

MASTER NOTES CONTRACTS

Prof. Laura Mott

Wednesday, January 18th

Reading:

- **Casebook** pp. 3-5; 15-20 (up to “Facts”); 23-24 (Law, Fact, & Legal Reduction); 27-30 (end of *Kirksey v Kirksey*); 36-40 (from Note on Markets up to “Reliance)
- **Restatement** § 1 and § 2 (p. 860 in the back of the casebook)
- **TWEN Course Materials**: Robin Kelley: *What Did Cedric Robinson Mean by Racial Capitalism?* Noah Zatz: *Is “The Market” the Enemy? Racial Exploitation in Bailey v. Alabama*

Writing:

- Prepare and bring to class an answer to the following question:
- What are the three “principles” of contract law, and what is their purpose?

From Case Book Chapter 2:

1. **Bargain Principle/ BARGAIN THEORY**: The bargain principle, a central thesis of traditional contract law states that, in the absence of a traditional defense relating to the quality of consent, **bargain promises should be enforced to their full extent**. **MUTUAL OBLIGATIONS**: “a deal is a deal”

ONE THING FOR ANOTHER GIVES RISE TO MUTUAL OBLIGATION

1. Both sides are committed. When you get something, you give something in return.
2. The other person will count on the deal and spend money or make commitments because he or she believes the deal will be fulfilled.
3. Deal making is the way people make a living—and so the promises made in this context are particularly serious and therefore obligatory.
4. Commercial exchange is crucial to our economy, and if people do not live up to their deals, business people will be unable to plan for the future, people won't be willing to make deals, businesses will shut down, people will be unemployed, etc.
5. Deals and the fulfillment of deals are crucial to a free market system and a free market is essential to individual freedom.

Kirksey v. Kirksey, 8 Ala. 131 (1845)

Promise to make a gift, vs. A promise to make an exchange.

- ❖ *Kirksey*: Where brother-in-law made a written promise to have his deceased brother's widow come live with him (perhaps to help work the land) was found to be a mere gratuity (no exchange), therefore not an enforceable promise. At the time, there was no reliance theory, so the case could not be argued under that principle.

Kirksey v. Kirksey, Ala. Sup. 8 Ala. 131 (1845), was a case decided by the Supreme Court of Alabama that held that a promise by a man, Issac Kirksey to give his sister-in-law a house if she would move to his land was not a valid contract because it lacked bargained-for-consideration.

Assumptions of Neo-Classical Economics:

- People act in their own self interest;
- In the pursuit of self interest, people act rationally;
- People have access to perfect information (this assumption means that people have the knowledge necessary to act rationally);
- People and resources are freely moveable;
- There are no artificial restrictions on entry to the marketplace (relying on this assumption we must conclude that the marketplace remains competitive because buyers and sellers are free to move in and out of the market and thereby effectuate the free mobility of people and resources);
- The current distribution of wealth and resources is taken as a given (acceptance of the current distribution is an important assumption in the neo-classical model because the allocation of resources and rights derived from the model is determined by people casting wealth-based economic votes. In other words, to the extent people cast their votes in the marketplace by spending dollars, the initial allocation of dollars will affect the outcome of the voting).

2. Reliance Theory: Morally and politically valuable, trusts necessary to the social fabric.

INVOLVES PROMISES TO GIVE GIFTS. SEEKS TO PROTECT THOSE WHO REASONABLY RELY ON OTHERS.

- Harmed when there was no one way exchange
- Seeks to protect those who rely on others
- HYPHETICAL WITHOUT AN EXCHANGE

3. Restitution Theory: ONE SHOULD PAY FOR ANY BENEFIT UNJUSTLY RETAINED. Our goal is to prevent unjust enrichment.

→ Begin your outline by starting a glossary of terms—including those in the Restatement sections—which are legally, economically, or theoretically significant for Contracts class.

Reading:

→ Casebook pp. 3-5; 15-20 (up to “Facts”); 23-24 (Law, Fact, & Legal Reduction); 27-30 (end of *Kirksey v Kirksey*); 36-40 (from Note on Markets up to “Reliance)

Only voluntarily made agreement/ promises are biding

A focus on the nature of voluntary choice

Another focus is **MARKET EXCHANGE**; setting out the rules of the game for a market economy

Connected to the idea of self-determination; the right to be oneself

This predictability of individual choice is acknowledged in casual ways: people say that he became a doctor because his father was a doctor, or that she had to drop out of high school because her family needed her to work or because she was pregnant, or that he got a job as an electrician because his uncle was in the union, or that she took a low-paying job as a waitress because she knew she wouldn't be hired in a higher-paying construction job. People in the United States acknowledge social determination of individual choice in these and many other ways. Yet this acknowledgment does not cause people to abandon the idea of individual freedom of choice—the two ideas, individual freedom of choice and the constraints of social positioning that determine or guide individual choices, merely co-exist, harmoniously or not, in our thoughts and actions. Because contract law concerns the obligations that arise from human relationships, it reflects both of these sometimes conflicting ideas.

→ **Restatement § 1 and § 2** (p. 860 in the back of the casebook)

The **Restatement (Second) of the Law of Contracts** is a legal treatise from the second series of the Restatements of the Law, and seeks to inform judges and lawyers about general principles of contract common law. It is one of the best-recognized and frequently cited legal treatises in all of American jurisprudence. Every first-year law student in the United States is exposed to it, and it is a frequently cited non-binding authority in all of U.S. common law in the areas of contracts and commercial transactions.

It is a work without peer in terms of overall influence and recognition among the bar and bench, with the possible exception of the **Restatement of Torts**. The American Law Institute began work on the second edition in 1962 and completed it in 1979; the version in use at present has a copyright year of 1981

[RESTATEMENT \(SECOND\) OF \(fbcoverup.com\)](http://fbcoverup.com)

Definitions

Chapter 1. Meaning of Terms

§ 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.

§ 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.

§ 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.

CONTRACT: PROMISE OR SET OF PROMISES FOR WHICH THE LAW GIVES REMEDY, OR THE PERFORMANCE OF WHICH THE LAW IN SOME WAY RECOGNIZES AS A DUTY.

- Private agreement between two or more parties
- Terms/ stipulations of an exchange
- Conditional written promissory agreement

Contract law, the field of the **law of obligations** concerned with contracts, is based on the principle that agreements must be honored.

Like other areas of private law, contract law varies between jurisdictions. In general, contract law is exercised and governed either under common law jurisdictions, civil law jurisdictions, or plenary jurisdictions that combine elements of both common and civil law. Common law jurisdictions typically require contracts to include consideration in order to be valid, whereas civil and most plenary jurisdictions solely require a “**meeting of the minds**” between the parties.

Meeting of the minds (also referred to as **mutual agreement**, **mutual assent** or **consensus ad idem**) is a phrase in contract law used to describe the intentions of the parties forming the contract. In particular, it refers to the situation where there is a common understanding in the formation of the contract. Formation of a contract is initiated with a proposal or offer. This condition or element is considered a requirement to the formation of a contract in some jurisdictions.

A **contract** is an agreement that specifies certain legally enforceable rights and obligations pertaining to two or more mutually agreeing parties.

A contract typically involves the **transfer of goods, services, money, or a promise to transfer any of those at a future date**. In the event of a breach of contract, the injured party may seek judicial remedies such as **damages or rescission**.

In contract law, **rescission** is an equitable remedy **which allows a contractual party to cancel the contract**. Parties may rescind if they are the victims of a **vitiating factor**, such as **misrepresentation, mistake, duress, or undue influence**.

1. **MISREPRESENTATION:** In common law jurisdictions, a **misrepresentation** is a false or misleading statement of fact made during negotiations by one party to another, the statement then inducing that other party to enter into a contract. The misled party may normally rescind the contract, and sometimes may be awarded damages as well (or instead of rescission). The law of misrepresentation is an amalgam of contract and tort; and its sources are common law, equity and statute.
2. **MISTAKE** In contract law, a **mistake** is an erroneous belief, *at contracting*, that certain facts are true. It can be argued as a defense, and if raised successfully, can lead to the agreement in question being found **void ab initio or voidable**, or alternatively, an equitable remedy may be provided by the courts. Common law has identified three different types of mistake in contract: the **'unilateral mistake'**, the **'mutual mistake'**, and the 'common mistake'. The distinction between the 'common mistake' and the 'mutual mistake' is important.
3. Another breakdown in contract law divides mistakes into four traditional categories: **unilateral mistake, mutual mistake, mistranscription, and misunderstanding**.
4. The law of mistake in any given contract is governed by the law governing the contract. The law from country to country can differ significantly. For instance, contracts entered into under a relevant mistake have not been voidable in English law since ***Great Peace Shipping Ltd v Tsavliris (International) Ltd (2002)***.
5. **DURESS** **Coercion** is compelling a party to act in an involuntary manner by the use of threats, including threats to use force against a party. It involves a set of forceful actions which violate the free will of an individual in order to induce a desired response. These actions may include extortion, blackmail, or even torture and sexual assault. For example, a bully may demand lunch money from a student where refusal results in the student getting beaten.
6. In common law systems, the act of violating a law while under coercion is codified as a duress crime.
7. Coercion can be used as leverage to force the victim to act in a way contrary to their own interests. Coercion can involve not only the infliction of bodily harm, but also psychological abuse (the latter intended to enhance the perceived credibility of the threat). The threat of further harm may also lead to the acquiescence of the person being coerced.
8. **UNDUE INFLUENCE:** is a psychological process by which a person's free will and judgement is supplanted by that of another. It is a legal term and the strict definition varies by jurisdiction. Generally speaking, it is a means by which a person gains control over their victims' decision making through manipulation tactics and unfair pressure, typically for financial gain. Historically, UI has been poorly understood, even in some

legal circles. Undue influence is typically perpetrated by a person who is trusted by the victim and is dependent on them for emotional and physical needs.

9. A binding agreement between actors in international law is known as a **treaty**.

***Great Peace Shipping Ltd v Tsavliris (International) Ltd* [2002]** EWCA Civ 1407 is a case on English contract law and on maritime salvage. It investigates when a common mistake within a contractual agreement will render it void. It is notable for its disapproval of *Solle v Butcher*, a Court of Appeal case wherein Lord Denning established a new doctrine of "equitable mistake".

Facts

The defendants, Tsavliris, were professional salvors in the business of maritime salvage and rendering aid to ships in difficulty in the South Indian Ocean. Learning that a vessel named *Cape Providence* was in trouble, Tsavliris entered into a salvage agreement with the owners on LOF terms. Tsavliris used the Ocean Routes service to try to locate the nearest rescue vessel, and were told that there was one about 35 miles away called the *Great Peace*. Using London brokers called Marint, Tsavliris contacted the *Great Peace's* owners, and agreement was made to hire the tug for a minimum of five days. It then became apparent that the *Great Peace* was not 35 miles from the Cape Providence, but 410 miles. Tsavliris then found a closer tug and terminated the contract with Great Peace Ltd, who responded by suing for gross breach of contract. Tsavliris argued it was a common mistake as to the location of the stricken vessel and this invalidated the contract.

Judgment

Lord Phillips of Worth Matravers MR held that the mistake was not sufficiently fundamental to void the contract. The *Great Peace* would have taken 22 hours to do 410 miles, but that delay was insufficient to make performance of the contract 'essentially different from those the parties envisaged when the contract was concluded.'

STOP

→ TWEN Course Materials: Robin Kelley: *What Did Cedric Robinson Mean by Racial Capitalism?*

RACIAL CAPITALISM: (ROBIN KELLEY)

What Did Cedric Robinson Mean by Racial Capitalism? - Boston Review

“Robinson’s critique of political order and the authority of leadership anticipated the political currents in contemporary movements such as Occupy Wall Street and Black Lives Matter—movements organized horizontally rather than vertically. His monumental ***Black Marxism: The Making of the Black Radical Tradition* (1983)** takes Karl Marx to task for failing to

comprehend radical movements outside of Europe. He rewrites the history of the West from ancient times to the mid-twentieth century, scrutinizing the idea that Marx's categories of class can be universally applied outside of Europe. Instead he characterized black rebellions as expressions of what he called the "Black Radical Tradition," movements whose objectives and aspirations confounded Western social analysis.

- Marxism also failed to account for the *racial* character of capitalism. Having written much of the book during a sabbatical year in England, Robinson encountered intellectuals who used the phrase "racial capitalism" to refer to South Africa's economy under apartheid. He developed it from a description of a *specific* system to a way of understanding the *general* history of modern capitalism."

Building on the work of another forgotten black radical intellectual, sociologist Oliver Cox, Robinson **challenged the Marxist idea that capitalism was a revolutionary negation of feudalism. Instead, capitalism emerged within the feudal order and flowered in the cultural soil of a Western civilization already thoroughly infused with racialism.** Capitalism and racism, in other words, did not break from the old order but rather evolved from it to produce a modern world system of "racial capitalism" dependent on slavery, violence, imperialism, and genocide.

- **Capitalism was "racial" not because of some conspiracy to divide workers or justify slavery and dispossession, but because racialism had already permeated Western feudal society.** The first European proletarians were *racial* subjects (Irish, Jews, Roma or Gypsies, Slavs, etc.) and they were victims of dispossession (enclosure), colonialism, and slavery *within Europe*.

The Law and Political Economy (LPE) Project

→ Noah Zatz: *Is "The Market" the Enemy? Racial Exploitation in Bailey v. Alabama*

Is "the Market" the Enemy?: Racial Exploitation in Bailey v. Alabama - LPE Project

"In our current moment, anticapitalism and struggles against state violence and incarceration tend to be separate movements."

Groundbreaking 1911 case of ***Bailey v. Alabama***. There, the Supreme Court struck down under the Thirteenth Amendment Alabama's use of criminal law to hold Black workers in peonage.

"Racialized carceral state"

"The basic point about *Bailey* is that the labor relationship between worker and employer was thoroughly shaped by Bailey's vulnerability to criminal prosecution for quitting work. That, in turn was thoroughly shaped by the *racial* relationship among Bailey, a Black agricultural laborer, the white farmer who employed him, and the state and local political institutions committed to upholding white supremacy. The law was specifically, though not explicitly, targeted at Black workers. Vulnerability to arrest, prosecution, and conviction was shaped by Bailey's blackness and the complaining farmer's whiteness. So, too, with the murderous

harshness of the potential sentence to “hard labor” in Alabama’s convict leasing system that operated under the principle of “One Dies, Get Another.””

“Structured by the property relations between landless Black workers and white landowners and by bargains struck over work and pay. Those relations, however, are rooted in and preserved by race, as well as being regulated by the racialized operation of criminal law conventionally located *outside* of markets. It is this admixture that suggests the virtues of the “racial capitalism” moniker.”

“Rather than being archaic, such sentiments are central to influential arguments offered for avowedly “paternalist” social policy approaches like those of Lawrence Mead, intellectual architect of welfare reform structured by work requirements and an advocate today of using child support enforcement and criminal justice supervision to threaten un(der)employed people with incarceration. Such coercive approaches are necessary, Mead argues, because “nonworking men are expressing desires but violating their own interests and values,” with the result that “[l]ow-income men, particularly blacks, have become less reliable employees.” Such arguments are not external to markets or addressed to nonmarket behavior but rather concern how markets are to be constructed through the appropriate calibration of influences on behavior.”

Bailey v. Alabama, 219 U.S. 219 (1911)

Facts

United States Supreme Court case that overturned the peonage laws of Alabama.

Issue

The Supreme Court considered the validity of the Alabama state court's ruling that Alabama statute (§ 4730 of the Code of Alabama of 1896, as amended in 1903 and 1907) was constitutional. The law read:

Any person who, with intent to injure or defraud his employer, enters into a contract in writing for the performance of any act of service, and thereby obtains money or other property from such employer, and with like intent, and without just cause, and without refunding such money, or paying for such property, refuses or fails to perform such act or service, must on conviction be punished.

Alonzo Bailey was an African American from Alabama who agreed to work for The Riverside Company for one year at \$12 per month. He received an advance of \$15. After working for a little over a month he stopped work but did not refund any money. According to Alabama law such refusal to work and refund the money was *prima facie* evidence of intent to defraud. The evidence presented against Bailey at trial was testimony that he stopped working, without cause, failed to repay the \$15 advanced to him and that he was a Negro.

The United States Supreme Court found that holding a person criminally liable for taking money for work not performed was akin to indentured servitude, outlawed by the Thirteenth Amendment, as it required that person to work rather than be found guilty of a crime.

In this first installment, *Bailey* punctures the ubiquitous conceit that there is or could be an autonomous sphere of economic life – “the free market” – that stands apart from politics, from contests over whether and when to authorize the coercive exercise of governmental power. That contrast between economic freedom and political power is ubiquitous, as in the language contrasting “private” law with government “intervention” in the market (via “public” law). This conceit renders unremarkable what might seem contradictory: a ubiquitous politics that abhors government regulation (of “the economy”) yet thirsts for a state that is “tough on crime.”

On the day after Christmas 1907, **Lonzo Bailey signed a contract “to work and labor for the said Riverside Company as a farm hand** on their Scott’s Bend place in Montgomery County, Alabama” (229). He received a \$15 advance on his nominal wages of \$12/month, putting him immediately in debt. Over a year’s promised work, he would even up by receiving monthly net pay of \$10.75. When Bailey quit come February, the Riverside Company did not sue for breach of contract. Instead, it had Bailey arrested, prosecuted, convicted, and sentenced to pay a fine of \$30 plus court “costs” several times that. In the certain event that Bailey could not pay, he would be incarcerated and forced to perform “hard labor” for 136 days. More in a subsequent post on this premonition of today’s post-Ferguson discussion of debtor’s prison, rendered here as forced labor under debt peonage.

Disposition

The Supreme Court eventually struck down the entire statute underwriting Bailey’s conviction, finding it contrary to the Thirteenth Amendment as enforced via the Anti-Peonage Act of 1867. The fatal flaw was that a bare breach of contract provided sufficient evidence to uphold a criminal conviction for fraud. With this threat of criminal prosecution hanging over a worker like Bailey’s decision whether to continue work or to quit and move on, the statute created a state of “compulsion” that rendered “involuntary” (244) any continued work under the original labor contract.

Class Notes 01/18/2023

Laura Mott/ Contracts

Mondays will be 615-8 then a skills session, there will sometimes be Saturday

Midterm March 15th 615-815 **20%** closed book

Practice Problems: **30%** 4 graded problems/ x4 3page essays.

- Don't overwrite

Participation: 15%

Final Exam: 45%

Questions of Contract Analysis

Themes in Contracts Law:

- Undergirded by policy decisions
- Contract law governs the problems arising out of contractual relationships
- Breaches of the contract
- Violation/Misunderstandings of the terms
- Contract law is the **law of private agreements**
- **Different from Criminal Law, (legislative process to be imposed on society); contract law is a dispute between individuals**
- Contracting process is exercise of individual freedom, not based on external restrictions
- **Illegality is a contract defense**
- **PARTY A and PARTY B**
- **Defenses to performance under a contract**
- Jurisdictionally speaking our cases will cover Restatement of Contracts as authority
- “Almost unrestricted freedom to make our own bargains”
- LEGAL INTERVENTION INTO PRIVATE AGREEMENTS
- To remedy injury
- Or prevent injustice
- FOCUS ON ANALYSIS: Generally, who are the two parties in any contract dispute?
- PARTY A-**Promisor**
- PARTY B-**Promisee**

Chapter 1. Meaning of Terms

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§ 3 Agreement Defined; Bargain Defined.

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→

→ **Third Party Beneficiary**

→ **IDENTIFY: WHICH WANTS THE RULE SATISFIED AND WHICH PARTY DOES NOT**

■ WANTS TO ENFORCE THE CONTRACT

■ DOES NOT WANT TO ENFORCE IT

ORIGINS

COMMON LAW

- Court made/ judge made law
- ENACTED LAW vs. CASE LAW
- Common Law is Case Law
- Custom or judicial precedent not statutes

LEGISLATION

- **Uniform Commercial Code Article 2.**
- Bills of sale, debt, security instruments, CHATTLE PROPERTY/ MOVABLE GOODS
- Not land
- UN CISG (we won't be using it) UN CODE ON SALE OF GOODS

COMMENTARY

- **Restatement (Second) of Contracts**
- Like a Model Penal Code of contracts
- Law reviews, treatises

Themes of Contracts & the Market Economies They Support

- Importance of the **market function/ exchange**
- Ways that market economy supports that exchange
- Certainty/ regularity of exchanges
- Courts focus on exchanges of goods and services NOT GIFTS/ NOT FAMILY AGREEMENTS
- **Foundational principle**
- **A GIFT IS UNILATERAL;** a one-way transfer
- IMPORTANCE OF ASSENT: **MUTUAL ASSENT/ MUTUALITY OF EXCHANGE**
- The meeting of the minds/ **OFFER AND ACCEPTANCE**
- Doesn't matter if the terms seem unfair if the parties agree to them
- BUT: People who don't read contracts are still held to them if they agree/ sign
- "A DEAL IS A DEAL"
- RULE v. RHETORIC
- CENTERED AROUND **COLORBLIND MARKETS**
- **OBJECTIVE TEST**
- **FORMATION/ MUTUAL ASCENT**
- "Would a reasonable person have agreed to the contract?"
- SOCIALLY SITUATED REASONABLE PERSON
- POSITIONED REASONABLE PERSON (in between prior 2)
- **An example of suing Apple for a very long boiler plate contract will point to the opportunity to read the contract that they signed.**
- **Example: CHANGING THE TERMS/ MANIPULATING THE AGREEMENT**
- **Racialized relationships/ institutions/ opportunities for overreaching**
- **EXCHANGE**
- **ASSENT**
- **COLORBLIND MARKET**
- **Capitalism as a racialized system**

OUTLINE OF THE COURSE

FIRST HALF

- **FORMATION**
- **"IS THERE AN ENFORCIBLE CONTRACT"**
- **Alternative theories in contract law**

SECOND HALF

- **Defenses**
- **Interpreting Terms**
- **Performance/ Breach**
- **Remedies**

UCC or COMMON LAW

- IRAC

FORMATION (Validly formed)

- 3-4 IRAC

YES OR NO

NO- ALTERNATIVE REMDEIES

YES- DEFENSES

1-7

CHANGES OF CIRCUMSTABCE

IMPLIED AND EXPRESSED TERMS

DAMAGES? REMEDIES

- Every issue index a rule!
- Developing a catalogue in your outline

What types of promises should be enforced?

2 kinds of promises: TO DO A THING/ NOT DO A THING

- Employment agreements
- Power imbalances
- Arena of harm
- **LACK OF CAPACITY DEFENSE**
- **CONTRACT**
- **AGREEMENT (more informal, without legal weight)**
- **PROMISE**
- **PROISOR**
- **PROMISEE**

MONDAY JANUARY 23rd NOTES

Topic: “Objectivity”? Interpreting Communicative Acts/Words

Rule: The Objective Theory of Interpretation

Cases: *Embry v. Hargadine*.

R.L.M. Dist. Co. v. W.A. Taylor, Inc.

Text pp. 59-64; 82-87, 87-108

- **For discussion:**
 - **What is the difference between objective and subjective approaches to assent; why, as a policy matter, does contract law opt for the objective approach?**

- **Prepare: Outline**
 - Include both the Bargain Theory and the Objective Theory as major topic headings, as well as definitions of both and smaller subtopics where needed.

BARGAIN THEORY

SUBJECTIVE THEORY: Meeting of the Minds

Subjective theory of contract is a doctrine that a contract is an agreement in which the parties have a subjective meeting of the minds. The courts must look to the parties' subjective expectations and anticipations (for example, whether delivery is actually desired) and ignore the objective language of the contract (for example, where delivery is expressly provided for). However, this theory has been roundly rejected by courts and commentators, in favor of the objective one.

OBJECTIVE THEORY: *The objective theory of contracts holds that an agreement between parties is legally binding if, in the opinion of a person who is not a party to the contract.*

The objective theory of contracts holds that an agreement between parties is legally binding if, in the opinion of a reasonable person who is not a party to the contract, an offer has been made and accepted.

This legal concept has become the standard for determining the intent of parties in an agreement since the late 19th century. **The objective theory of contracts supersedes the previous standard, known as the subjective theory of contracts or “meeting of the minds,” that was commonly applied throughout the early 1800s.**

Thus, the main determinant in the validity of a contract is the acts, or external performances of the parties, not the internal state of mind, or intent of the parties, that exists when coming to an agreement.

Subjective Theory vs. Objective Theory of Contracts

There is some debate as to what constitutes a legally binding contract. Many legal scholars believe that the Common Law governing contracts has always, to some degree, **required an objective test by an unbiased third party to determine the validity of an agreement.** Some

scholars argue that the objective theory is only a recent development and that precedent dictates that the long-held subjective theory should still be applied in the courts.

However, even these scholars, known as “subjectivists,” recognize that by the late nineteenth century the other side, the “objectivists,” had gained the upper hand, and the objective theory is the widely accepted theory.

Briefly, the major differences can be summarized by the following examples:

→ Party A owns a guitar signed by Elvis Presley appraised as being worth several hundred thousand dollars. A neighbor, Party B, expresses interest in the guitar and in jest tells Party A that they’d pay a million dollars for the opportunity to own such a treasured keepsake. Party A agrees and challenges in court that an agreement was reached with the neighbor, even though he knows that the neighbor does not have access to that kind of money. **The subjective theory holds that there was not a “meeting of the minds,” and that neither party had an expectation of the transfer of the guitar occurring.**

→ In a similar scenario, the neighbor expresses interest in the guitar, and this time, Party A states a price for selling the guitar based on the appraisal rate and actually lets the neighbor get the instrument appraised by a third-party. The neighbor then sells valuable assets to raise the funds to purchase the guitar, but at the last minute the owner decides not to sell. **Applying the objective theory, the court could determine that through the act of setting a price, letting an independent appraisal occur and the neighbor acting to raise the funds, a valid contract between the parties does exist.**

What spurred the transition from the long-held concept of subjective theory to the popularity of the objective theory of contracts now being used in U.S. courts of law? Scholars agree that many prominent judges issued decisions in contract disputes applying the objective theory of contracts beginning sometime in the late-nineteenth century. These included U.S. Supreme Court judges and leading authorities on contract law, such as Christopher Columbus Langdell and Samuel Williston, who argued that it was difficult for one person to subjectively determine the thoughts of another and to, in effect, read a person’s mind.

Not Always Black and White

Although both sides, the “subjectivists” and the “objectivists” appear to hold vastly different views on the way intent should be determined by a court of law, in many cases, both theories can justifiably be applied.

If two parties enter into an agreement through a clear and obvious “meeting of the minds” and also make external acts that show their intent to consummate an agreement, the contract could be deemed binding. However, both theories could also be used if one party was to argue there was no actual intent to form an agreement. **It would come down to whether or not a “reasonable person” would consider that both parties were proceeding in good faith toward the agreement or whether or not the deal was too good to be true and to one party’s obvious advantage.**

- **Case brief of Embry.** I will post a sample brief on TWEN with a discussion of the choices that the author of the sample brief made. Consider the differences between yours and the sample and the likely reasons for the differences.

Embry v. Hargadine, McKittrick Dry Goods Co.

CITATION: 105 S.W. 777 (1907)

PARTIES:

The Plaintiff, Embry (Plaintiff), worked for the Defendant, Hargadine, McKittrick Dry Goods Co. (Defendant).

FACTS

The Plaintiff's contract expired in and he met with Defendant's President to renew it for a year. The President said "go ahead, you're all right; get your men out and don't let that worry you." The contract was terminated a few months later. The Plaintiff brought suit based on breach of contract.

ISSUE Was the oral promise by the Defendant Corporation's president a valid contract?

HOLDING: YES

RULE

If a reasonable person would understand the oral promise to be an agreement for employment, then it is a valid contract.

Regardless of the parties' subjective or actual intent, if a reasonable man could infer from their conduct intent to enter into a binding and enforceable contract, a binding and enforceable contract is presumed to exist.

REASONING

If the conversation happened as Plaintiff said and Plaintiff understood that he was employed, then there was a valid contract in law. It is only necessary that a reasonable man would have construed what the President said to be an offer of employment offer and that Plaintiff so understood it.

"In exceptional cases, a promisor may be bound to perform something which he did not intend to promise, or a Promisee may not be entitled to require that performance which he understood to be promised to him."

DISPOSITION: Reversed remanded

C/D/ Notes:

R.L.M. Dist. Co. v. W.A. Taylor, Inc.,

CITATION: 723 F. Supp. 421 (D. Ariz. 1988)

Parties

Plaintiff: RLM is an Arizona corporation with its principal place of business in Phoenix, Arizona. RLM is engaged in the wholesale wine and spirits business throughout the State of Arizona.

Defendant: Taylor is a New York corporation with its principal place of business in Miami, Florida. Taylor is an importer and marketer of distilled spirits and is a subsidiary of Hiram-Walker-Gooderham & Worts Limited.

FACTS

RLM distributes the products of approximately 40 suppliers in addition to Taylor. This is a **distributor termination action** in which plaintiff R.L.M. Dist. Co. ("RLM") alleges that the announced termination by defendant W.A. Taylor Company ("Taylor") of RLM's appointment to distribute Taylor's spirituous liquor products in Arizona is in violation of Arizona statutory and common law. In response to RLM's request for a preliminary injunction enjoining Taylor from terminating RLM's appointment during the pendency of this litigation, the court accelerated the trial on the merits with respect to the injunction claims of Counts Four and Five of RLM's complaint. Count Five of the complaint alleges the Taylor's actions violated the Arizona Spirituous Liquor Franchises Act, A.R.S. § 44-1565 *et seq.* ("Act"). Count Four alleges that Taylor breached its contractual obligations of good faith and fair dealing, under both common law and the Act, in terminating RLM's appointment.

- The term "Taylor products" means Courvoisier cognac, Drambuie and Tia Maria liqueurs, Old Smuggler scotch, Makers Mark bourbon and Booth's gin.

RLM became a distributor of Taylor products in Arizona as of August 1, 1985, following the acquisition by R.L.M. of the assets and liabilities of Taylor's former distributor in Arizona known as All American Distributing Co., Inc.

Taylor agreed to accept RLM as a distributor of Taylor products in Arizona as of August 1, 1985. **There was no written distributorship or franchise agreement between RLM and Taylor as of August 1, 1985, or at any time thereafter.**

On or about August 11, 1987, Taylor gave written notice to RLM that RLM's distributorship with respect to Taylor products in Arizona would be terminated "within ninety days."

On or about September 17, 1987, Taylor appointed McKesson Wine and Spirits, Inc. as a distributor of Taylor products in Arizona.

PP

This action was originally filed in the Superior Court of the State of Arizona in and for the County of Maricopa. Taylor removed the action to this court pursuant to 28 U.S.C. § 1441, on grounds that there exists complete diversity of citizenship between RLM and Taylor and the amount in controversy exceeds \$10,000.00 exclusive of interest and costs.

ISSUE

The limited issue that is to be decided by the court is whether RLM is entitled to an injunction barring Taylor from terminating RLM as the distributor of W.A. Taylor products in Arizona.

Also

ISSUES BEFORE THE COURT

1. Has the relationship between RLM and Taylor been a "franchise" subject to the Arizona Spiritous Liquor Franchises Act?
2. If the Act applies, was Taylor's announced termination of RLM as a distributor of Taylor products in Arizona based upon "**good cause**" within the meaning of A.R.S. § 44-1565(2)?
3. If the Act applies, was Taylor's announced termination of RLM as a distributor of Taylor products in Arizona done in "**good faith**" within the meaning of A.R.S. § 44-1565(3) and Arizona law?
4. Was Taylor's announced termination of RLM as the distributor of Taylor products in Arizona a violation of Taylor's **implied covenants of good faith and fair dealing** which were part of its distributorship agreement with RLM under Arizona law?
5. Is RLM entitled to an injunction enjoining Taylor from terminating RLM as Taylor's distributor of Taylor products in Arizona?

HOLDING: NO; not entitled to injunction

RULE

Basic contract law **does not require that agreements be made exclusively through verbal or written communications.** Contracts may be implied in whole or in part through conduct alone or through usage of trade.

REASONING

Basic contract law does not require that agreements be made exclusively through verbal or written communications. Contracts may be implied in whole or in part through conduct alone or through usage of trade. *See Cook v. Cook*, 142 Ariz. 573, 691 P.2d 664 (1984); *Restatement (Second) Contracts* § 4, comment a; *Id.* § 5 comment a; 1 *Corbin on Contracts* § 18 (1963). Therefore, even though RLM and Taylor never discussed the issue of transferability, an implied agreement concerning this subject may arise in the absence of a specific agreement to the contrary if custom or practice in the industry provides for such an understanding.

In the present case, the evidence at trial established that while spirituous liquor suppliers and distributors often do not discuss, orally or in writing, the terms of their transfer rights, the custom in the industry is that distribution rights may be transferred, with the consent of the supplier, upon sale of the distributor's business or transfer of the business.

The court finds and concludes that custom and practice in the industry and the course of conduct between RLM and Taylor was sufficient to imply an agreement between the parties relating to transferability within the meaning of **A.R.S. § 44-1565(1)(c)**. For this reason, the court finds that the Arizona Spirituous Liquor Franchises Act applies in the instant case.

Taylor was entitled to terminate RLM based upon poor sales performance.

Poor sales performance in violation of an understanding between a supplier and distributor has been held to constitute good cause for termination under similar statutes. Second, **good cause exists where there is an irreconcilable difference in marketing philosophy** between the supplier and its distributors.

Third, RLM reorganized its sales force contrary to representations it made to Taylor concerning how it would be organized. Based on the above, the court finds and concludes that Taylor had "good cause" to terminate RLM's distribution arrangement. **RLM WAS TERMINATED IN "GOOD FAITH" UNDER THE ACT.** Taylor's termination of RLM was made in "good faith" within the meaning of A.R.S. § 44-1565(3). Section 44-1565(3) states: "Good faith" means the duty of each party to any franchise and all officers, employees or agents thereof to act in a fair and equitable manner in carrying out the agreement.

Based on the above, the court finds and concludes that Taylor had "good cause" to terminate RLM's distribution arrangement. **RLM WAS TERMINATED IN "GOOD FAITH" UNDER THE ACT**

Taylor's termination of RLM was made in "good faith" within the meaning of A.R.S. § 44-1565(3). Section 44-1565(3) states:

"Good faith" means the duty of each party to any franchise and all officers, employees or agents thereof to act in a fair and equitable manner in carrying out the agreement.

DISPOSTION: The court finds and concludes that custom and practice in the industry and the course of conduct between RLM and Taylor was sufficient to imply an agreement between the parties relating to transferability within the meaning of A.R.S. § 44-1565(1) (c). For this reason, the court finds that the Arizona Spirituous Liquor Franchises Act applies in the instant case. **TAYLOR'S TERMINATION OF RLM DID NOT VIOLATE ARIZONA'S IMPLIED COVENANTS OF GOOD FAITH AND FAIR DEALING. IT IS ORDERED denying plaintiff's request for injunctive relief.**

IT IS FURTHER ORDERED that the temporary restraining order heretofore issued by the court in this action is hereby dissolved.

C/D/NOTES:

JANUARY 25th, 2023

- **Communicative acts (many)**
- Parameters of what makes a communicative act have legal standing as an offer

- Standard of communicative acts to make it an offer.
- Rules to control the MEASURABLE STANDARDS
- Exchange
- Assent; doesn't matter if terms
- Colorblind markers
- **NEO-CLASSICAL ECONOMICS**; values efficacy and profit-making: self-interest, rationality, access to perfect information, movable people and resources, no artificial restrictions
- **BARGAIN THEORY**: AGREEMENT TO EXCHANGE ONE THING FOR ANOTHER GIVES RISE TO OBLIGATIONS
- Great for those that want to enforce the contract
- IS THERE AN ENFORCIBLE CONTRACT? (Main question of class)
- INTENT OF THE PARTIES; what did they mean when they created the contract
- **ACTUAL INTENT**
- **APPARENT INTENT**
- REASONABLE PERSON TEST; what they would have though perceived the communication
- Mutual Assent; to exchange on thing for another
- **OBJECTIVE TEST**; look at apparent intent would RP think there was assent; turn facts into factors
- CLARITY OF REPRESENTATION
- SERIOUSNESS
- DEFINITNESS/ level of detail
- Relationships of the Parties
- Prior Dealings
- Industry custom
- Urgent need/ time sensitivity
- Other context
- LEGAL REALISM; accused the formation roles oversimplify human communication
- **SUBJECTIVE TEST**;

FACTORS ARE WEIGHED OR BALENCED

RULE

OFFER: RESTATEMENT Section 24;

AN OFFER IS

A MANIFESTATION

OF THE WILLINGNESS TO ENTER INTO A BARGAIN,

SO MADE AS TO JUSTIFY ANOTHER PERSON IN UNDERSTANDNG THAT HIS OR HER OTHER ASSENT TO THAT BARGAIN IS INVITED

AND WILL CONCLUDE IT.

HYPOs

- WILL YOU SELL ME YOUR PROPERTY FOR \$60,000
- IT WOULD NOT BE POSSIBLE FOR ME TO SELL IT UNLESS I RECIEVE \$70,000.
- Do you want to buy 240 good 1000 IBs cattle for \$1000

Essential elements of contract formation

A *contract* is a legally enforceable exchange of promises. Contract formation requires the following three essential ingredients:

- **Offer:** The offeror promises the offeree something in exchange for the offeree's promise to do or not to do something.
- **Acceptance:** The offeree gives the offeror whatever was requested, such as a promise to do or not to do something.
- **Consideration:** The consideration is whatever each party brings to the table in the bargained-for exchange.

Offer Definition: A manifestation of willingness to enter into a bargain, so made as to justify another person in understanding his assent to that bargain is invited and will conclude it. (**R.2d Sec. 24**)

1. Can a claim be made under the Bargain Theory?

- a. Was there assent?
 - i. Was there an offer?
 - ii. Was the contract bilateral (default) or unilateral?
 - iii. Was the offer revoked?
 - iv. Was there acceptance?
- b. Was there consideration?

2. Can a claim be made under the Reliance Theory?

- a. Was there a promise?
- b. Was there reliance on the promise? (Change in position)
- c. Was the reliance reasonable?

d. Did the reliance cause injury?

3. Can a claim be made under the Restitution Theory?

BARGAIN THEORY

- **RST § 1 Requirements under the bargain theory:**

- **Assent** (offer and acceptance)

- **Exchange** (consideration)

- **Express contract: contract that results from words** (oral or written)

- Has all the elements of a contract

- Assent (offer and acceptance)

- Consideration (exchange)

- **Contract implied in fact:** contract that results from CONDUCT

- Has all the elements of a contract

- Implied offer and Acceptance

- Assent can be implied by words or actions

- **Involves exchange/reciprocity (+ assent)**

- Promise for a performance

- Promise for a promise

- Performance for a performance

- **Underlying policy:**

- fairness (BUT Court's role is to *enforce* existing exchanges, not question terms of exchange for each party)

- reliance: not under reliance theory, but expectation of marketplace

- efficiency (all of the economic/market arguments about the free flow of goods)

- Bargains are motivated by self-interest

Considerations for enforcement of a contract:

- **Was there assent** (offer + acceptance)?

- **Gift** (no promise)

● **Seriousness of promise** (would a reasonable person believe it to be a serious promise?) ● No real promise → promise must be part of an exchange (not a one-sided promise) ● Against public policy

● **Definiteness/ambiguity** of terms of promise- no real assent

● **Mental capacity/minor:** unable to assent to promise

● Assent was coerced or made under **duress**

HYPOTHESIS: Uncle promises to pay nephew \$5000 if he quits drinking and smoking until he turns 21.

→ **Exchange does not have to involve a benefit to both parties, but both parties have to be performing/giving up something to establish exchange.**

Offer

Restatement 24: Offer = Manifestation of intent to enter into a bargain made by offeror to offeree

● Court uses objective test to determine “manifestation of intent”: Would a reasonable person in the shoes of the offeree think there was an offer?

● One party will always argue there was an offer, other party will argue there wasn't.

● **Factors to consider:**

○ language- words of promise or commitment?

○ level of detail

○ number of people to whom addressed (and does it name a party or parties?)

○ trade usage/custom

○ prior dealings/prior conversations

○ characterization

❖ *Southworth v. Oliver:*

CONTEXT AND CIRCUMSTANCES SURROUNDING THE COMMUNICATIVE ACTS GOING BACK AND FORTH.

T1: Seller Oliver stops by to talk with buyer Southworth

T2: Confirms things are still in order with the deal

T3: Packet of information is sent out; property/price/ terms (buy sent to three other people)

Building blocks:

- **Communication between them (beginning the meeting of the minds)**
- Four factors serve as a guide in making this determination.
- First, the expression should be judged on the basis of **what a reasonable person in the position of the offeree has been led to believe.** This involves what the offeree should have understood based on all the circumstances of the transaction and the opportunities available to him to discern the offeror's intent, rather than what the offeror actually subjectively intended.
- **Second, the language of the parties is important. If there are no words of promise, undertaking, or commitment, a statement by a party will typically be construed not as an offer, but as an invitation for an offer or mere preliminary negotiations.**
- Third, **the definiteness of the addressee to which the statement is made is controlling.** If a statement is made to a definite individual or group of addressees, as opposed to an indefinite group, the statement is more likely to be construed as an offer.
- Finally, the **definiteness of the proposal itself matters,** as more definite proposals containing many material terms are more likely to be construed as offers.

3. Categories

Rule for Southworth

(+)

RULE FROM RESTATEMENT s.24

Offer or Reward

Prove me wrong Offers

Prizes for skill and luck

- **Limits number of people who can assent**

Not offers

Ads, Price quotes

+ PepsiCo

Clear, definite, explicit and leaves nothing to interpretation = offer, first come first served, quantity of goods (only three can accept it) = Lefkowitz

An advertisement is not an offer unless it has a reward-based communication, requesting specific performance.

Reward Ad is not an offer when there is a reward and specific performance OR ENOUGH DETAIL

References Lefkowitz and Carbolic Smoke Ball

Bilateral vs. Unilateral Contracts

(Mostly for non-sale of goods situations) → only need to talk about this when the issue is triggered or one party is using this distinction to try to get out of a contract. RULE: Courts prefer bilateral contracts, therefore in order to form a unilateral contract, it must be explicitly clear that the offer was unilateral.

- **Bilateral:** Promise in exchange for promise
 - Acceptance happens with return promise
 - Both parties bound when the return is made (acceptance)
 - DEFAULT: bilateral contract (unless otherwise specified)
- **Unilateral:** Promise in exchange for performance
 - Acceptance occurs when offeree renders full performance (under unilateral K, partial performance does not constitute acceptance; under bilateral K, partial performance might indicate acceptance)
 - Neither party is bound unless/until offeree performs
 - Offer must specify that it can be accepted only by performance (if not specified, it's a bilateral contract)

Advertisements Rule

- **RULE:** Ads generally are not offers because of custom and the fact that merchants wouldn't be expected to open themselves up to more acceptances than they can support. However, an ad may be considered an offer if the words are very clear and definite that it was meant to be an offer, and it leaves nothing open for negotiation; if it uses limiting language such as "first come first served," or "while supplies last"; or if it invites performance on the part of the other party.
- Presumption: Solicitation of offer/invitation to negotiate
- Exceptions:

1. Limits number of people who can accept

a. Policy: Seller can't fulfill contract if there are too many acceptances than they can accommodate → can't require ad to constitute an offer

2. Invites performance

a. Examples: Prove me wrong offers, reward offers, prize for skills (ie. hole-in-one) → person making offer isn't expecting too many acceptances

b. Policy: doesn't solve the issue of too many acceptances, but it wouldn't be FAIR if you require a person to act/perform (part of exchange) and then rescind your

promise

c. Rewards (ie. for lost cat) already limits number of people who can accept

d. Typically, in reward/prove-me-wrong offers, goal of the offer is to increase business, so enforcement of that promise goes towards the policy of FAIRNESS

3. Communicates willingness to commit

a. Includes clear words of promise, esp. "offer"

b. Precision of detail indicating serious offer

❖ *Leonard v. Pepsico*:

NOTES: 01.23.23

- **Polling**
- [POLLEv.com/lauramott203](https://pollev.com/lauramott203)
- Text LAURAMOTT302 to 37607 once to join
- Some of the defenses will be on Midterm
- Formation/ alternative theories
- **REAL PROPERTY:** Real property is the **land**, everything that is permanently attached to the land, and all of the rights of ownership, including the right to possess, sell, lease, and enjoy the land. Real property can be classified according to its general use as residential, commercial, agricultural, industrial, or special purpose.
- UNIFORM MANUFACTURING HOUSING ACT (UMHA)- converting a home from personal to real property
- **Are all promises enforceable? NO**
- THREE THEORIES OF RECOVERY
- **BARGAIN THEORY**- agreement to exchange one thing for another gives rise to mutual obligations.
- **RELIANCE THEORY**- promises to give gifts, seeks to protect those who **reasonably** rely on others. (No exchange)

- **RESTITUTION THEORY** one should pay for any benefit unjustly retained, prevent unjust enrichment. UNJUST ENRICHMENT? Work outside your job description example.
- Each has a policy reason
- The Market Economy likes order and predictability
- EXCHANGE (of goods and services, not gifts/family agreements)
- ASSENT (fair doesn't matter IF they agreed)
- COLORBLIND MARKETS
- **Neo-Classical Economics**- most closely associated with bargain theory; "A DEAL IS A DEAL": VALUES EFFICIENCY AND PROFIT-MAKING
- **Neoclassical economics** is an approach to economics in which the production, consumption and valuation (pricing) of goods and services are observed as driven by the **supply and demand model**.
- According to this line of thought, the value of a good or service is determined through a hypothetical **maximization of utility** by income-constrained individuals and of **profits** by firms facing production costs and employing available information and **factors of production**. This approach has often been justified by appealing to **rational choice theory**, *a theory that has come under considerable question in recent years*.
- *Assumes everyone is ACTING IN THEIR OWN SELF INTEREST?*
- *ACTING RATIONALLY?*
- *ASSUMPTIONS:*
- *People act in their own self interest*
- *People act rationally*
- *People have access to perfect information*
- *People and resources are freely movable*
- *There are no artificial restriction on entry to the market*
- Neoclassical economics historically dominated **macroeconomics** and, together with **Keynesian economics**, formed the **neoclassical synthesis** which dominated mainstream economics as "neo-Keynesian economics" from the 1950s to the 1970s.
- It competed with new Keynesian economics as new classical macroeconomics in explaining macroeconomic phenomena from the 1970s until the 1990s, when it was identified as having become a part of the new neoclassical synthesis along with new Keynesianism.
- There have been many critiques of neoclassical economics, a number of which have been incorporated into newer versions of neoclassical theory, whilst some remain distinct fields.
- ARTIFICIAL RESTRICTIONS INTO A MARKET/ THRESHHOLD REQUIREMENTS
- CREDIT SCORES AS A BARRIER TO HOUSING/ LOANS
- **SOCIOECONOMICS**
- **We cannot adequately understand economic behavior by using concepts of autonomy, rationality, and efficiency**

- **MARKETS ARE A SOCIAL CONSTRUCTION**

- **NOT AN AGGREGATION OF CHOICES**

- **Socioeconomics** (also known as **social economics**) is the social science that studies how economic activity affects and is shaped by social processes.
- Analyzes how modern societies **progress, stagnate, or regress** because of their local or regional economy, or the global economy.
- CONSIDERATIONS: SOCIAL NORMS, DISPARATE BARGAINING POWER, RACISM, SEXISM, EDUCATIONAL INEQUALITIES
- DIFFERENTIATION THE **LEGAL ARGUMENT** VIA **MORAL ARGUMENT**; vehicles to make arguments on both sides.
- “Socioeconomics” is sometimes used as an umbrella term for various areas of inquiry. The term “social economics” may refer broadly to the "use of economics in the study of society".
- Contemporary practice considers behavioral interactions of individuals and groups through **social capital** and social "markets" (not excluding, for example, sorting by marriage) and the formation of **social norms**.
- In the relation of economics to **social values**.
- A distinct supplemental usage describes social economics as "a discipline studying the reciprocal relationship between economic science on the one hand and social philosophy, ethics, and human dignity on the other" toward social reconstruction and improvement or as also emphasizing multidisciplinary methods from such fields as sociology, history, and political science.
- In criticizing mainstream economics for its alleged **faulty philosophical premises** (for example the pursuit of self-interest) and **neglect of dysfunctional economic relationships**, such advocates tend to classify social economics as heterodox.
- **DEFENSES USE ASPECTS OF THE SOCIOECONOMIC THEORY**

DEFINE

- **CONTRACT**
- **AGREEMENT**
- **PROMISE (where only one person made a unilateral offer)**
- **PROMISOR (at least 2 in a bargain for exchange)**
- **PROMISEE (at least 2 in a bargain for exchange)**

ASUMPSIT: In laws of equity, “**unjust enrichment**” occurs when one person is enriched at the expense of another in circumstances that the law sees as unjust.

Where an individual is unjustly enriched, the law imposes an obligation upon the recipient to make **restitution**, subject to defenses such as change of position.

Liability for an unjust (or unjustified) enrichment arises irrespective of wrongdoing on the part of the recipient. The concept of unjust enrichment can be traced to Roman law and the maxim that "no one should be benefited at another's expense".

The law of unjust enrichment is closely related to, but not co-extensive with, the **law of restitution**. The law of restitution is the **law of gain-based recovery**. It is wider than the law of unjust enrichment. Restitution for unjust enrichment is a subset of the law of restitution in the same way that compensation for breach of contract is a subset of the law relating to compensation.

Unjust enrichment is not to be confused with **illicit enrichment**, which is a legal concept referring to the enjoyment of an amount of wealth by a person that is not justified by reference to their lawful income.

GIANT STEEL HYPO

Appeal to work harder!

Should the court enforce a promise to keep the plant open?

- Reliance on that statement and what it asserts is reasonable?
- Employees gave concessions
- A deal is not a deal when there is no meeting of the minds
- **PROMISSORY ESTOPPEL**

Estoppel is a judicial device in common law legal systems whereby a court may prevent or "estop" a person from making assertions or from going back on his or her word; the person being sanctioned is "estopped". **Estoppel may prevent someone from bringing a particular claim.** Legal doctrines of estoppel are based in both common law and equity. It is also a concept in international law.

BARGAIN THEORY: AGREEMENT TO EXCHANGE ONE THING FOR ANOTHER GIVES RISE TO MUTUAL OBLIGATIONS

- ALWAYS START HERE WITH A CONTRACTS ANALYSIS!
- START WITH BARGAIN FOR EXCHANGE
- Establishes the possibilities of analyzing defense arguments
- NO ELEMENT OF OFFER; no contract

BARGAIN THEORY

Elements

Determining whether a party assented to an agreement

ACTUAL OR APPARENT INTENT?

- **APPARENT INTENT, to the reasonable person in other party's shoes**
- **Communicative act (indicating assent); handshake, thumbs up, talking**

THEORIES OF RELIEF

1. Bargain Theory

Contract Formation

1. MUTUAL ASSENT

- OFFER (IRAC)
- ACCEPTANCE (IRAC)
- CONSIDERATION (IRAC)

2. EXCHANGE

RULE STATEMENT:

(ISSUE)

Was there contract formation?

(RULE)

A valid contract is only formed where there is an offer, acceptance, and consideration.

NO TO ANY?

- RELIANCE THEORY
- RESTITUION THEORY

SUBJECTIVE TEST: looks at actual intent

OBJECTIVE TEST: Looks at apparent intent. Would a reasonable person think there was assent.

- Go back to communicative act
- “Meeting of the minds of the parties, and both must agree to the same thing in the same sense.”
- It is only such intention as the words, or the actions of the parties indicate; not one secretly cherished which is inconsistent with those words or acts.

WHAT FACTS DID THE COURT RELY ON TO SUPORT RPT?

- Turning facts into factors
- What points of proof
- What’s the rule for determining what a reasonable person would think?
- More facts point to then did not?

RULE RPT:

(Factor based rule)

1. Clarity of representation
2. Seriousness
3. Definiteness/ level of detail
4. Relationship of the Parties
5. Prior Dealings
6. Industry Custom
7. Urgent need/ time sensitivity
8. Another context

Variations:

UNIVERSAL REASONABLE PERSON

- Relevant evidence: just specific words being interpreted

POSITIONED REASONABLE PERSON

- Relevant evidence: words plus all the circumstances surrounding the communication
(USED BY MOST COURTS)

SOCIALLY SITUATED REASONABLE PERSON

- RE: Words surrounding circumstances plus the social identity of the person hearing the words

NOTES Jan.30.2023

Topic: Contract Formation: Mutual Assent

Text pp 107-112, 114 (starting at “acceptance by silence”)-116 (top), 126-127 (stop at the case)

RST § 30; UCC §§ 2-206, 2-207(1)

Text pp 116-127 (very top)

Optional:

[The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of Their Rights](#)

B. Was there Acceptance?

Rule: Mirror Image Rule and the Mode/ Manner of Acceptance

MIRROR IMAGE RULE

MODE/MANNER OF ACCEPTANCE

Cases: *Panhandle Eastern Pipeline Co. v. Smith*;

FACTS

Grievance settlement over a letter written by a grievance claimant where he sought new terms in a letter as to whether it constituted a counteroffer.

2 issues/Prongs; Mode/manner of acceptance

Content of Acceptance

Panhandle Rule

Did Smith's response violate the mirror image rule; no, exception that acceptance is still effective if the addition only asks for something small or trivial

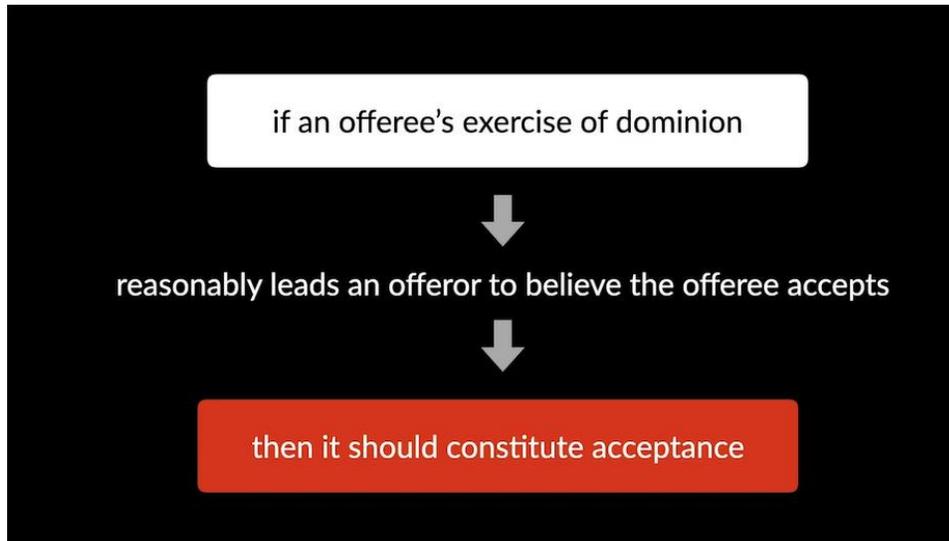
SUB RULES

- Addition implied
- Mere request
- Grumbling acceptance

ARTICLE 2 of the UCC

- Applies to sale of goods
- Not to sale of real estate or sales of services
- Realist Code- more flexible/liberal approach to contract formation
- UCC 2-207
- Can have a contract even if the acceptance has terms different from the offer, as long as the "bargained for" terms agree
- TERMS- Those the parties agreed on +
- Code Gap Filler

Russell v. Texas Co.



Rule: Judicial Interpretation of Unread Boilerplate, Shrink Wrap, Click Wrap, and Browse Wrap Contracts

Case: *Nguyen v. Barnes & Noble, Inc.*

FACTS: A case about whether a browse wrap agreement on arbitration would be binding on a consumer seeking damages.

CONSTRUCTIVE NOTICE

CLICKWRAP, or click through the agreement to proceed

BROWSEWRAP; hyperlink terms and conditions on the bottom

p.123

BOILER-PLATE AGREEMENT/ Form Pad Agreements;

The Mirror Image Rule:

Acceptance must be a mirror image of the offer, No additional terms

Exceptions

1. Apparently added “new” terms, were implied terms of original offer
2. When additional terms were immaterial, minor
3. Characterized as requests for modification “grumbling acceptance”

Uniform Commercial Code

▪ **For Discussion:**

- Would **Panhandle** have been decided differently if it had been a sale of goods? If so, how?

▪ **Prepare:**

- Find at least two differences between the UCC and the RST rules. (*Hint: think authority and scope.*)

UCC

Authority:

Scope:

RST

Authority:

Scope:

▪ **Theoretical Perspective:**

- In class, we will discuss the contrast between **Formalism** and **Legal Realism** as illustrated by the difference between the RST and the UCC.

▪ **Policy Questions:**

- What justifies the common law mirror image rule? Under what circumstances does this rule protect the offeror? Under what circumstances might it create incentives for opportunistic behavior?

- Why does the UCC reject the mirror image rule? Generally speaking, is the UCC more generous to offerors or offerees?

01/30/23

Class Notes:

- A deal is a deal
- Values efficiency and profit making
- SOCIOECONOMIC THEORY
- SUBJECTIVE JURY INSTRUCTION: “DID BOTH INTEND” to enter contract
- OBJECTIVE JURY INSTRUCTION:
- COURT APPLIES POSITIONED REASONABLE PERSON TEST

FINDING AN OFFER

DEFINITION

FACTORS

CATEGORIES

Ex:

In (Embry), the court found that

NARROW LEGAL CONCLUSION

BECAUSE

LEGALLY RELEVANT FACTS

THEREFORE

BROAD LEGAL CONCLUSION

Power to create/shape the offer vs. Power to accept and form a contract

ACCEPTANCE

Manifestation of assent to the terms made by the offeree in a manner invited or required by the offer.

Easier to find acceptance than offer

DEFINITE EXPRESS OF

NO CONDITIONAL COMMITMENTS

CLASS NOTES 02.01.2023

NEW PRACTICE PROBLEM

SKILLS at NOON SATURDAY

- **Polling**
- **POLLEv.com/lauramott203**
 - Acceptance must be a mirror image of the offer
 - Even small, unimportant changes will result in no acceptance but rather a counteroffer
 - It matters how you answer an offer
 - **MAKING A COUNTEROFFER STARTS THE WHOLE PROCESS AGAIN**
 - Each HYPO is a series of steps

Acceptance • RST § 50 : Manifestation of assent to the terms made by the offeree in a manner invited or required by the offer

COUNTER-OFFER

Offer made by offeree to his offeror

Relating to the same matter as the original offeror

Proposing substitute bargain

No K until accepted

SUB RULES

1. Acceptance is still effective if the “addition” only asks something implied in offer anyway
2. Still acceptance if “mere request”
3. Still acceptance of mere request is offeree expresses dissatisfaction but still manifests intent to accept. “Grumbling acceptance”

COMMON LAW IS STRICTER THAN UCC

1-103 UCC purposes policies of UCC

Looser mutual assent in UCC

2-206 Offer and Acceptance in Formation of a Contract

- “Code gap fillers”

UCC

DEFINITE and SEASONABLE EXPRESSION OF ACCEPTANCE OR A WRITTEN CONFIRMATION

Sent within a reasonable time

Even if it states additional terms

- Expressly made conditional on assent to the additional or different terms

OUTLINE

§ 1-103. Construction of [*Uniform Commercial Code*] to Promote Its Purposes and Policies; Applicability of Supplemental Principles of Law.

- (a) [The *Uniform Commercial Code*] must be liberally construed and applied to promote its underlying purposes and policies, which are:
 - (1) to simplify, clarify, and modernize the law governing commercial transactions;
 - (2) to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and
 - (3) to make uniform the law among the various jurisdictions.
- (b) Unless displaced by the particular provisions of [the *Uniform Commercial Code*], the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement its provisions.

Official Comment

1. The *Uniform Commercial Code* is drawn to provide flexibility so that, since it is intended to be a semi-permanent and infrequently amended piece of legislation, it will provide its own machinery for expansion of commercial practices. It is intended to make it possible for the law embodied in the *Uniform Commercial Code* to be applied by the courts in the light of unforeseen and new circumstances and practices. The proper construction of the *Uniform Commercial Code* requires, of course, that its interpretation and application be limited to its reason.

Contracts 2.1.23

- Finish Acceptance
- Start Revocation Acceptance
- RST § 50 : Manifestation of assent to the terms made by the offeree in a manner invited or required by the offer.

Panhandle Rule: Manner/Mode of acceptance • Offeror is “controller” of the offer

- Offeror can demand an exclusive mode of acceptance • But, MUST be clear / expressly stated that exclusive mode of acceptance
- Otherwise, court will interpret offer as allowing acceptance in any reasonable manner Content of Acceptance: Mirror image rule

“Acceptance must be a mirror image of the offer “

- Even small, unimportant change will result in no acceptance, but rather counteroffer

Counteroffer

- Offer made by offeree to his offeror
- Relating to same matter as original offer
- Proposing substitute bargain
- No K until the counteroffer is accepted Sub-rules

- (1) Acceptance is still effective if the “addition” only asks for something that was implied in the offer anyway.
- (2) Still an acceptance if “mere request”
- (3) Still an acceptance if offeree expresses dissatisfaction with the offer but still manifests an intent to accept (“grumbling acceptance”)

§ 2-105 Definitions: Transferability; “Goods”; “Future” Goods; “Lot”; “Commercial Unit.”

- (1) “Goods” means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8), and things in action. “Goods” also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2-107).

Article 2 of the UCC

- Applies to sale of goods
- NOT to sale of real estate or sale of services
- Realist code – more flexible/liberal approach to contract formation UCC § 2-207(1)
- Can have a contract even if the acceptance has terms different from the offer, as long as the “bargained for” terms agree.
- Terms are: – Those the parties agreed on + – Code gap fillers Outline – Acceptance (so far)
- Definition / Objective test
- Content Common law: Rule Exception Example UCC: • Mode Common law:

UCC: **Silence as acceptance** = Usually not a valid mode

Exceptions: (§ 69 & page 114)

- Parties agree
- Past dealings (have they done this before/)
- Offeree retains the benefits of the K Silence as Acceptance
- “If I do not hear from you in a week, I’ll take it that you have accepted my offer.”
- “If you eat your lunch later today that will indicate that you accept this offer.”

§ 2-206 Offer and Acceptance in Formation of Contract.

- (1) Unless otherwise unambiguously indicated by the language or circumstances
 - (a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances;
 - (b) an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or nonconforming goods, but such a shipment of nonconforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.
- (2) Where the beginning of a requested performance is a reasonable mode of acceptance an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.

Russell v. Texas Co. (p. 114)

In 1918, Northern Pacific RR:

Grants Sec. 23 ... Keeps a **TITLE** (ownership rights) to Russell's Predecessors in interest **LEASEHOLD** (limited use rights, here mineral rights.)

Russell v. Texas Co. (p. 114) In 1918, Northern Pacific RR: Grants Sec. 23 ... Keeps a TITLE (ownership rights) to Russell's Predecessors in interest LEASEHOLD (limited use rights, here mineral rights.) In 1952, grants mineral rights to Russell v. Texas Co. (p. 114)

- Russell offers Texas a **revocable license** (can revoke at any time) to use section 23 for \$150/day.
- **Express Proviso**: "Your continued use of the roadway, water, and/ or minerals will constitute your acceptance of this revocable permit"
- Did Texas accept the offer? What did it do?
- LEGAL ISSUE

DOES RETAINING A BENEFIT IN SILENCE A CONSTITUTE AGREEMENT?

What did the court say?

- Yes, they retained dominion. If the offeror was reasonably led to believe that the act of the offeree was an acceptance, the offer will be treated as accepted and a binding contract is formed.
- What's the counterargument?

EASEMENT: An **esement** is a nonpossessory right to use and/or enter onto the real property of another without possessing it. It is "best typified in the right of way which one landowner, A, may enjoy over the land of another, B".

An easement is a property right and type of incorporeal property in itself at common law in most jurisdictions.

An easement is similar to real covenants and equitable servitudes. In the United States, the **Restatement (Third) of Property** takes steps to merge these concepts as servitudes.

Easements are helpful for providing access across two or more pieces of property, allowing individuals to access other properties or a resource, for example to fish in a privately owned pond or to have access to a public beach. The rights of an easement holder vary substantially among jurisdictions.

Bilateral vs. Unilateral

- **Bilateral:** – Promise in exchange for promise.
 - Acceptance happens with return promise.
 - Both parties bound when the return promise is made.
- **Unilateral:** – **Promise in exchange for performance.**
 - Acceptance occurs when offeree renders full performance.
 - No one is bound unless/until offeree performs.
 - Offer must specify that it can be accepted only by performance.

The contract formed in the **Russell v. Texas Co.** case could be interpreted as **either** a bilateral or a unilateral contract:

→ **Bilateral:** (*promise for a promise*)

- *Offer:* Russell promised to give Texas Co. a revocable license to use Sec. 23's roads if Texas promised to pay Russell the fee.
- *Acceptance:* If viewed as a bilateral contract, the prescribed manner of acceptance would be a return promise - Texas Co.'s promise to pay the revocable license fee to use Section 23's roads.

→ **Unilateral:** (*promise for performance*)

- *Offer:* Russell promised to give Texas Co. a revocable license for a fee if they used Sec. 23's roads.
- *Acceptance:* If viewed as a unilateral contract, the prescribed manner of acceptance would be Texas Co.'s using Section 23's roads.

End User License Agreements (EULAs)

- **Click wrap:** Applies to internet transactions. User must click on box saying, “I agree.” Most accepted.
- **Browse wrap:** Like click wrap, but you don’t have to click “I agree.”

Website provides notice of the terms and conditions. No action has to be taken.

- **Shrink wrap**: Applies to store bought software (or over the phone). Reference to license agreements is placed on the outside of the software packaging. Rules of objective assent become problematic

Limit warrantee and disclaim liability, ubiquitous in 80s.

Types of Notice *IMPORTANT PROPERTY LAW TERMS*

- **Actual** (strongest)- actually been told what you are agreeing to
- **Inquiry**- see something to indicate you have to go somewhere to find out what you are agreeing to.
- **Constructive** – terms of notice are somewhere

Nguyen v. B&N (p 116)

PP

De novo

Under *de novo* review, the appellate court acts as if it were considering the question for the first time, affording no deference to the decisions below. Legal decisions of a lower court on questions of law are reviewed using this standard. This is sometimes also called plenary review or the "legal error" standard. It allows the appeals court to substitute its own judgment about whether the lower court correctly applied the law. For example, as noted in *Bose Corp. v. Consumers Union of United States, Inc.*, *de novo* review is required in the United States when First Amendment issues are raised on appeal. Questions of statutory interpretation decided by an administrative agency in a manner that has the force of law are subject to *Chevron* review. Questions of statutory interpretation decided by an agency in a manner that does not have the force of law are subject to *Skidmore* review.

A new trial in which all issues are reviewed as if for the first time is called a **trial *de novo***.

- Who is the plaintiff?

Nguyen contesting the arbitration mandate

- Website's terms of use: "By visiting any area in the Barnes & Noble.com Site, creating an account, or making a purchase, a User is deemed to have accepted the Terms of Use" [which includes an arbitration clause]
- Did Nguyen agree to the arbitration clause?
 - Claims he never did
- Why does Nguyen think he's not bound by it? Nguyen, cont.

No notice, no assent.

- What is B&N's argument that he assented?
 - Claims they put him on constructive notice

NOTE

Arbitration is not plaintiff friendly, favors the person paying, affords corporations a get out jail free card, limit the amount of damages extensively

Holding: A website user lacks sufficient notice to a company's terms of use if, despite the presence of conspicuous hyperlinks to the terms of use, **the website neither provides notice to users nor prompts users to affirmatively demonstrate assent.**

- What does the validity of browse wrap agreements turn on?
- Here? **Actual knowledge? Constructive knowledge?**
- Standard of Browse Wrap Agreements (front his case)
 - User must have actual or constructive knowledge of the website's terms and conditions
 - Depends on design and content of the website
 - Court looks for textual notice on every page -- user has to go past to get to site
 - **Notice must be conspicuous and well-placed**
 - **PLUS language directing user to terms**
 - "Read our terms before signing.." Hypo – shrink wrap
 - Consumer orders computer software from Gateway
 - Software arrives including list of terms
 - Says these terms will apply if the customer uses the software or fails to return it after 30 days.
 - Customer keeps the software for more than 30 days
 - Later has a complaint about the software
 - One term says mandatory arbitration
 - He wants to sue in court
 - Issue: Are these additional terms part of the contract? (is he limited to arbitration?)
 - Who made the offer? Who accepted? At what moment?
 - Include policy arguments

Arguments

- Arguments those terms shouldn't be part of the contract?

- Argument those terms should be part of the contract?
- Problem with terms later agreements?
- Why are they allowed?

4 ways to terminate an offer

- Rejection
- Revocation
- Lapse
- Death or incapacity of either party

Dickinson v Dodds (1876) 2 Ch D 463 is an English contract law case, heard by the Court of Appeal, Chancery Division, which held that notification by a third party of an offer's withdrawal is effective just like a withdrawal by the person who made an offer.

ISSUE

The significance of this case to many students of contract law is that **a promise to keep an offer open (an option) is itself a contract which must have some consideration.**

Facts

On Wednesday 10 June 1874 Mr Dodds delivered Mr Dickinson an offer to sell some houses for £800, an offer open until 9am on Friday 12 June. On Thursday afternoon, another man called Mr Berry told Mr Dickinson that the houses had already been sold to someone called Mr Allan (who was the second defendant). Mr Dickinson found Mr Dodds in the railway carriage at 7am on Friday, leaving Darlington railway station, and gave his acceptance there. But Mr Dodds said it was too late. Mr Dickinson sued for breach of contract.

Revocation Offeror can revoke any time prior to acceptance

Dickinson v. Dodds • 6/10: Offer

- 6/11 (morning): Dickinson decides to accept
- 6/11 (afternoon): Dodds sells property to Allen
- Later Dickinson was informed that Dodds sold prop to Allen • 6/11 (evening): Dickinson leaves formal acceptance letter with Dodds' mother-in-law
- 6/12 (morning): Dodds receives Dickinson's acceptance Dickinson
- This offer will be left open until 6/12 • Dickinson tried to accept before 6/12 • What's the issue?

- Offeror can revoke any time prior to acceptance EVEN IF she promised not to revoke (unless...) How to revoke Offeree must get actual notice (reliable information) – but doesn't have to come directly from offeror Dickinson chronology

- 6/10: Offer

- 6/11: Revocation

- 6/12: Attempted acceptance too late Revocation Offeror can revoke any time prior to acceptance EVEN IF she promised not to revoke

UNLESS: Option K: Additional consideration (exchange) plus signed writing (§§ 25, 87(1)) Or Firm Offer (UCC § 2-205): Doesn't require additional consideration if: – Signed writing – By a merchant – Then: Irrevocable during the time stated OR reasonable time BUT not longer than 3 months.

NOTES ON READINGS

FOR WEEK 2.6-2.8

- Offeror is “the master of the offer”
- The manner of acceptance can be specified
- Panhandle Case; on manner and mode of acceptance, counteroffer
- EXCEPTIONS TO MIRROR IMAGE RULE; express agreement to all terms
- 1. new terms are implied in the contract
- 2. immaterial or minor terms
- 3. requests/ grumbling acceptance
- § 30. RST
- Form of Acceptance Invited
- (1) An offer may invite or require acceptance to be made by an affirmative answer in words, or by performing or refraining from performing a specified act, or may empower the offeree to make a selection of terms in his acceptance.
- (2) Unless otherwise indicated by the language or the circumstances, an offer invites acceptance in any manner and by any medium reasonable in the circumstances.

[RESTATEMENT \(SECOND\) OF \(fbcoverup.com\)](http://fbcoverup.com)

[UCC](#)

UCC

§ 2-206 Offer and Acceptance in Formation of Contract.

Primary tabs

(1) Unless otherwise unambiguously indicated by the language or circumstances

- (a) an offer to make a [contract](#) shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances;
- (b) an order or other offer to buy [goods](#) for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of [conforming](#) or non-conforming goods, but such a shipment of non-conforming goods does not constitute an acceptance if the [seller](#) seasonably notifies the [buyer](#) that the shipment is offered only as an accommodation to the buyer.

(2) Where the beginning of a requested performance is a reasonable mode of acceptance an offeror who is not notified of acceptance **within a reasonable time** may treat the offer as having lapsed before acceptance.

§ 2-107. Goods to Be Severed From Realty: Recording.

Primary tabs

(1) A contract for the sale of minerals or the like (including oil and gas) or a structure or its materials to be removed from realty is a contract for the sale of [goods](#) within this Article if they are to be severed by the [seller](#) but until severance a purported **present sale** thereof which is not effective as a transfer of an interest in land is effective only as a contract to sell.

(2) A [contract](#) for the [sale](#) apart from the land of growing crops or other things attached to realty and capable of severance without material harm thereto but not described in subsection (1) or of timber to be cut is a contract for the sale of [goods](#) within this Article whether the subject matter is to be severed by the [buyer](#) or by the [seller](#) even though it forms part of the realty at the time of contracting, and the parties can by identification effect a [present sale](#) before severance.

(3) The provisions of this section are subject to any third party rights provided by the law relating to realty records, and the [contract for sale](#) may be executed and recorded as a document transferring an interest in land and shall then constitute notice to third parties of the [buyer's](#) rights under the contract for sale.

p. 155

Termination and Revocation of the Offer Prior to Acceptance

p. 185

The Consideration Doctrine

- The CD embodies the *laissez faire* free market doctrine in USA after civil war
- Consideration makes a promise enforceable
- “a return promise or performance”
- “Courts will not inquire into the adequacy of consideration”
- **HAMMER v. SIDWAY**- \$5,000 reward to abstain from vice
- The Consideration must be bargained for (induced by return promise or performance”
- PRICE OF THE PROMISE

- Redux into Kirksey; she was used for him to obtain land
- **US v. Meadors** illustrates the distinctions between the benefit-detriment theory and the bargain exchange theory of consideration.
-
- **Langer v. Superior Steel Corp.** P205
- Paid \$100 a month to not work for a competitor post retirement
- Stopped payments after 4 years

PRE-EXISTING DUTY RULE

ANGELA WHITE vs. Village of

Class NOTES on 02/06/2023

BROWSE WRAP

- User must have actual or constructive knowledge of the website's terms and conditions
- Depends on design and content of the website
- Court looks for textual notice on every page -- user has to go past to get to site
- Notice must be conspicuous and well-placed
- PLUS, language directing user to terms
- "Read our terms before signing.."
- **Bilateral:**
 - Promise in exchange for promise.
 - Acceptance happens with return promise.
 - Both parties bound when the return promise is made.
- **Unilateral:**
 - Promise in exchange for performance.
 - Acceptance occurs when offeree **renders full performance.**
 - No one is bound unless/until offeree performs.**
 - Offer must specify that it can be accepted only by performance.

OFFEROR: makes the offer, master of the offer, control what's in the offer, retain the ability to revoke until acceptance. Promise for performance (cross-promise).

OFFEREE: power of acceptance/decline/ counter-offer.

- **BILATERAL CONTRACT (CROSS-PROMISES):**
 - EXCHANGING PROMISE FOR A PROMISE, OR
 - PROMISE FOR PERFORMANCE (ONLY NEED TO BEGIN)
- **UNILATERAL CONTRACT: PROMISE FOR FULL PERFORMANCE.**
 - K NOT FORMED UNTIL PERFORMANCE COMPLETE
 - OFFER SPECIFIES FULL PERFORMANCE
 - ACCEPTANCE CREATES AN OBLIGATION ONLY ON THE OFFEROR.

Dickinson v. Dodds

FACTS:

- On June 10, 1874, John Dodds (defendant) drafted a document which **stated his willingness to sell a piece of property to George Dickinson** (plaintiff). The document stated that the offer would be **open until 9AM on June 12, 1874**.
- On Thursday, June 11, Dickinson was informed by his agent that Dodds changed his mind and actually intended to sell the property to Thomas Allen (defendant).
- Dickinson immediately went to the home of Dodd's mother-in-law where Dodds was staying and dropped off a document expressing his intent to accept Dodds' offer to sell the property. Dodds never received this document from his mother-in-law.
- At 7AM on the morning of June 12, Dickinson and his agent both found Dodds at a train station and provided him with duplicate copies of the document accepting Dodds' offer to sell. Dodds stated that it was too late and he had already sold the property to Allen.

ISSUE: Whether an offer may be revoked by the offeror without an express or actual statement of revocation communicated to the offeree?

HELD: YES

RULE: An offer may be revoked by the offeror without an express or actual statement of revocation communicated to the offeree **provided there has been no meeting of the minds and the offeree is aware of conduct by the offeror demonstrating intent to revoke the offer.**

REASONING

A **"meeting of the minds"** occurs when both parties to the contract have the same understanding of and mutually assent to the terms of an agreement at the same time. It is sufficient to form a valid contract.

DISPO:

Thus, Dodds effectively revoked his offer to sell property to Dickinson by expressing intent to sell instead to Allen, and no meeting of the minds ever occurred between Dodds and Dickinson that would form a binding contract. REVERSED

REVOCAION: "Offeror can revoke any time prior to acceptance"

- Offeree must get **actual notice** (reliable information) – but doesn't have to come directly from offeror
- _ Offeror can revoke any time prior to acceptance EVEN IF she promised not to revoke *UNLESS*:
- **Option K:** Additional consideration (exchange) plus signed writing (§§ 25, 87(1))
- Or
- **Firm Offer** (UCC § 2-205): Doesn't require additional consideration if:
 - Signed writing
 - By a merchant
 - Then: Irrevocable during the time stated OR reasonable time BUT not longer than 3 months.

Offeror can revoke any time prior to acceptance EVEN IF she promised not to revoke *UNLESS*:

Option K: Additional consideration (exchange) plus signed writing (§ 87(1))

Firm Offer (UCC § 2-205): Doesn't require additional consideration. Just signed writing by merchant...

Reasonable Reliance (**Drennan**) (§ 87(2))

4 sub rules

Part Performance of Unilateral K (§ 45)

4 Ways to Terminate:

1. Rejection
2. Revocation
3. Lapse
4. Death or Incapacity of either Party

Drennan v. Star Paving Co.

FACTS

- Drennan (plaintiff), a general contractor, was preparing a bid for a school construction project. As was customary, Drennan solicited bids from subcontractors to perform the paving work necessary for the project. Star Paving Co. (Star) (defendant) contacted Drennan and submitted a bid of \$7,131.60 for the paving work.
- **This was the lowest bid**, and Drennan relied on Star's bid when computing his own bid for the project. Drennan's bid was lowest and he was ultimately awarded the general contract.
- Drennan promptly informed Star it was awarded the subcontract. However, Star informed Drennan that it had made a mistake in computing its bid and could only complete the work for \$15,000.
- Drennan stated this was unacceptable and proceeded to look for another subcontractor to perform the paving work.
- After months of searching, Drennan awarded a new subcontract to a company bidding \$10,948.60 for the project; the lowest bid found by Drennan. Drennan brought suit against Star to recover damages caused by Star's failure to perform work as specified in its bid.

ISSUE: Detrimental Reliance/ Promissory Estoppel

Whether detrimental reliance by one party on another party's offer, without formal acceptance of the offer, is sufficient to make the offer irrevocable.

HOLDING

YES

RULE

An offer which the offeror **should reasonably expect to induce definite and substantial reliance by the offeree, and which does induce such reliance is binding on the offeror** and enforceable even without consideration if enforcement is necessary to prevent injustice to the offeree.

REASONING

→ What is **Part Performance**

→ Usually:

- Beginning of performance is required, not just mere preparation
- But doesn't need to be substantial performance – can be just the very start of performance

CLASS 02/08/23

Consideration Day 1 **Doctrine of Consideration**

- Contracts should be enforced when parties agree to exchange one thing for another
- Based on notions of **fairness, reliance, and efficiency**
- Doctrine of consideration is reason for enforcing promises Consideration: 400 Year History

Contract Law is Private Law

Early View:

- From Roman law, “causa” (looking at what was causing the promise)
- Broadly construed
- Any type of reason for making the promise was ok.

Consideration: 400 Year History

- “**Classical Reformulation**” (late 19th – early 20th century jurisprudence): Rejects the concept of “past benefit”
- Repositions consideration as central to contracting
- Focused on centrality of bargaining
- Looked for “**inducement**” (the motivation)

BENEFIT/DETRIMENT TEST

- Classical Reformulation framed by Urbanization & “Freedom To Contract” in Gilded Age (1877-1900); overlap with Lochner Era (1890-1937)

- Post-Civil War “free market” economy

Laissez-faire economics = government noninterference

Lochner Era; “freedom to contract”

Less interference, more profit!

- Reading in substantive due process “rights” to strike down laws that protected workers

Second Industrial Revolution (factory assembly lines, automobile, telephone, house and business electrification)

Rapid urbanization; Great Migration, European immigration Exploitation of labor

Restatement 2nd **§ 90: Promissory Estoppel**

- Became sole location for claims for reliance on gratuitous (“free of charge”) promises
- “Restated” the law as it accurately existed 1970s: “The Death of Contract”
- “It seems apparent ... that a system in which everybody is invited to do [their] own thing, at whatever cost to his neighbor, must work ultimately to the benefit of the rich and powerful, who are in a position to look after themselves and to act, so to say, as their own self-insurers...narrow scope of social duty...” [Gilmore, textbook p. 191] Doctrine of Consideration...
- “...understood in terms of the ends it serves ... rather than as an abstract rule or principle” • Today, courts often use as way to “deny enforcement of exchanges which are unfair, or to implement other policy goals”
- [text p. 192] Consideration § 71 Must be Bargained For:

- Sought by the promisor in exchange for her promise; and

- Given by the promisee in exchange for that promise Both parties must be making their promise so as to get the return promise Comments: A receives a gift from B of a book worth \$10. Subsequently A promises to pay B the value of the book. Consideration? A promises to make a gift of \$10 to B.

In reliance on that promise, B buys a book from C and promises to pay C \$10 for it.
Consideration?

Comments: A desires to make a binding promise to give \$1000 to his son B. Being advised that a gratuitous promise is not binding, A writes out and signs a false recital that B has sold him a car for \$1000 with a promise to pay that amount Consideration? A desires to make a binding promise to give \$1000 to his son B. Being advised that a gratuitous promise is not binding, A offers to buy from B a book worth \$1 for \$1000. Consideration? Comments: How about a promise to buy a \$10 book for \$100? Consideration? How about a promise to buy a \$10 book for \$20? Consideration? Comments: A promises to give a reward of \$500 to anyone who returns her lost dog. B returns the dog – doesn’t know about the reward. Consideration? Employer promises gold watch “in return for your hard work during the year just ended.” Then reconsiders.
Consideration?

“INCURING A DETRIMENT”

DOESNT ACTUALLY TELL YOU THE FULL RULE

Hamer v. Sidway

FACTS

- 1869: Uncle promises to give 15-year-old nephew \$5,000 if nephew quits drinking, smoking etc. until he turns 21 (Drinking and smoking were legal for young people at that time)
- 1875: Nephew fully performs and asks for the money. Uncle writes letter intending to pay (w/ delay?)
- 1887: (12 years later) Uncle passes away before following through on his promise. Hamer, continued
- What’s the Estate’s argument it doesn’t have to pay?
- What does the court hold?
- What rule does the court apply? How does the court define legal detriment? Legal Detriment Don’t need to show that the promise benefits the promisee or harms the promisor. Just show: Promisor gave up a legal right Forbearance/waiver of a legal right

Abandons a right

Limits his freedom of action in the future Legal Detriment Both parties must promise to do something (or do something) they have a legal right not to do, or promise to refrain from doing something (or refrain from doing something) they have a legal right to do. How would Hamer be decided under § 71?

- Legal detriment?
 - Bargained for? Consideration
- (1) There must be legal detriment (both parties)
- (2) It must be bargained for (both parties) Adequacy
- Courts will not inquire into adequacy (fairness) of consideration. Why?
 - What assumptions does neo-classical economic theory make about motives and contracting?
 - Why else might a consumer pay more than the market value for goods or services? Price disparities can be based on:
 - Lack of access to wider markets
 - Traditional practice
 - Discrimination/animus – race/class hostility
 - No access to perfect information • Systemic racism
 - Structural discrimination Neo-classical economic theory and Adequacy

- Should sellers be permitted to charge what the market will bear, even if it means charging higher prices for goods in poor neighborhoods, to folks of color, or to women?
- What if individuals from those groups agree to pay more? Bargained-For Hypo #1 I promise to paint you a painting for \$500. You agree.

My chief motive is fame – I don't care about the money. Consideration? Bargained for Doesn't have to be the only motive or even the predominant motive. Can be part bargain, part gift. Doesn't even have to be the actual motive – use objective test (secret intentions don't count) Bargained-For Hypo #2 What if I already painted the painting and gave it to you.

Then you promised to give me \$500? Revisit Kirksey

- Legal detriment?
- Bargained for?

SBA v. Betty Jo Meadors

- Facts?

SBA Melton Meadors Jay Judd Harold Ducote Mrs. Ducote Betty Jo Meadors Guaranty Bangersville State Bank M.J.D The individuals guaranteed the SBA – if SBA has to pay the Bank because of MJD's default, the individuals will cover any deficiency left after SBA sells collateral. The SBA guaranteed the loan from Bangersville State Bank. In the event that MJD defaulted, SBA would repay up to 56% of the loan. Loan from Bank to M.J.D SBA v. Betty Jo Meadors (p 200)

- Did the SBA ask Betty to sign the guaranty?
- Was her guaranty necessary to close the loan transaction with the SBA?
- Was there consideration for her promise? (which elements is at issue?) – Legal detriment? – Bargained for? Dana and Lee were crossing a downtown intersection in the marked crosswalk when a taxi ran a red light. Dana saw the taxi approaching and pushed Lee out of harm's way. It was too late for Dana to jump aside and she was struck and severely injured. A couple of weeks later, as Dana was recuperating at home, Lee visited her and promised to pay her \$20,000 for saving him from being hit by the taxi. Dana agreed to the payment. Was there consideration for Lee's promise? a) No, because Lee's promise was illusory. b) No, because there is no evidence that Dana's injuries cost \$20,000. c) No, because Lee's promise was for a past benefit. d) Yes, because Dana incurred a detriment.

Adequacy

- Courts will not inquire into adequacy (fairness) of consideration. Why?
- What assumptions does neo-classical economic theory make about motives and contracting?
- Why else might a consumer pay more than the market value for goods or services?

ABOVE IN OUTLINE

NOTES 02.13.23

Consideration Day 2

Consideration: PROOF THAT A CONTRACT IS WORTH ENFORCING

Elements

(1) There must be **legal detriment** (both parties)

(2) It **must be bargained for** (both parties)

- Inducement

Hamer, continued

- What's the Estate's argument it doesn't have to pay?
- What does the court hold?
- What rule does the court apply? How does the court define legal detriment?
- Run it through the elements: Legal Detriment? Bargained-for?

Element 1: Legal Detriment

Don't need to show that the promise benefits the promisee or harms the promisor.

Just show: Promisor gave up a legal right Forbearance/waiver of a legal right Abandons a right Limits his freedom of action in the future

Element 1: **Legal Detriment**

Both parties must promise to do something (or do something) they have a legal right not to do, or promise to refrain from doing something (or refrain from doing something) they have a legal right to do.

Element 1: Legal Detriment

Both parties must: A) promise to do something (or do something) they have a legal right not to do; or

B) promise to refrain from doing something (or refrain from doing something) they have a legal right to do.

Consideration § 71

Element 2: Must be Bargained For: Sought by the promisor in exchange for her promise; and Given by the promisee in exchange for that promise Both parties must be making their promise so as to get the return promise

- MUTUAL RECIPROCAL INDUCEMENT

How is a bargained-for promise...

- Distinguished from a gift promise (Kirksey)?

GIFT PROMISE, NOT MAKING SO AS TO INDUCE SOMETHING OF VALUE

“GIFT PROMISE”

SBA v. Betty Jo Meadors (p 200)

- Did the SBA ask Betty to sign the guaranty?
- Was her guaranty necessary to close the loan transaction with the SBA?
- Was there consideration for her promise?

(which elements is at issue?)

- Legal detriment?

YES BOTH PARTIES

- Bargained for? BF Hypo #1 I promise to paint you a painting for \$500. You agree. My chief motive is fame – I don't care about the money.

BF Hypo #1

I promise to paint you a painting for \$500. You agree. My chief motive is fame – I don't care about the money. Consideration?

1) Legal Detriment: Both parties must:

- A) promise to do something (or do something) they have a legal right not to do; or
- B) promise to refrain from doing something (or refrain from doing something) they have a legal right to do.

2) Bargained-For: LD/promise must be:

- A) Sought by the promisor in exchange for her promise; and
- B) Given by the promisee in exchange for that promise

Consideration? BF

§71 Requirement of Exchange; Types of Exchange.

- (1) To constitute consideration, a performance or a return promise must be bargained for.
- (2) A performance or return promise 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) The performance may consist of
 - (a) an act other than a promise, or
 - (b) a forbearance, or
 - (c) the creation, modification, or destruction of a legal relation.
- (4) The performance or return promise may be given to the promisor or to some other person. It may be given by the promisee or by some other person.

Hypo #1 I promise to paint you a painting for \$500. You agree.

My chief motive is fame – I don't care about the money. Consideration?

1) **Legal Detriment:** Both parties must:

A) promise to do something (or do something) they have a legal right not to do;

or

B) promise to refrain from doing something (or refrain from doing something) they have a legal right to do. BF

Hypo #1 I promise to paint you a painting for \$500. You agree. My chief motive is fame – I don't care about the money. Consideration?

1) **Legal Detriment:** Both parties must:

A) **promise to do something** (or do something) they have a legal right not to do; or

B) **promise to refrain from doing something** (or refrain from doing something) they have a legal right to do.

2) **Bargained-For:** LD/promise must be:

A) Sought by the promisor in exchange for her promise; and

B) Given by the promisee in exchange for that promise Another way to phrase this:

- Party A gave up ___ so as to get ___ .
- Party B gave up ___ so as to get ___ . Another way to phrase this:
- I gave up the painting so as to get \$500.
- You gave up \$500 so as to get the painting .

Element 2: Bargained-For Doesn't have to be the only motive or even the predominant motive.
Can be part bargain, part gift.

Doesn't even have to be the actual motive – use objective test (secret intentions don't count).
Objective appearance of bargained-for.

Adequacy: **Courts will not inquire into the adequacy (fairness) of consideration BF**

Hypo #2 What if I already painted the painting and gave it to you. Then you promised to give me \$500?

“MUTUAL RECIPROCAL INDUCEMENT”

GRATUITIOUS PROMISE: PROMISE TO GIVE A GIFT

Langer v. Superior Steel

(p 205) • Parties?

• Issue: **Whether sufficient consideration for an enforceable contract exist when one party agrees to do something or refrains to do anything that he has a right to do? GRATUITIOUS PROMISE, or BARAGAINED FOR EXCHANGE?**

• Facts?

- Langer (p) was employed as a superintendent at Superior Steel Corp. (Superior) (d). When Langer was about to retire from his position, **Superior sent him a letter offering him a pension of \$100 per month in exchange for Langer agreeing not to seek employment with any of Superior's competitors.**
- Langer accepted these terms and did not seek competitive employment. Superior paid Langer \$100 per month for four years, after which it notified Langer that it would no longer make payments.
- Employer writes letter commending employee for his long and faithful service and offering employee \$100/month pension “for as long as you live and preserve your present attitude of loyalty to the company . . . and are not employed in any competitive occupation.”

• Subject matter of contract? (What P is suing for)

• Procedural posture?

• D's argument?

- **He incurred a legal detriment restraining from outside employment**

• P's argument?

- Was there legal detriment?
- Was it bargained for?
- How does court distinguish from Kirksey?
- How is Langer different from Kirksey?

Kirksey: “If you come and see me, I’ll let you have a place to raise your family...”

Langer: “I’ll give you \$100/month for as long as you live and remain loyal by not working at another steel company”

- Why did the court find no consideration in Kirksey but consideration in Langer?

Bargained for vs. Gift w/ Condition

- How can you tell if it’s a gift with a condition or bargained for consideration?
- I promise to give you these two tickets to the concert if you come to my office by tomorrow to pick them up. Bargained for

• **Can be mixed motive**

• **Can’t be past consideration**

• **Can’t be condition of a gift**

• **Can’t be nominal Sufficiency**

WHERE ELEMENT FAILS, ELEMENT TWO WILL ALWAYS FAIL.

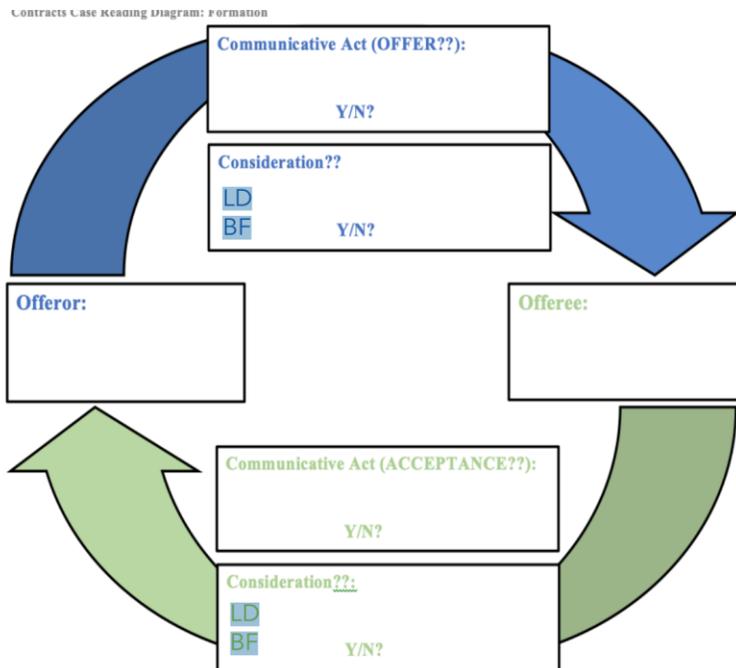
GENERAL RULE: Court won’t look at adequacy of consideration..... but consideration must be sufficient

- Can’t be nominal (“in name only”) (e.g., \$1 for a \$1M property)
- Can’t be a sham (false) or pretext. Really unfair is different from nominal.

Pre-existing Duty

Hypo

Contractor agrees to construct a building.



OFFER, ACCEPTANCE, CONSIDERATION

After work has begun, he threatens to walk unless the other party (owner) agrees to pay an additional sum. ("I promise to keep working if you promise to pay me more") Consideration? - Legal detriment? - Bargained for?

Pre-existing duty

- A promise to do something one is already obligated to do is not valid consideration.
- No legal detriment. They don't have a legal right not to do it.
- Pre-existing duty can arise from:
 - Law
 - contract
 - custom

Angela White v. Village of Homewood (p 209)

- What did the defendant claim was the consideration?
- Which element failed?
- Was there legal detriment?

no

- Was it bargained for?

Illusory promises (RST § 77)

THERE NO, ILLUSSORY PROMISES

- I promise to sell you my car unless I decide not to.
- I promise to buy as many bushels of wheat from you that I want.
- I reserve the power to terminate the agreement at any time.

WORLD WHERE THEY DO NOT HAVE A LEGAL DETRIMENET

- I will if I want to...

Performance is entirely optional

Promise in form but not in substance

Illusory K Hypo #1 I promise to buy from you all the coal that I want to purchase if you promise to sell me all the coal that I order.

Illusory Promise Sub-Rules

- “Want” is different from “need”
- Rule: Court will read a promise so that it’s not illusory if possible (especially where there’s an elaborate agreement)
- Rule: Court will impose an obligation of good faith in to every contract.
- Implied: “I promise to use good faith to determine how much coal I’ll need” Hypo #2 I promise to buy this business from you if I decide to go out and obtain a lease on this property from the landlord. Hypo #2 -- revised I promise to buy this business from you if I’m able to get a lease on this property. Illusory Promise Sub-Rules
- If performance is entirely within one party’s control, it might be illusory • But, rule: court will impose obligation of best efforts
- Implied: “I promise to use my best efforts to try to get a lease on the property.” Hypo #3 I promise to spend as much time working for you as I, in my sole judgment, shall deem necessary, if you promise to employ me. Hypo #4 I promise to purchase land for a shopping center if I can get leases for future occupancy that are “satisfactory” to me. Illusory Promise Sub-Rules
- When a party has discretion, they must exercise their discretion in good faith

Wood v. Lucy, Lady-Duff Gordon (p. 218)

- Parties?
- Facts?

Otis Wood hired as a marketer. • “...the exclusive right, subject always to my approval, to place my endorsements on the designs of others, place my own designs on sale, or to license others to market them. In return, I will get one half of all profits and revenues derived from any contracts you might make. This grant of exclusive right lasts for one year.”

- Subject matter of contract? (what P is suing for)
- Procedural posture?
- Issue? Wood v. Lucy, Lady-Duff Gordon (p. 218)

Wood v. Lucy, Lady-Duff Gordon (p. 218)

- D’s argument?
- P’s argument?
- Was there legal detriment? • Was it bargained for?
- How does court distinguish from Kirksey?
- Try to recall these elements and their applications in the hypos!
- This effort of testing yourself on what you remember strengthens the importance of the memory to your brain

02.15.2023

NOTES

MEMORIZE RULES FOR FORMATION/ ALTERNATIVE REMEDIES

Contracts 2.15.23

Illusory Promises; Reliance Upcoming Contracts Classes & Skills Sessions • Saturday, Feb 18: Skills

- 12 pm – 1:30 pm: Review Pulse Check Questions; more Formation MCQ • 2 pm – 4 pm: Turn Writing Assignment 2 into a “mock exam”!
- [Monday, Feb 20 – no class]

• Tuesday, Feb 21: Contracts: Restitution Theory • Skills 8:30 – 9:30 pm: Outlining Alternative Theories of Recovery (Reliance and Restitution) • Wednesday, Feb 22: Contracts: Statute of Frauds

• Saturday, Feb. 25: [No live Skills; video lesson posted]

• Monday, Feb 27: Contracts: Defenses – Public Policy Consideration: 2 Elements

1) **Legal Detriment:** Both parties must: A) promise to do something (or do something) they have a legal right not to do; or B) promise to refrain from doing something (or refrain from doing something) they have a legal right to do.

2) **Bargained-For:** LD/promise must be: A) Sought by the promisor in exchange for her promise; and B) Given by the promisee in exchange for that promise Another way to phrase this:

• Party A promised/gave up ___ so as to get ___ . • Party B promised/gave up ___ so as to get ___ . LD BF LD BF

Legal Detriment

• Can't be a gift

• Can't be pre-existing duty

• Can't be illusory Pre-existing duty; a promise to do something one is already obligated to do is not valid consideration.

• No legal detriment. They don't have a legal right not to do it.

• Pre-existing duty can arise from: • Law • contract

• custom Pre-existing Duty

HYPO

• Suppose the City offers a reward to anyone who turns in a person who just robbed a bank.

• A police officer finds the person and turns them in.

• Can the police officer collect the reward?

• Offer and acceptance?

• Legal detriment?

• Bargained for?

Hypo Contractor agrees to construct a building. After work has begun, he threatens to walk unless the other party (owner) agrees to pay an additional sum.

("I promise to keep working if you promise to pay me more")

Consideration?

- **Legal detriment?**

CANT BE A PREEXISTING DUTY

- **Bargained for?**

Work had already begun, and a contract was already in place.

Angela White v. Village of Homewood (p 209)

• Issue?

Is a pre-existing legal duty sufficient consideration for a binding contract?

•Facts:

Angela White (plaintiff) sought to become a firefighter and paramedic for the Homewood Fire Department. In order to become a firefighter and paramedic, applicants were required to perform a physical-agility test. White signed an exculpatory agreement releasing Homewood from any claims that might arise out of the physical-agility test. White was injured while performing the test and sued the Village of Homewood (Homewood) (defendant) for negligently administering the test. Homewood moved to dismiss the claim based on the **exculpatory agreement.**

• Subject matter of contract (what P is suing for?)

• Procedural Posture?

The trial court granted the motion to dismiss, and White appealed to the Illinois Appellate Court.

Angela White v. Village of Homewood (p 209)

• P's argument?

• D's argument? (**Radloff** case?)

CONSIDERATION WAS NOT RAISED IN RADLOFF

• Was there legal detriment? (what is the "hotel safe" example used by the court?)

• Was it bargained-for?

NO THERE WAS STATUTORY OBLIGATION TO GIVE THE TEST

Hotel Safe Example:??

- Court's reasoning & holding? Legal Detriment • Can't be a gift • Can't be pre-existing duty

A pre-existing legal duty is not sufficient consideration for a binding contract.

Exculpatory contracts are essentially releases of potential liability. These contracts are generally enforceable if supported by actual consideration. Consideration must consist of a benefit or a detriment to a party. Consideration cannot consist of an obligation that a party is already legally required to perform. In this case, Homewood asserts that the consideration is Homewood's administration of the physical-agility test and White's ability to participate. However, Homewood was required by Illinois law to administer the physical-agility test, and White had a legal right to take the test. While the adequacy of consideration will generally not be evaluated by the courts, some consideration must exist in order to form a binding contract. **Here, no consideration existed for the exculpatory agreement, because Homewood was required to administer the test and allow White to participate.**

- Can't be illusory

Illusory promises (RST § 77)

WORDS THAT SOUND LIKE PROMISES, BUT ARE NOT PROMISE IN FORM

LANGUAGE MAKING TOTALLY OPTIONAL THE PROMISE

- I promise to sell you my car unless I decide not to.
- I promise to buy as many bushels of wheat from you that I want.
- I reserve the power to terminate the agreement at any time.
- I will if I want to...

Performance is entirely optional

Promise in form but not in substance

Illusory K Hypo #1 I promise to buy from you all the coal that I want to purchase if you promise to sell me all the coal that I order.

A TRAP DOOR IN THE PROMISE

Illusory Promise Sub-Rules

- "Want" is different from "need"

- Rule: **Court will read a promise so that it's not illusory if possible (especially where there's an elaborate agreement)**
- Rule: **Court will impose an obligation of good faith, fair dealing, best efforts into every contract.**

• Implied: "I promise to use good faith to determine how much coal I'll need"

Hypo #2 **I promise to buy this business from you if I decide to go out and obtain a lease on this property from the landlord.**

Hypo #2 -- revised I promise to buy this business from you if I'm able to get a lease on this property.

Illusory Promise Sub-Rules

- **If performance is entirely within one party's control, it might be illusory**
- **But, rule: court will impose obligation of best efforts**
- Implied:

"I promise to use my best efforts to try to get a lease on the property."

WORDS IF BY THERE TERMS MAKE PERFORMANCE ENTIRELY OPTIONAL

- **When a party has discretion, they must exercise their discretion in good faith**

A promise is illusory if:

- **Performance is entirely optional**
- **Words in promissory form that are actually promising nothing Sub-rules:**
- **Court will read a promise so that it's not illusory if possible (especially where there's an elaborate agreement)**
- **Court will imply obligations of good faith and best efforts**

Hypo #3

"I promise to spend as much time working for you as I, in my sole judgment, shall deem necessary, if you promise to employ me."

Hypo #5

- I promise to sell you between 400 and 600 tons of fertilizer monthly as ordered by you. I reserve the right to terminate the agreement at any time without notice.

Hypo #5 -- modified

- I promise to sell you between 400 and 600 tons of fertilizer monthly as ordered by you. I reserve the right to terminate the agreement on one month's notice. Requirements and Outputs contracts

- I promise to buy as much fertilizer from you that I'll need for the year...

- I promise to sell you all the fertilizer that I produce....

- Must operate the business in good faith and according to commercial standards of fair dealing in the trade. Hypo #4 I promise to purchase land for a shopping center if I can get leases for future occupancy that are "satisfactory" to me.

Wood v. Lucy, Lady-Duff Gordon (p. 218)

FACTS

1. Wood (plaintiff) entered into a contract with Lucy, Lady Duff-Gordon (Lady Duff-Gordon) (defendant), whereby Lady Duff-Gordon agreed to grant Wood the exclusive right to place her endorsement on others' clothing designs.
2. She also granted Wood the exclusive right to market her designs and sell them. In return, Lady Duff-Gordon would receive 50 percent of the profits from Wood's efforts with regard to her endorsements and designs.
3. Wood agreed to keep records of all accounts and to take out all patents, copyrights, and trademarks necessary to protect Lady Duff-Gordon's designs.

Lady Duff-Gordon later entered into a contract with another company whereby she placed her endorsement on others' clothing designs. Wood filed suit, claiming breach of contract.

Lady Duff-Gordon filed a **motion for demurrer**, arguing that there was no enforceable contract for lack of consideration.

THEN SHE PUT A TON OF ADDS IN SEAR-ROEBUCK.

HE IS SUING FOR DAMAGES

MONEY DAMAGES- legal remedy

EQUITABLE RELIEF- specific performance; order for a party to stop something

- Used to be courts of relief/ courts of equity; now are combined jurisdictions

- Subject matter of contract? (what P is suing for)

- Procedural posture?

The trial court denied the motion. Lady Duff-Gordon appealed. The Appellate Division reversed and entered judgment for Lady Duff-Gordon. Wood appealed to the Court of Appeals of New York.

Wood v. Lucy, Lady-Duff Gordon (p. 218)

- Issue?

MOVING PAST PRIMATIVE FORMALISM: LEGAL REALISM; THIS IS THE NEW LAW; SUFFICIENT CONSIDERATION OF ENFORCEMENT OF AN UNSTATED DUTY, THIS IS NOT AN ILLUSORY PROMISE.

IN THE REAL WORTLD WE ARE Not bound by the words of a page.

LEGAL FORMALISM: Universal Reasonable person test, not In words, not a thing. THIS HAS BEEN DISSMISSED AND PUT TO REST; PRP, SSRP; inability to account for real life scenarios.

- P's argument? • D's argument?

- Was there legal detriment?

- Was it bargained-for?

- Court's reasoning & holding (formalism?)

“...the exclusive right, subject always to my approval, to place my endorsements on the designs of others, place my own designs on sale, or to license others to market them. In return, I will get one half of all profits and revenues derived from any contracts you might make. This grant of exclusive right lasts for one year.” As we leave Consideration (and Formation...)

- Review Rest. 2nd § 71 – all illustrations in the Comments...

•What cases have we studied where the court has found NO consideration? Relationship of Consideration doctrine (bargain theory) & promissory estoppel (reliance theory)

• What were the two “inventions” of classical contract law? (p. 241)

Relationship of **Consideration doctrine (bargain theory)** & **promissory estoppel (reliance theory)**

• Bargain Theory as **distributive justice**

• Reliance Theory as **restorative (corrective) justice**

Concern with Reliance theory

• By 1950s, **“claim of omnipotence of the consideration doctrine had to be abandoned”**

• Led to the reliance and restitution theories...but...

• View that it would “cut up the doctrine of consideration by the roots” (Holmes) Relationship of Consideration doctrine (bargain theory) & promissory estoppel (reliance theory)

PUSH AND PULL BETWEEN AWARDING DAMAGES BASED ON CONTRACT AND THE THEORY OF CORRECTING WRONGS, INJURED SHOULD BE COMPENSATED.

ON EXAM:

BEGIN WITH BARGAIN THEORY

ANALYSIS TIP: • Always start with Bargain theory.

- If you’re focusing in on consideration in analysis, you should also discuss promissory estoppel
- If there’s no consideration under BT, is the promise enforceable anyway under the reliance theory?

IF NO CONSIDERATION: THEN YOU WILL NEED IRAC ON PE./ Reliance Theory/ no cross promises.

ONCE YOU MAKE A PROMISE YOU CANNOT CHANGE YOUR MIND.

Reliance Theory based on:

(1) A person who is injured ought to be compensated for that injury (in some cases)

(2) One who causes harm ought to be accountable for it

Assumptions

- People do rely on each other
- Such reliance is morally and politically valuable (trust in others should be protected/encouraged)
- **Reliance theory doesn't protect promises – it protects reliance.**

Assumptions • Trust in others should be protected

- Such reliance is morally and politically valuable
- Reliance theory doesn't protect promises – it protects reliance.

Elementize!

Rule for Recovery Under Reliance Theory (Promissory estoppel) (§ 90)

- (1) **PROMISE (objective test)**
- (2) **RELIANCE on the promise** (change of position)
- (3) **Reliance must be REASONABLE** (objective test)
- (4) **Reliance must have caused HARM** (beyond not getting the thing promised) Rule for

Recovery Under Reliance Theory (Promissory estoppel) (§ 90)

- (1) PROMISE (objective test)
- (2) RELIANCE on the promise (change of position)
- (3) Reliance must be REASONABLE (objective test)
- (4) Reliance must have caused HARM (beyond not getting the thing promised)

Reconsider Kirksey: The court said the brother-in-law's promise was a mere gratuity. Would the brother-in-law's promise have been enforceable under the reliance theory (even absent consideration)? (reliance theory not developed until the 20th century) (argue both sides!)

Reconsider **Kirksey v. Kirksey**

- The court said the brother-in-law's promise was a mere gratuity.
- Would the brother-in-law's promise have been enforceable under the reliance theory (even absent consideration)? (reliance theory not developed until the 20th century) (argue both sides)

Ricketts v. Scothurn (p 43)

- Parties? • Facts? • Subject matter of contract (what P is suing for?) • Procedural Posture?
- Ricketts v. Scothurn (p 43)

- Issue?
 - Court’s reasoning & holding? (“weaving a new doctrine out of several existing threads”) • Damages? (reliance as reason to enforce the promise) Factors for determining Reasonableness Would a reasonable person have relied?
 - Was the promisor serious? • Did promisor induce reliance? • Who are the parties? What is their relationship?
 - What was the nature of the promise?
 - Does promisor have ability to follow through?
 - Was the promise in writing? (not required) Reasonableness Here:
 - Family setting • Promisor was serious – in writing
 - Promisor intended the promisee to rely – induced her reliance
 - Reliance was foreseeable Harm
 - The harm must be above and beyond not getting the thing promised. Was there harm from the reliance?
 - What harm did Ricketts suffer?
- Be specific. BT vs RT
- How could the grandfather have amended the promissory note to make it enforceable under the bargain theory?

NOTES

| | | | |
|--|---|---|---|
| <p>Feb. 21 (Tues) - We have class <i>(Legislative Monday)</i></p> | <p>Topic: Alternatives to the Bargain Theory Model</p> <p>B. <u>The Restitution Principle</u></p> <p>Cases: <i>Cotnam v. Wisdom, Bailey v. West, Toalson v. Arch Madison</i></p> | <p>Text pp. 46-53, 292-296; 298-303</p> | <p>▪ For Discussion:</p> <ul style="list-style-type: none"> ○ Rule Synthesis: How will the rule for the Restitution principle appear in your outline? ○ How does it differ from the other principles? ○ Case illustrations: what does each case add to your understanding of the doctrine of Restitution? |
|--|---|---|---|

NOTES:

Tuesday/02/21/23

RELIANCE THEORY

Common Law or UCC, threshold question.

UCC- movable goods

Common LAW: all else, (much stricter rules for formation)

FIRST ISSUE: Was a contract formed?

BARGAINED FOR EXCHANGE?

1. OFFER?

I

R

A

C

2. ACCEPTANCE?

I

R

A

C

- **Unilateral or Bilateral?**

-

3. CONSIDERATION?

I

R

A

C

SECOND ISSUE: Alternative Remedies

Should a promise be enforced absence of exchange?

Alternative remedies

RELIANCE (promissory estoppel)

Protecting the trust placed in promises?

RULE FOR RECOVERY UNDER RELIANCE THEORY (Promissory Estoppel) s. 90

1. **PROMISE** (objective test RP; was there a promise?) One promisor and one Promisee.
2. **ACTUAL RELIANCE** on the promise (**change of position**) subjective test; did this particular person in the particular shoes do something that they would not have.
3. **RELIANCE MUST BE REASONABLE** (objective test), standing in the shoes

FACTORS FOR REASONABLENESS

1. **Promisor serious?**
 2. **Did the Promisor induce reliance?**
 3. **Who are the parties? What is the relationship?**
 4. **What was the nature of the promise?**
 5. **Does the promisor have the ability to follow through?**
 6. **Was the promise in writing? (not required)**
-
4. **RELIANCE** (change of position) **MUST HAVE CAUSED HARM** (beyond not getting what was promised.)

WHERE IT OBJECTIVELY FORSEEABLE TO THE PROMISOR THAT THE PROMISEE WILL RELY ON THEIR PROMISE, like satisfies element 3.

Promissory Estoppel

- Cause of action in the reliance theory
- Bars a promisor from not delivering
- Compensation only for the amount of the promise
- Damages are only available in a bargained for exchange
- **RELYING ON A PROMISE TO MAKE A GIFT** (unliteral) v. **RELYING ON A PROMISE TO MAKE A DEAL.**

Ricketts v. Scothorn

FACTS

1. Katie Scothorn (plaintiff) quit her job and left her profession as a bookkeeper after her grandfather gave her a **promissory note promising to pay her \$2,000 on demand and 6% annual interest.**
2. At the time of giving her the note, her grandfather stated that he did not want his grandchildren to work, and upon receiving the note, **Scothorn quit her job.**
3. Neither the terms of the note nor her grandfather's statements obligated her to quit her job in order to receive the promised sum, although this appeared to be her grandfather's intention.
4. Her grandfather paid one year's interest on the note, but had not paid the balance by the time of his death.

ISSUE Is Grandfather equitably estopped?

May equitable estoppel prevent a promisor of an otherwise unenforceable gratuitous promise from revoking the promise where the promisee foreseeably and reasonably relied on the promise to her detriment? **Held: YES**

RULE: Equitable estoppel prevents a promisor from revoking an otherwise unenforceable gratuitous promise if the promisee foreseeably and reasonably relied on the promise to her detriment.

Reasoning

1. Although a promise may be unenforceable for lack of consideration because it was gratuitously made, the promise cannot be avoided if the promisee suffered some detriment in relying on the promise, and such reliance was a foreseeable result of the promise.
2. Gratuitous promises are generally not enforceable and where they have been enforced, the investment made or expenses incurred in reliance on the promise have constituted sufficient consideration.
3. However, equitable estoppel provides a separate basis for enforcing a contract by estopping the promisor on equitable grounds from avoiding the contract for lack of consideration.
4. The promise by Scothorn's grandfather was not enforceable for lack of consideration. His promise to pay was gratuitous and he sought nothing in return for his promise, even though it appears to have been his wish that she leave her employment.
5. **He must have known that in giving Scothorn the promissory note, she was likely to give up her employment and leave her profession in reliance on the promissory note.**
6. Therefore, Ricketts, as executor of her grandfather's estate, is estopped from denying the obligation of the promissory note on the ground of equitable estoppel.

DETRIMENTAL RELIANCE/ PRIMOSSORY ESTOPPEL

State Bank of Standish v. Curry, (1993)

FACTS

1. Each winter for 10 years, Robert and Kathleen Curry (defendants) met with State Bank of Standish (bank) (plaintiff) officials to hold preliminary discussions about a loan to cover the Currys' spring planting expenses. Early each spring, the bank renewed the loan on the same terms as before.
2. By 1985, **the Currys had amassed so much debt that the bank changed the terms of repayment.**
3. In the 1986 winter meeting, the now financially stressed Currys asked the bank officials for advice on applying for a federal buyout of their farm, which would have wiped out their bank debt.
4. The Currys discussed the matter with the bank's officials who, although they said nothing specifically about renewing the annual loan, reassured the Currys that the bank would continue supporting them.
5. **The bank turned down the Currys' loan application in May 1986, which was too late for them to arrange either adequate alternative financing or the federal buyout.**
6. The bank sued to collect on the Currys' debt.

ISSUE

Whether sufficient evidence of a clear and definite promise support a claim for relief based on promissory estoppel?

HOLDING: YES

RULE Sufficient evidence of a clear and definite promise supports a claim for relief based on promissory estoppel.

-
- **As PE is alternative theory, we don't want to allow it to completely negate the requirement of consideration (POLICY)**
 - **Flexible Approach Factors in Curry**
 - **NATURE OF THE RELATONSHIP**
 - **CLARITY OF THE REPRESENTATION**
 - **Circumstances making the representation**
 - **Course of performance, course of dealing, usage of trade)**

RESTITUTION THEORY

NOTES 02/22/2023

1. DEFINITIONS

2. RULES

3. CASES

ROMISSORY ESTOPPEL/ detrimental reliance theory

State Bank of Standish v. Curry, (1993)

FACTS

1. Each winter for 10 years, Robert and Kathleen Curry (defendants) met with State Bank of Standish (bank) (plaintiff) officials to hold preliminary discussions about a loan to cover the Currys' spring planting expenses. Early each spring, the bank renewed the loan on the same terms as before.
2. By 1985, **the Currys had amassed so much debt that the bank changed the terms of repayment.** In the 1986 winter meeting, the now financially stressed Currys asked the bank officials for advice on applying for a federal buyout of their farm, which would have wiped out their bank debt.
3. The Currys discussed the matter with the bank's officials who, although they said nothing specifically about renewing the annual loan, reassured the Currys that the bank would continue supporting them.
4. They did not put in a competitive bid for gov't buyout.

5. **The bank turned down the Currys' loan application in May 1986, which was too late for them to arrange either adequate alternative financing or the federal buyout.** The bank sued to collect on the Currys' debt.

ISSUE: **Whether sufficient evidence of a clear and definite promise supports a claim for relief based on promissory estoppel?** HELD: YES

Sufficient evidence of a clear and definite promise supports a claim for relief based on promissory estoppel.

- Subject matter of K?
- What's the alleged promise?
- What do the Currys do in response? • What happens?
- What is the basis of the Currys' counterclaim?
- Why don't they bring their claim under the bargain theory? Was there an offer? Promise How definite must a promise be? - Do you need all the essential details? - Does it need to be as definite and comprehensive as an offer? What's the difference between the strict view of promise and the flexible view? What's the policy underlying each? Which approach does the court choose? Flexible approach
- Promise triggering reliance doesn't have to be as comprehensive as an offer.
- Parties don't always expressly state things, but reasonable people might still rely.
- The contract model is inadequate to evaluate trust in situations of power inequity / dependency Flexible Approach
- What factors will the court consider to determine whether there's been a promise? • How are these factors applied in the case?
- What is the counterargument (using these factors) (argument for the bank that there was no promise)? Strict (Narrow) Approach
- Promise must be as definite, comprehensive, and unequivocal as an offer.
- No offer = no promise.
- **As PE is an alternative theory, should not be allowed to completely negate the requirement of consideration.**

Alden v. Elvis Presley, p. 277

FACTS

1. Elvis promised to pay a mortgage for his wife's mom.
2. Elvis dies without paying, estate refuses the payment.
3. Court dismisses the divorce action
4. P refiles

ISSUE

Was there a contract formed by this promise? Was there reasonable reliance?

HOLDING

No, it's a gratuitous promise. It's just a gift.

RULE

NOTES

| | | | |
|----------------------------|---|-------------------------|--|
| <p>Feb 22 (Wed)</p> | <p>Topic: Contract Formation: Statute of Frauds</p> <p>A. Is a Writing Necessary?</p> <p>Rule: Statute of Frauds</p> <p>Cases: <i>Metz Beverage Co. v. Wyoming Beverages, Inc.</i></p> | <p>Text pp. 320-327</p> | <p>▪ For Discussion: SOF practice problems posted on TWEN</p> |
|----------------------------|---|-------------------------|--|

*** Questions on Midterm about element 4: HARM

DEFINITIONS

Restitution: A contract implied in law.

RULES

CASES

Contracts 2.22.23

Restitution Were other PE elements met in Curry?

1. PROMISE (objective test)
2. RELIANCE on the promise (change of position)
3. Reliance must be REASONABLE (objective test)
4. Reliance must have caused HARM (beyond just not getting the thing promised)

Flexible Approach

Factors in Curry (p. 247-48) What is the counterargument (using these factors) (argument for the bank that there was no promise)? Curry: Takeaways? Alden v. Elvis Presley (p 277) • Facts? ? ? ? ? ? Alden v. Elvis Presley (p 277) • Facts? E Promise to pay mortgage P files for divorce for first time, releasing H from mortgage liability E dies without paying, E Estate refuses payment. Court dismisses P – H divorce action #1. P refiles divorce action, again releasing H from mortgage liability

Alden v. Elvis Presley (p 277) • Was there a contract under the bargain theory? • Procedural posture? Alden v. Elvis Presley (p 277) • Which element was at issue under PE? • Go through the four elements 1. PROMISE (objective test) 2. RELIANCE on the promise (change of position) 3. Reliance must be REASONABLE (objective test) 4. DETRIMENTAL RELIANCE

Reliance must have caused HARM (beyond just not getting the thing promised) Alden v. Elvis Presley: Takeaways? • Limits to Promissory Estoppel doctrine!

RESTITUTION

CONTRACTS IMPLIED IN LAW (another alternative theory!)

Restitution Involves

contracts implied in law (no “real” contract – legal fiction)

Quasi contract;

IN QUANTUM MERUIT

Court implies a contract to prevent unjust enrichment

Court implies a contract to prevent unjust enrichment Hypo #1

** RESTATEMENT OF RESTITUTION, a separate body of law

Duty to repair the injury, one ought to pay for a benefit that is unjust retained.

Contracts IMPLIED IN FACT v. LAW v. EXPRESS CONTRACTS

IN LAW

Legal fiction to account for situations that parties intended did not intend to form a contract. Yet, the court implies a contract.

IN FACT

EXPRESS

• You pass out and a stranger spends time and money to save your life at her own expense. • Do you owe them anything? – Argue no (policy?) – Argue yes (policy?)

Hypo #2 • Two parties negotiate and reach an agreement.

• The agreement is determined to be unenforceable because it’s against public policy. • One party has made a \$5,000 down payment based on the contract. • Can they recover the \$5,000 even though the contract isn’t enforceable?

Restitution: Theory

Toalson v. Arch Madison

• Houston sold Lot 17 to the plaintiffs and Lot 18 to the defendant

• When he sold Lot 17 to the plaintiffs he showed them Lot 18, but said it was Lot 17.

• Plaintiffs made extensive improvements on Lot 18.

- Eventually defendant told plaintiff he was the owner of Lot 18.
- Plaintiffs tried to get reimbursed for the work they had done on Lot 18. Toalson
- Which element was at issue. Why was it at issue? • Why generally do Plaintiffs claim they are entitled to be reimbursed? • What is defendant's response? • Who wins and why? • What's the general rule about restitution when one party mistakenly believes himself to be the the owner and makes improvements?

FORMATION • NO? YES? FORMATION • NO? YES?

1. OFFER?
2. ACCEPTANCE?
3. CONSIDERTION?

NEXT

Statute of Frauds! (THRESHHOLD BEFORE DEFENSES)

FORMATION

- NO? YES? Statute of Frauds!

Based on your reading, how many steps are there to this analysis?

6 types of contracts that need to be in writing to be enforceable:

Contracts that must be in writing:

(1) A K of an executor or administrator to answer for a **debt of decedent**

(2) K to answer for **debt of another**

(3) K made in **consideration of marriage**

(4) K for the **sale of land**

(5) K that **can't be performed within one year** from the making of the K

(6) K for the **sale of goods for more than \$500 ...but why?**

- Reasons for the Rule? • Problems?

Writing need not be formal, but must contain:

1) **Reference to the agreement - Identify the parties - Show that a K has been made by them**
 - Indicate the nature of the K and the subject matter / essential terms (UCC only quantity is necessary)

2) **Signature by party against whom enforcement is sought** (electronic is ok; letterhead is ok)

- Doesn't have to be made at the time the contract was entered into

• Sufficient writing doesn't mean assent, offer, acceptance or consideration! Contracts that must be in writing (1) A K of an executor or administrator to answer for a debt of decedent

(2) K to answer for debt of another

(3) K made in consideration of marriage: (not to each other) (dowery women as chattel/ prenuptial agreements/ dowery)

(4) K for the sale of land (NOT LEASES/ REAL ESTATE BROKERAGE)

(5) K that can't be performed within one year from the making of the K; courts despise this rule. It is a technicality that can be marshalled to enforce a validly formed contract. Contract has to set a date or time. Duration of performance must be specified to conclusively use this rule.

(6) K for the sale of goods for more than \$5000

#2: Ks of

• A writing is only required when there's no consideration

Contracts that must be in writing

(1) A K of an executor or administrator to answer for a debt of decedent

(2) K to answer for debt of another

(3) K made in consideration of marriage

(4) K for the sale of land

(5) K that can't be performed within one year from the making of the K (6) K for the sale of goods for more than \$5,000 Contracts that must be in writing (1) A K of an executor or administrator to answer for a debt of decedent (2) K to answer for debt of another (3) K made in consideration of marriage (4) K for the sale of land (5) K that can't be performed within one year from the making of the K (6) K for the sale of goods for more than \$5,000 Contracts that must be in writing

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Contracts that must be in writing (1) A K of an executor or administrator to answer for a debt of decedent (2) K to answer for debt of another (3) K made in consideration of marriage (4) K for the sale of land (5) K that can't be performed within one year from the making of the K (6) K for the sale of goods for more than \$500 Hypos (1) Ten-month employment k (2) K to be performed at the death of a person (3) A promises to work for B for the rest of A's life [or the rest of B's life] (4) Comfort Arms promises to care for Betty for 18 months More Hypos (5) K to build a full-

scale replica of Empire State Building (6) K for permanent employment (7) Two-year K to sell all the grain you shall need for \$100/barrel (8) Eight-month K subject to renewal

Exception Party is estopped from asserting the SOF to bar enforcement if:

- Part Performance
- Fraud
- (Reliance?)

IRAC 1: "MYLEGS"!

• (1) The following classes of contracts need to be in writing; if not in writing, no enforceable contract unless there is an applicable exception:

• (M) a contract made in consideration of marriage, BUT NOT mutual promises to marry (the marriage provision);

• (Y) a contract that, by its terms, cannot be performed within one year from the date of contracting (the one-year provision)

• (L) a contract for the sale of land or house (the land/buildings contract provision);

• (E) a contract by the executor of a will to pay the debt of the estate with their own money (the executor-administrator provision);

• (G) a contract in which one party becomes a guarantor for another party's debt or other obligation, when there's no consideration (the guarantor provision);

• (S) contracts governed by UCC § 2-201 (and other statutes or regulations) The sale of goods over \$500 provision)

Metz Beverage Co. v. Wyoming Beverages, Inc., (2002). (p 323)

FACTS

1. Pursuant to an oral contract, Metz Beverage Company (Metz) (plaintiff) distributed soft drinks made by Wyoming Beverages, Inc. (Wyoming Beverages) (defendant). The parties' mutually profitable relationship continued for 30 years.
2. However, efforts to reduce the contract's provisions to writing always failed because Metz wanted the contract to be terminable only for cause, but Wyoming Beverages wanted to limit the contract's term to three years.
3. Relations between the parties were usually amicable, although Wyoming Beverages occasionally voiced dissatisfaction with Metz.
4. Wyoming Beverages ended the relationship 30 years after the oral contract and began distributing its own beverages. Metz sued Wyoming Beverages for fraud.

ISSUE

Whether the Uniform Commercial Code legitimizes some unwritten contracts that the statute of frauds would prohibit?

HOLDING: **YES**/RULE: **The UCC legitimizes some unwritten contracts that the statute of frauds would prohibit.**

- Subject matter of the contract?
- Wyoming tries to terminate a long-standing business relationship with Metz bc no writing • Is a writing required? What rule? • Was there a valid writing? • Do any exceptions apply? • What are the terms? FORMATION • NO? YES? [Statute of Frauds!] β like a threshold issue for defenses

DEFENSES

- Public Policy Practice question 1:*

1. Which of the following contracts, if oral, would the Statute of Frauds likely NOT apply to?

(A) An agreement is made between a creditor and a friend of the debtor stating that the friend will guaranty the debt in exchange for the creditor extending the payoff time.

(B) A landlord and a tenant agree for the lease of land for two years.

(C) A school board and a teacher enter into an agreement on January 1, 2017 for nine months of service to begin on September 1, 2017.

(D) A law firm and an attorney enter into a contract on December 15, 2017 for six months of services, to begin on January 1, 2018. *Adapted from LexisNexis Questions & Answers, Contracts 2nd Ed. Rest of the semester • Defenses • Changed circumstances – Modification • Content of the contract – Interpretation: Implied terms – Interpretation of express terms – Parol evidence rule • Breach

- Remedies (money damages)

Defenses to Formation of K

• **Illegality**

Public Policy

• **Lack of capacity**

• **Duress / Undue Influence**

• **Mistake**

- Misunderstanding
- Misrepresentation
- Unconscionability

Restrictions on the power to contract

(Defenses) When should court disregard a private agreement? Reasons court will step in: • Who's involved • How the bargain was reached • Substance of agreement (only sometimes)

Contract Defenses (Competing Values) Private Public (Individual freedom) (Social Regulation)

Private agreements External controls Freedom of Contract Limitations to private K Bargain Theory Protection of parties, Assent courts, public Protect justified What if parties can't Expectations protect themselves? Avoid forfeiture Illegality • General rule: Generally, a contract or contract term that is illegal (violates a statute) or is against public policy will not be enforced.

• However, not every violation of a statute will create a policy concern strong enough to deny enforcement of an otherwise valid contract. Court will consider: • What was the relevant fault of the two parties? • What degree of harm was caused by the violation of the statutory scheme? • Was the entire contract illegal or just one part of it? • Will one party be harmed in a way that's disproportionate to the harm done by violating the statute? • Will enforcing the contract encourage people to violate the law? • Will refusing to enforce the contract deter illegal conduct?

Examples of policies • Family / marriage • Gambling • Trade/competition • Property • Litigation • Government See RST 179, 186-196 Policies tend to be grounded in: • Moral Values • Economic notions • Protect government institutions Framework for Public Policy Arguments to enforce: FOC, assent Protect justified expectations etc. Other policy arguments in favor of the subject matter of the K Arguments not to enforce: Identify: What policies Who is court protecting? What interests? (moral, economic, etc.) Balance!!!

Public Policy (Competing values)

Private Public interest n FOC Pub interest in some other policy Economic notions Moral values Free market

PART II

DEFENSES

Topic: Defenses

B. Lack of Capacity: Who Can Contract?

1. Children

Case: Kim Young v. Phillip Weaver

2. Mental Incapacity

Rules: volitional and cognitive tests

- **For Discussion:**
 - **Policy:** Do you think the rule for minority/children is fair? Who is the rule trying to protect, and from what? What assumptions does the rule make about minors, and are they valid?
 - How does it differ from the other principles?
- **Comparing rules:**
 - How is the test for mental capacity different from the test for minority? Why do you suppose the tests are different? By comparing these rules, we can see that policy is built into each rule. What policy concerns underlie the different rules?

Defenses:

1. Public Policy/Illegality
2. Lack of Capacity a) Children b) Mental incapacity a) Volitional b) Cognitive
3. Duress
4. Mistake
5. Misunderstanding

UCC or common law?

Sale of Goods?

Brief Analysis at beginning.

Defenses to Formation of K

- **Illegality / Public Policy**

- **Lack of capacity**

- **Duress / Undue Influence**

- **Mistake**

- **Misunderstanding**

- **Misrepresentation**

- **Unconscionability Illegality**

- General rule: **Generally, a contract or contract term that is illegal (violates a statute) or is against public policy will not be enforced & renders a contract VOID.**

- However, not every violation of a statute will create a policy concern strong enough to deny enforcement of an otherwise valid contract.

Illegality RULE

- Generally, court doesn't want to use its resources to enforce a contract that's illegal or violates public policy. • No bright line test. • Will enforcing the contract encourage people to violate the law? • Will refusing to enforce the contract deter illegal conduct?

Defenses to Formation of K

- **Illegality / Public Policy**

- **Lack of capacity**

- **Duress / Undue Influence**

- **Mistake**

- **Misunderstanding**

- **Misrepresentation**

- **Unconscionability Restatement**

RST § 178: Unenforceable On Grounds of Public Policy

Void "as against public policy..."

Examples of policies: Policies Grounded In:

- Family / marriage

- Gambling • Trade/competition • Property • Litigation • Government

See RST 179, 186-196 • Moral values • Economic notions • Protecting government institutions Framework for Public Policy Arguments to enforce: Freedom of contract, assent Protect justified expectations etc.

Framework for Public Policy

Arguments to enforce: Freedom of contract, assent Protect justified expectations etc.

Other policy arguments in favor of the subject matter of the K Framework for Public

Policy Arguments to enforce: Freedom of contract, assent Protect justified expectations etc.

Other policy arguments in favor of the subject matter of the K Arguments not to enforce:

Identify: What policies Who is court protecting? What interests? (moral, economic, etc.)

Framework for Public Policy Arguments to enforce: Freedom of contract, assent Protect justified expectations etc. Other policy arguments in favor of the subject matter of the K

Arguments not to enforce: Identify: What policies Who is court protecting? What interests? (moral, economic, etc.)

PUBLIC POLICY-SURROGACY CONTRACTS

In the Matter of Baby M, (1988).

FACTS

1. William Sterns (plaintiff) and his wife, Elizabeth, could not have children. The Sternses contacted the Infertility Center of New York (ICNY) to discuss surrogacy. The Sternses and Mary Whitehead (defendant) agreed that Whitehead would be artificially inseminated by Sterns and carry the child.
2. After birth, Whitehead would surrender the child and her parental rights to the Sternses.
3. In exchange, Sterns would pay \$10,000 to Whitehead and \$7,500 to the ICNY. Sterns and Whitehead signed a surrogacy contract outlining these terms.
4. The ICNY conducted a psychological examination of Whitehead to determine her fitness for surrogacy and noticed some potential issues that could make it difficult for Whitehead to surrender a child.
5. The ICNY did not share these concerns with Sterns or Whitehead. Additionally, Whitehead did not consult legal counsel outside of a conversation with an ICNY lawyer.
6. Finally, Whitehead made no inquiries as to the Sternses' fitness for parenting. Whitehead became pregnant.
7. Once the child was born, however, Whitehead experienced emotional difficulty surrendering her to the Sternses. Whitehead fled with the child to another state, and the Sternses called the police to forcibly remove the child from Whitehead's home. Due to these difficulties, Sterns sued Whitehead in New Jersey state court, seeking enforcement of the surrogacy contract.

ISSUE: Whether surrogacy contracts are valid based on Public Policy goals?

HOLDING: NORULE: Surrogacy contracts involving the exchange of money for a binding agreement by the surrogate to surrender her child upon birth are against public policy and void as a matter of law.

Baby M: Supreme Court (p 345) Held that the surrogacy agreement was “illegal” -- violates:

- (1) Adoption laws
- (2) Custody laws
- (3) Public policy

Baby M: Supreme Court (p 345) • What public policy is the agreement against? • Whose interests is court protecting? • Child – what interests? • Natural mother – what interests? • Society – what interests? Baby M: Supreme Court (p 345) • What public policy is the agreement against?

- Whose interests is court protecting?
 - Child – what interests?
 - Natural mother – what interests? • Society – what interests? Baby M: Supreme Court (p 345) • What public policy is the agreement against? • Whose interests is court protecting?
 - Child – what interests? • Natural mother – what interests? • Society – what interests?
- Commodification arguments • Pure commodification: The belief that real welfare is always promoted by permitting exchange. Everything can be commodified (made available on open markets and therefore the subjects of contracts) • Critique: Anti-Commodification: Certain things (with emotional content) should not be contactable or commodifiable. (e.g., this case) Policy Reasons to Enforce? • Contracts reasons • Law and economic reasons • Consider costs to the parties and to society • Supply and demand • Efficiency (treat fertility like an asset) • Wealth maximization • Free market activity • Social reasons • For the infertile couple, same-sex couples, single parents • For the birthing person/natural mother • For society

Defenses to Formation of K

- Illegality / Public Policy
- Lack of capacity
- Duress / Undue Influence
- Mistake

- Misunderstanding
- Misrepresentation
- Unconscionability Capacity: Definitions?

“The maximum amount that something can contain” – Oxford Dictionary

“The amount that something can produce” – Oxford Dictionary

“ One’s status as a person, distinct from any other role” – Wikipedia [Synonyms: quantity, scope, size, space, competence, facility, power, readiness, skill, strength, talent, accommodation, bulk, contents, dimensions” – Dictionary.com]

Capacity: Critical Legal Theory • Legacy of contractual ‘incapacity’ = legacy of subordination • Law as architecture of systemic discrimination • Creation and maintenance of economic and social inequality

• Legacy continues... Capacity: History, Justification (?) Risks • Justification: “shifted from protection of the status and property interests of dominant groups to protection of children and people with mental incapacity.”

• What are the risks of undoing a contract if one party is unable to understand the terms?
Risks

• Lack of stability of contractual relations / forfeiture

• Can perpetuate stereotypes

• Takes away agency of contracting party Agency • Right to make decisions and exercise control over our own actions and possessions • Our ability to act for ourselves as a fundamental aspect of personal freedom and liberty • Link between agency and freedom/full citizenship • Subordination/discrimination can deprive people of the right to contract and limit market activity of particular groups • Legacy of contractual incapacity continues today: – Implicit/systemic bias – disparate pricing – racial stereotyping... • Capacity doctrine can take away agency of certain groups – either intentionally or not. Effect of Lack of Capacity Balance • Stability of contract relations vs. • Protection of people who the law decided can’t protect themselves • Where/how should the court draw the line? • How much power should the court have in deciding if people are able to understand? Minority • One straightforward way of determining whether a person is unable to negotiate her own best interest

• General Rule: **All contracts with minors are voidable** (§ 14) by the minor only.

• What policy supports this rule?

- What legal presumptions are we making about minors?
- These presumptions are not rebuttable Exception to the general rule • Emancipation: – Marriage – Military service – Living apart / independently from parents (requires judicial proceeding). • Policy?

Kim Young v. Phillip Weaver, (2003)

FACTS

1. Kim Young (defendant) and her friend were both 18 and therefore younger than Alabama’s age of majority, which was 19. The young women wanted to try living on their own, so they signed a 10-month lease on an apartment owned by Phillip Weaver (plaintiff).
2. No adult cosigned the lease. Young stayed at the apartment and paid her share of the rent for two months before deciding to abandon the apartment and go home to live with her parents, who willingly accepted her return.
3. Before Young did so, her dog caused several hundred dollars’ worth of damage to the apartment. After Young left the apartment, she made no further payments to Weaver. Weaver sued Young to collect eight months’ rent and reimbursement for the dog’s damage.

ISSUE: Whether a minor legally incapable of entering into a binding contract?

HOLDING: YES RULE: A minor is legally incapable of entering into a binding contract.

-
-
- Could Young disaffirm? • What does the court say is the purpose of the infancy doctrine (allowing a minor to disaffirm)? • Does the exception apply? • What’s the issue? Restitution • What’s the rule? • Suppose minor buys a car and drives it around for a few months and then tries to return it? What if she gets in an accident and then tries to return it? What if there’s damage to the car? Restitution Rules
 - Generally, when a minor disaffirms, they don’t have to pay restitution. • Must return the property but can get all their money back. They don’t have to pay for use or depreciation or any damage to the goods. • If they can’t return the property, they still get their money back!
 - What’s the policy behind the rule regarding restitution? Exceptions to restitution rule
 - Misrepresentation, tortious damage to property, or willful destruction of property • Necessaries

- Minor can disaffirm the contract and can get money back, minus the loss of value of the goods (has to pay restitution) Necessities • e.g., food, clothing, shelter, etc. IF they can't be provided by a parent

- **Rule: Minor can avoid a contract for necessities but still has to pay for the loss of value of the goods.** • Policy behind the exception for necessities? (why is minor less protected when buying necessities?) What constitutes a necessity? • Something necessary to the position and condition of the minor • Flexible and relative term • Does it fall within the general class of necessities? (food, clothing, shelter, support and maintenance, medicine and medical attention • If so, is it necessary under the circumstances of this particular case? *Young v. Weaver* • Is a car a necessary? • Is an apartment lease a necessary? Restitution • Isn't this a harsh rule to the seller? Does the seller get any protection? • What type of loss might the seller suffer, even if the minor returns the goods intact? • Why have a rule that seems unfair to an innocent seller? • What is the impact of this rule on minor buyers?

Topic: Defenses

C. Duress: Force and Threats

Case: Trane v. Bond

- **Elementizing rules:**
 - What's the difference between § 174 and § 175 in substance and in effect? What elements are required under § 175(1) for a showing of duress by threat by the other party? Read § 176. When is a threat improper? Can a threat be 'proper'?
- **Critical Theory:**
 - Does a class/gender analysis help to understand *Trane*?

Contracts 3.8.23 Finish Capacity Duress Spring Examsoft License Download Procedure 1) Visit www.examsoft.com/cuny 2) Sign in with: • Username: firstlast • Password: 0000 + your 4-digit examID – e.g. “0001234” • (If you don't know exam ID, go to CUNYFirst à Academics à Grades à Law Exam Number) 3) Either: 1) Accept the disclaimer that appears when you sign in (this means you have the latest version installed), or 2) If program doesn't prompt you to update, then go to examsoft.com/cuny and manually download the newest version. 4) Practice with the IT Practice Exam • IT Practice Exam is in once using in and can do it as many time as you like • PW – cuny Upcoming Contracts, Skills, & TA Office Hours & Review Schedule Monday, March 6: Contracts: Public Policy (finish) and Capacity (start)

Skills: SOF outlining and multiple choice strategy Wednesday, March 8: Finish Capacity; Duress Friday, March 10th: Distribute Rules List TA Review 5-6 pm Saturday, March 11th: 12 pm - 1:30 pm: Mock Midterm 2 pm - 3 pm: Review of Mock Midterm Monday, March 13: Contracts: Rules Review Mistake & Misunderstanding Skills: Mock Midterm, repeated Wednesday, March 15: Midterm (no class afterwards – enjoy your break!!!) Monday, March 27: Misrepresentation & Unconscionability Minority • One straightforward way of determining whether a person is unable to negotiate her own best interest •

General Rule: All contracts with minors are voidable (§ 14) by the minor only.

- What policy supports this rule?
- What legal presumptions are we making about minors? • These presumptions are not rebuttable
- Exception to the general rule • Emancipation: • Marriage • Military service • Living apart / independently from parents (requires judicial proceeding). • Policy?

Young v. Weaver

- Could Young disaffirm?
- What does the court say is the purpose of the infancy doctrine (allowing a minor to disaffirm)? • Does the exception apply?
- What's the issue?

Restitution

- What's the rule?
- Suppose minor buys a car and drives it around for a few months and then tries to return it? What if she gets in an accident and then tries to return it? What if there's damage to the car? Restitution Rules • Generally, when a minor disaffirms, they don't have to pay restitution. • Must return the property but can get all their money back. They don't have to pay for use or depreciation or any damage to the goods. • If they can't return the property, they still get their money back! • What's the policy behind the rule regarding restitution?

Exceptions to restitution rule

- Misrepresentation, tortious damage to property, or willful destruction of property
- **Necessaries**
- Minor can disaffirm the contract and can get money back, minus the loss of value of the goods (damage)
- In other words, they have to pay restitution to the seller

Necessities

• Defined as: food, clothing, shelter, etc. IF they can't be provided by a parent (two elements) • Rule: Minor can avoid a contract for necessities but still has to pay for the loss of value of the goods.

• Policy behind the exception for necessities? (why is minor less protected when buying necessities?)

What constitutes a necessity?

• Something necessary to the position and condition of the minor

• Flexible and relative term

• **TWO-PART TEST:**

1) Does it fall within the general class of necessary to live? (food, clothing, shelter, support and maintenance, medicine and medical attention)

2) If so, is it necessary under the circumstances of this particular case? (can the parent provide it?)

Young v. Weaver

• Is a car a necessary? • Is an apartment lease a necessary?

Restitution

• Isn't this a harsh rule to the seller? Does the seller get any protection? • What type of loss might the seller suffer, even if the minor returns the goods intact? • Why have a rule that seems unfair to an innocent seller? • What is the impact of this rule on minor buyers?

• § 15(2) (This rule not on final exam)

• Where:

• Fair terms and

• Other party had no knowledge of the mental disability

• No power of avoidance to the extent that: • Contract performed in whole or in part OR • Circumstances changed so that avoidance would be unjust • (Why this additional protection to the adult?) Restitution and mental incapacity • Restitution is required in full to the extent of any benefit received

• UNLESS: The other party had knowledge of the incompetency • (Why is restitution required when mental incapacity but not when minority? What policy concerns at play?) Compare infancy doctrine with mental capacity doctrine • What protections does each give to the party dealing with the person who lacks capacity? • Why do rules for mental incapacity weigh the other party's interest more heavily as against the interests of the person lacking capacity than the rules for minority? How are the policy concerns different? ADA • No individual shall be discriminated against on the basis of disability (includes "mental impairment") • How should a seller deal with this? What's the conflict?

CLASS 04/12/23

MODIFICATIONS

DEFINITIONS

1. ECONOMIC DURESS
- 2.

RULE

Modification

- Issue trigger: changed circumstances – parties want to change the terms of their contract.
- With impracticability (not covered), circumstances materially change after the parties sign the contract so court excuses performance. • Here, change in circumstances might not be material enough to excuse performance (original contract may still be enforceable), but parties want to modify terms.

Pre-Existing Duty Rule • A promise to do something you're already obligated to do can't be sufficient consideration for a return promise. • Used to be: K modification not valid unless both parties agree to something additional (additional consideration on both sides) • Reason for that old rule? • Criticism? • New rules: Take into account good faith reasons to modify

CASES