts imposes numerous limitations on the types of promises that are enforceable and on the circumstances in which they will be enforced.

Basic Requirements for a Contract

The basic requirements for a contract are *mutual agreement*, usually made through a process of *offer* and *acceptance*, and *consideration*, or one of its substitutes. In addition, the parties must be 18 years of age, and otherwise mentally competent, the terms of the agreement must be defined in enough detail that a court (and the parties) can determine their obligations, and the subject matter of the agreement must not be illegal.

The Offer

An offer is the outward expression of a willingness to enter into an agreement. Offers can be written or even implied from conduct.

An offer might impose time limits on the acceptance. If so, the offer expires if it is not accepted within that time period. If there is no specific time limit, the offer must be accepted within a “reasonable” time.

Also, if the other person has paid you to keep the offer open, thus creating an *option contract*, then you do not have the right to revoke or withdraw the offer before it is accepted.

The Acceptance

Like an offer, an acceptance consists of some outward expression of agreement. The acceptance can be express or implied, written or oral. It might consist of a signature on a written offer, a simple “okay” or even a nod of the head. When an offer specifies terms of a particular method of acceptance, it may not be satisfactory to accept it any other way.

Generally, accepting an offer requires an affirmative act by an individual. Silence does not usually imply acceptance.

An individual does not have to accept an offer as proposed. The individual can reject it outright or make a counteroffer, which may include its own terms and conditions. If a counteroffer is made, all previous offers are void. If an offer is “accepted” with conditions, it is not actually an acceptance at all, but, rather, a counteroffer.

Consideration and Reliance

Remember, for a contract to be valid, *each* party must make a promise or give or receive some benefit in return for the promise. A contract’s consideration may be either an act or a promise. Without this element of exchange, a promise lacks consideration and usually cannot be enforced as a contract. As a result, a promise to make a gift to someone generally is not regarded as a contract, because usually only one party benefits and the necessary element of consideration is lacking.

Consideration can take many forms. It might be money, property, rights, services or simply a promise to do something in return or even a promise not to do something that you would otherwise have the right to do. Consideration can be present even though no money changes

hands. Consideration exists when parties have done nothing more than exchange promises with one another.

Even when there has been nothing given in exchange for a promise, the promise still might be enforceable if someone relied on the promise in some tangible way. Thus, even though a promise to make a gift is not usually enforceable, if the beneficiary of the gift takes some concrete action in reliance on the promise, the promise may be enforced. This is sometimes called *promissory estoppel*, because the person who made the promise is “stopped” from claiming that there was no consideration for the promise.

Other Requirements: Certainty, Legality, and Competence of the Parties

A contract cannot be enforced if its terms are so vague that no one can determine what to enforce. There is an offer and acceptance of sorts when, for example, you tell a friend you will do something for him or her in the future and the friend agrees. Because there is neither certainty about what to do or when to do it, nor certainty about the consideration for doing it, the contract (if there is one) would be unenforceable because of any one of these uncertainties.

In addition, the agreement must be for something that is legal for the parties to agree about. An agreement to do something illegal is not a contract, though it may be a conspiracy to commit a crime that could expose both parties to criminal prosecution. Likewise, an agreement to do something that the law will not permit, even if it is not a crime, cannot be enforced as a contract.

Also, the parties to a contract must be competent to enter into it. In most cases, children under 18 years of age are not legally competent to enter into legally binding agreements. A person suffering from a mental disease or disability also might be found by a judge to be incompetent to enter into a legally binding agreement. On the other hand, a minor or incompetent person who receives something necessary for life, such as food, shelter, clothing

or medical care, may be responsible to pay for the reasonable value of whatever was provided.

While a minor or a person suffering from legal disability cannot be bound to a contract, if such a person performs his or her part of an agreement, the other party still will be bound by the contract.

Express and Implied Contracts

The terms “express contract” and “implied contract” refer to nothing more than the formality or informality of the method used to create the contract. Many express contracts are created by signing a detailed written agreement, containing all or most of the terms the parties have agreed upon, such as a contract for the purchase of a home or a new car. So-called “implied contracts” are created with little or no formality, such as the implied contract that is made when someone asks a mechanic to perform a necessary car repair. By asking the mechanic to do the work, the car owner implies that he or she has agreed to pay the mechanic’s usual hourly service fee together with the cost of any parts necessary to complete the repairs. By taking the car, the mechanic agrees to perform the work within a reasonable time and in a professional manner for the usual hourly fee.

Written and Oral Contracts

With some exceptions, an oral contract is as valid as a written contract, as long as the basic elements of a contract exist. However, in a dispute, the terms of an oral contract may be more difficult to prove than the terms of a written contract.

Some types of contracts must be in writing and will not be enforced unless the essential terms of the agreement are contained in a signed, written document. Contracts that must be written are:

- contracts for the sale of land or any interest in real property, including a home;
- contracts in which one person promises to pay another’s debt (for example, when a parent guarantees a child’s debt);
- prenuptial agreements or contracts between couples settling various questions

- of property and other rights in consideration of marriage;
- contracts that cannot be fully performed within a year of the time the contract is made, such as a contract to work for someone for 18 months;
- contracts for the sale of goods for a price of \$500 or more.

Written contracts do not have to be formal. The language can be plain or very complicated. Written contracts may be printed or typewritten. The writing may be of nothing more than a sales slip, which is no more than a memorandum of the contract of sale. It might even be a hand-written note on a stray scrap piece of paper.

Of course, it is almost always better to write out the terms of a contract, even when there is no legal requirement for the contract to be written. The more that is available in writing to all the parties to a contract, the less likelihood there is that there will be a misunderstanding between the parties about their obligations. However, if parties go to the trouble of writing out the terms of their agreement, they should make sure to include all of the agreed-upon terms. Otherwise, they may not be able to prove that a particular part of their agreement was ever made.

Performance of Contracts and the Consequences of Breach

Generally, parties to a contract must do everything required by their agreement. Differences of opinion and legal action may arise when one party to a contract either fails to perform completely or chooses not to complete his or her end of the bargain. In these instances, questions of performance arise.

A person who substantially performs his or her side of bargain can enforce the contract

against the other person if the other person fails to perform.

The situation becomes more complicated when a person “partially performs” a promise, but does not “substantially perform.” If a person only partially performs a contract, he or she may not even be able to get paid for the value of his or her partial performance, and likely will be responsible for any harm caused to the other party.

Substantial Performance & Material Breach

At one time, the law required strict compliance with the terms of a contract. Even a minor deviation from the terms of one person’s promise would excuse the other person from performing his or her own duties. Today, if one party has broken its promise in some minor way, but has still *substantially performed* its promise, then the other party still must perform his or her own part of the deal. The second party is excused from performing his or her own part of the deal *only* if the first party’s failure to perform is serious enough to be a *material breach*.

Offer to Perform as a Precondition to the Right to Sue

As explained above, Ohio law does not require one party to honor an agreement if the other party breaks his or her end of the contract. But, to enforce a contract, a party may be required to demonstrate that he or she is still “ready, willing and able” to fulfill his or her part of the agreed exchange.

Excuses for Nonperformance or Breach of Contract

Sometimes, a party to a contract may be excused from performing his or her part of an agreement. As explained above, a person is excused from performing due to the other

party's failure to substantially perform his or her own obligations. Similarly, a party may be excused if it is clear that the other party is unlikely to perform, even if the other party has not yet breached the contract.

When the contract specifies that its duties or obligations absolutely must be performed by a specific time (when "time is of the essence"), a delay by one party can excuse performance by the other and provide the other party with grounds for legal action.

A party to a contract also may voluntarily give up some rights under a contract through a voluntary "waiver." A waiver can be an excuse for nonperformance by the other party.

Prevention of Performance

Nonperformance of a contract is excused if one party prevents the other from complying with the contract.

Impossibility of Performance

Impossibility of performance of a contract also might excuse its nonperformance.

Remedies for Breach of Contract

The usual remedy for breach of contract is legal action to recover enough money to pay for the harm caused by the breach. In some cases, the injured party can force the breaching party to perform the contract, under threat of imprisonment for contempt of court, or have the contract modified or canceled, or get some other type of court order to prevent further loss.

The injured party should notify the other party right away if there is a defect in the other party's performance. In some situations, the injured party who fails to provide prompt notice will be prevented from obtaining any remedy.

Money Damages for Breach of Contract

The usual remedy for losses caused by a breach of contract is *monetary damages* (money

paid to make up for the loss). The defendant isn't necessarily liable for the entire contract price, but rather for the value of the actual loss suffered by the injured party.

Specific Performance

If the object of a contract cannot be obtained by any other means, or if the subject matter of the contract is unique, a court may force a party to comply with the contract rather than pay damages.

Cancellation

The technical term for cancellation of a contract is *rescission*, which refers to an action the injured party can take without going to court.

Injunction

Injunctions are court orders that require people to act (or not to act) in certain ways. In contracting, an injunction would order a party not to violate a contract when there is a real threat that a breach of contract will continue. In these situations, monetary damages are inadequate remedies because the injured party would have to go to court repeatedly. If the injured party succeeds in getting an injunction against the other party, the other party risks being found in contempt of court for breaching the contract.

Quasi-Contract or "Restitution"

Sometimes the law infers a contract-like relationship among parties to prevent someone from benefiting unjustly (legally called an *unjust enrichment*). Such a quasi-contract is used to protect one party from taking advantage of another, especially when the event in question arose innocently or accidentally.

Covering Contract Cases

Because so much of contract law is linked to actual written agreements, journalists covering contract cases are advised to obtain the original

contract documents along with the briefs from both sides detailing the breakdown of the contract.

In covering contract cases, the devil is in the details. Journalists are advised to spend the time needed to understand the subtleties of contract law and the nature of the dispute to accurately interpret the conflict for readers and viewers. Much of contract law also requires an intimate understanding not only of the law but also of the field or industry that is part of the dispute. Thus, a real estate contract case will require the journalist to understand the nature of real estate law as much as the nature of contracts.

Covering contract cases often requires advance homework and hours of reading court documents to ascertain the exact nature of the dispute, the position of the parties involved and the court's decision. There may be dozens of questions within the contract for the court to consider. Journalists covering such cases are often called upon to make judgment calls about the most important claims to highlight and explain to readers and viewers. Those judgments are critical and can be assisted by the attorneys involved in the case, with the understanding that attorneys represent a particular viewpoint.

Web Links:

OSBA's "Law You Can Use" articles:

(go to <http://www.ohioabar.org/pub/lycu> and search for article by title or topic)

“Digital Signatures: Might You Sign a Contract Without Realizing It?”

“Know Which Contracts Can Be Canceled Within Three-Day Period”

“Understand Recording Company Contracts Before You Sign”

From FindLaw's Web site:

<http://library.findlaw.com/> (choose “Commercial Law and Contracts”)

From Cornell Law School Legal Information Institute:

<http://www.law.cornell.edu/wex/index.php/Contracts>