

## CONTRACT LAW IN GENERAL:

### R§1. Contract Defined

A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.

### R§2. Promise; Promisor; Promisee; Beneficiary

- (1) A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.
- (2) The person manifesting the intention is the promisor.
- (3) The person to whom the manifestation is addressed is the promisee.
- (4) Where performance will benefit a person other than the promisee, that person is a beneficiary.

### R§3. Agreement Defined; Bargain Defined

An agreement is a manifestation of mutual assent on the part of two or more persons. A bargain is an agreement to exchange promises or to exchange a promise for a performance or to exchange performances.

### R§4. How a Promise May Be Made

A promise may be stated in words either oral or written, or may be inferred wholly or partly from conduct.

- Requirements for a valid contract:
  - Bilateral or Unilateral? Consideration (or substitutes), assent (offer + acceptance magic moment), external limitations on content of contract/bargaining process requirements (no duress etc.), content requirements that make an otherwise valid contract unenforceable (no unconscionability, fraud/misrepresentation)
- Private vs. Public in Contracts
  - Sometimes called private legislation or private law making
  - Binding committing arrangements private individuals decide upon (after negotiating terms)
  - It's in the private sphere on one hand, but it's also public because once it is a binding contract the government becomes relevant to enforce it
  - Normative aspect of contract law
    - Justification of why the government ought to enforce it, why should they enforce it, how, and under what conditions?
    - Why are some promises contracts and not others?
    - Stability perhaps? Economic and moral social and cultural (especially first two).
- US Contract Law
  - Contract law in the united states is different in each state, there is no federal law.
  - However, that does not mean that disputes will always be adjudicated in state rather than federal court. (It goes to different courts in different circumstances if they have appropriate jurisdiction).
  - This is true since 1938, *Erie v Tompkins*, which stated there is no federal common law with regard to contracts- they must use state law.
- Common Law in the US
  - Same jurisdiction binding (higher on lower usually) , vertically binding, also horizontal sometimes too
  - Primarily common law in the US (form of law judge made e.g. not statute, created piecemeal, *stari decisis* binding precedent), even still today.
  - Holding of precedent ratio, dictum of precedent etc. (discuss more later fret not about meanings)
  - Source is court decisions
  - Assumption within common law that despite each jurisdiction is independent there is some coherence, principle etc. so that's why other sources are persuasive authority.
  - Most important source in the US is the Restatement 2<sup>nd</sup> on Contracts.
    - Not law
    - Frequently cited due to its comprehensiveness and coherence
    - Persuasive authority
    - It's a document produced by the American Law institute formed in 1923
    - Purpose is to restate the common law within particular areas.
- Recent Trends in Contract Law in US

- Statutory law
- UCC (Uniform Commercial Code)

Substance

Form

←-----1-----2-----3-----→

1) fair bargains/fairness 2) Economic value: bargains vs. gifts 3) cautionary notice and evidentiary

**Fairness:** We should only enforce fair bargains (this is not popular with courts except in special circumstances of justice: reliance, duress etc.) And substantive bargains what people really intended. Subjective.

**Economic Value:** By and large, bargains are the sort of transaction that are more economically significant and valuable as opposed to gifts. Private and social cost to enforcing promise, we should only enforce those promises that are economically significant e.g. more socially valuable. Bargains are *welfare enhancing*, both parties are supposed to be better off after the exchange. Usually bargains involve a higher economic value than gifts.

### The Formality of Bargains

- Evidentiary (it demonstrates whether or not a contract was formed)
  - In case of a dispute (formal or informal) makes it easier to decide if a contract was actually formed.
  - Formalities leave a trail. Helps to establish whatever needs to be established to find a certain legal outcome. (e.g. writing, etc.)
  - How consideration forms evidentiary: you have better evidence of the objective manifestation of the parties to enter into a contract, to be legally bound.
- Cautionary Notice (it warns people of the seriousness beforehand, aware of consequences, they know whether their activity is in a contract, it enhances certainty, reduces chance of people reaching those outcomes casually).

### Implied in Fact vs. Implied in Law:

Implied in fact (context of parties- although not explicitly said it is REALLY there it was what the parties really meant objectively reasonable person would understand) vs. implied in law (meaning court is making it up- no basis in representations between the parties express or otherwise- court imposing legal meaning and significance) centuries of precedence.

### POLICY QUESTIONS GENERALLY

- Hard cases make bad law (muddle distinctions) or Good law (reemphasize justice and fairness)
- Risk allocation (to whom should the risk be allocated?)
- Freedom from contract vs. freedom to contract
  - Requiring writing may allow for both. People can be bound if they really want to be but with cautionary notice. (it also provides evidentiary and ???)
- Consequentialist arguments (economic effects) vs. Fairness arguments
- Welfare enhancing? (Bargains)
- Three functions:
  - Evidentiary
  - Cautionary and notice function
- A good rule:
  - Contracting available to non lawyers
    - Freedom to contract
  - But not so easy that unwary gets contracted against will
    - Freedom from contract

### MUTUAL ASSENT

#### Manifestation of mutual assent

#### R 4: How a promise may be made

- Promise may be made oral written inferred wholly or partly from conduct

#### R 24: Offer Defined

- An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.

**R 50: Acceptance of Offer Defined; Acceptance by performance; Acceptance by Promise**

- (1) Acceptance of an offer is a manifestation of assent (objective) to the terms thereof made by the offeree in a manner invited or required by the offer.
- (2) Acceptance by performance requires that at least part of what the offer request be performed or tendered and includes acceptance by a performance which operates as a return promise.
- (2) Acceptance by a promise requires that the offeree complete every act essential to the making of the promise.

Hawkins v. McGee (1929) 2: Hairy hand case, guarantee 100%, solicitation

- Rule: If a person makes a promise in solicitation of a performance, that promise is a contract if the promisee performs and it was reasonable to infer it was a promise.
  - **R 4** (promise made through conduct) which was an offer **R 24** & accepted by patient when he began to render performance
- Policy considerations:
  - Consequentialist concerns about doctors being afraid to do risky procedures and unfairness concerns about patients lack of knowledge
  - Freedom to contract vs. Freedom from contract
  - Solution: some states e.g. Michigan have enacted legislation to this effect. Which allows for binding only if written (leaves open freedom to contract, but also provides freedom from contract); and also allows for greater clarity of the terms

Lucy v. Zehmer., (1954) pp. 117-122, napkin contract for sale of real estate

- Rule: Subjective mental assent of parties is not requisite for the formation of a contract. If the words/acts of the parties have but one reasonable meaning, his undisclosed intention is immaterial except when an unreasonable meaning which he attaches to his manifestations is known. (**Test for assent = objective test of outward manifestations.**)
- **R 50:** Acceptance of an offer is an manifestation of assent (objective) to the terms

Reasonable objective manifestations- objective (vs. Meeting of minds- subjective)

- New example: both parties don't intend to be bound, but they do not know the other knows that they are joking. Outward manifestations look serious.
  - Under both tests there is a contract. This isn't mutual knowledge.
  - Policy reasons probably against this- unacceptable to make contract when neither thought there was one – so this is made an **exception** to rule
  - Safety valve exception

Procedural Safeguards to ensure that when someone knows the intent is not real, even if the objective reasonable person would not from the external evidence:

- availability of pretrial discovery to reveal inconsistent statements or evidence
- confidence in jury to tell when someone is lying
- fact that person whose intent is at issue may be a corporation leading to possibility of conflicting sources of intent from disaffected former employees or email trails.
- If I know your subjective meaning → objective unless I do something about it.

Skepticism about intent to be bound:

- Optimistic statements from doctors to patients
- Statements made for social purposes
  - Though weddings might be binding especially if express agreement or guest of honor where elaborate expenditures have been undertaken
- Statements made among family members

Factors in determining whether parties meant to be bound

- Whether there has been an express reservation of the right not to be bound in the absence of a writing
- Whether there has been partial performance of the contract
- Whether all of the terms of the alleged contract have been agreed upon
- Whether the agreement at issue is the type of contract that is usually committed to in writing

Reasonable objective manifestations- objective (vs. Meeting of minds- subjective)

- **Policy Issues in favor of choosing the Objective Test**
  - Too easy for people to lie if no objective test, no assurance contract would be valid, and we need contracts for the economy to allocate risks.
    - Consequentialist argument
    - Reliance- no reliance when both know its not a contract just a performance.
  - Material evidence issue
    - Consequentialist argument about Administrability
    - Little evidentiary value/lack of cautionary
    - Makes complicated, costly, hard to achieve.
  - Want to give people freedom to contract an objective test works better for this possibly.
  - Fairness argument
    - 1) It's unfair to the person who objectively sought the contract, all conditions were met, person agreed, if I behave reasonably and you unreasonably believe that your objective representations don't mean what they actually mean you cause me damage.
    - 2) Not reliance damages its expectation damages. Not enjoying what you would have if the contract had been enforced.
- **Policy issues against choosing the objective test**
  - Fairness argument 1) lacks a reliance point – should only apply when reliance
  - Freedom from contract (especially in hard cases)

**Tension between two concepts:**

1. A meeting of the minds
2. No binding contract absent writing

From judicial effort to resolve these two—

- a. That absent an expressed intent that no contract shall exist, mutual assent between the parties, even though oral or informal, to exchange acts or promises is sufficient to create a binding contract
- b. That to avoid the obligation of a binding contract, at least one of the parties must express an intention not to be bound until a writing is executed

*Factors* considered absent a writing

1. Whether there has been an express reservation of the right not to be bound in the absence of writing
  2. Whether there has been partial performance of the contract
  3. Whether all of the terms of the alleged contract have been agreed upon
- a. How many agreed upon earlier, how many left for later... more left for later, less likely to be a binding contract
  - b. Are the ones agreed on “Deal breakers”
4. Whether the agreement at issue is the type of contract that is usually committed to writing

**Promises: Express or Implied Warranties as bases for enforcement (UCC)**

**UCC 2-313:** Express Warranties by Affirmation, Promise, Description, Sample

Express warranties are created as follows:

- Express warranties by the seller are created as follows:
  - (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
  - (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
  - (c) Any sample or model which is made part of the basis of the bargain creates an express

warranty that the whole of the goods shall conform to the sample or model.

- (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

#### **UCC 2-314: Implied Warranty: Merchantability; Usage of Trade.**

- (1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
- (2) Goods to be merchantable must be at least such as
  - (a) pass without objection in the trade under the contract description; and
  - (b) in the case of fungible goods, are of fair average quality within the description; and
  - (c) are fit for the ordinary purposes for which such goods are used; and
  - (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
  - (e) are adequately contained, packaged, and labeled as the agreement may require; and
  - (f) conform to the promise or affirmations of fact made on the container or label if any.
- (3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

Bayliner Marine Corp. v. Crow, (1999) 4: Defendant (seller) gives buyer prop matrices about speed of different boat and a brochure "kind of boat you need" for a boat.

- Rule:
  - 1) If an item is substantially different from that represented by the manufacturer there is no express warranty for the different product.
  - 2) An opinion does not constitute an express warranty has to be a statement of fact
  - **UCC 2-313** (see above) & **2-314** (not implied because still merchantable?)
- Policy Issues: Taking bargaining statements as fact may affect aggressive bargaining but have to be balanced against interest of consumer protection. There's also a cautionary notice issue here.

### **CONSIDERATION**

#### **Requirement of Exchange**

**\*\*\* FOR Contract Modification See Policing Bargaining Process Below**

#### **R 71:**

1. Either a promise or a performance has to be bargained for in exchange for the promise. (can NOT be mere pretense e.g. No Peppercorn)
2. A performance is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise
3. Performance may consist of
  - An act other than a promise or
  - A forbearance or
  - The creation modification or destruction of a legal relation

#### **R 73: The Pre-existing Duty Rule**

- Performance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration §73
- When is the modification of a contract properly seen as resulting from the genuine assent of the party to whom the performance is owed, and when is a renegotiated deal more likely the result of coercion?

**R 79:\*** Courts don't consider mutuality of obligation or equivalence in values because it is subjective and want to allow people to decide for themselves, freedom to contract

1. No benefit/detriment requirement
2. Equivalence in values exchanged
3. Mutuality of obligation