

### **Basic Terms:**

1. *express contract*: verbal contract
2. *implied contract*: based in part on contract, can't find deal simply from the word of the parties. Law is the same for implied and express contracts
3. *executory*: executory contract is one that has not yet been performed.

### **UCC article 2**

- I. When do I do article 2: sale of goods (movable property) – not services or real estate.
  - a. Mixed deal? Hire someone to paint a house and bring paint. That is goods and services
    - i. What is the more important part of the deal? Services or goods. Here most likely basically a services contract with paint thrown in. So use common law.

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## **IS THEIR A DEAL?**

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- I. **OFFER**: Looking for a manifestation of willingness to enter into a bargain which justifies another in understanding his assent can conclude the bargain. Essentially creates the power of acceptance.
  - a. Subjective v. Objective approach: Reasonable man: no in general, reasonable man in the context of the conversation
    - i. Flower City Painting: sub thinks paint interior walls, contractor thinks all. Sub did not know ordinary trade usage, so reasonable man assigned his knoweldge
  - b. Bilateral v. Unilateral
    - i. Bilateral: both sides make promises
    - ii. Unilateral: one side promises the other performs
  - c. Not contracts: offers made in jest, auctions, preliminary negotiations, solicitation of bids
  - d. Misunderstanding: (rest. 20)
    - i. No contract if (1) parties attach different meanings and neither party has reason to know of others misunderstanding- both innocent (2) both parties have reason to know and still proceed – both rascals
    - ii. Contract if where party 1 has knowledge to know what party 2 knows and party 2 had that understanding. Party 2 innocent, party 1 rascal. Benefit to the party in the dark.
      1. bottom line if you know there is misunderstanding, then you must clear it up or you are on the hook.
    - iii. Mistake v. Misunderstanding: Mistake is where a party is wrong about a fact, misunderstanding where a party meant different things. Mistake goes to excuse of contract, misunderstanding saying there was never a contract to begin with because of a failure for mutual assent.
  - e. Offer/Invitation/Promise: To hold intention as offer must be certainty to determine breach and a remedy for the breach.
    - i. Promise – apply promissory estoppel. Rest. 90.

- f. Missing Terms: no longer a requirement that communication contain all material terms in order for it to be an offer. Can be manifestation of commitment even though there are gaps.
- i. Missing price problem: offer to sell Blackacre (no price). Not an offer – price term and description of real estate required (under common law).
  - ii. UCC 2-305: communication can be an offer even though there is a missing price term – for sale of goods obviously
    1. if you leave it out, another person gets to decide it.
    2. need amount, not necessarily the price.
- g. Ambiguous terms: fair, reasonable, appropriate.
- i. Rule: Important aspect of contract (price, quantity) is described in ambiguous terms = no manifestation of commitment. (common law and UCC)
- h. Advertisements: general rule is that adverts are not offers. Treated as invitations to make an offer. *Exceptions*: whether the advert is specific about how many advertised items are available and who can accept the goods or words of commitment (send three box tops and get good for reduced price)
- i. Requirement contract: situation involving a sale of goods in which the quantity is described in terms of the buyers need (promise I will buy all the grits I need from you). Valid, even though ambiguous.
- i. Artificial ceiling though: increase that is unreasonably disproportionate is not valid. Match what asking for today with what he previously asked for.
  - ii. *Feld*: D seller of crumbs to P, D stops making crumbs and reneges his deal. Court says you can't do this unless on verge of bankruptcy.
  - iii. If you say I will buy all that I want – no consideration
- j. Output contract: sell all you produce to someone.
- i. Have to have a good faith reason (implied good faith reason) to stop making, and have to give proper notice. Can't stop because economically inefficient. Courts won't reward you for the loss of your bargain, sucks for you.
  - ii. Good faith reason is really only if compliance will put you out of business
- k. Firm offer (kinda same as option contract): writing by merchant to keep an offer open. (no consideration needed – except if common law or not merchant then you need recited consideration (don't actually have to give the dollar))
- l. Option contracts: only created when accept offer by performance, or give nominal consideration for offer to keep open. Rules are below.
- i. Rest. 32: when an offer can go either way, pick bilateral.
  - ii. Rest 62: if you accept by performance you create an option contract under a bilateral contract, you are promising to complete it. Here neither can get out of it once performance has started.
  - iii. Rest 45: unilateral contract creates an option contract when you can only accept by total performance. Offeror is not able to get out of it. Offeree can because acceptance is total performance

- iv. Rest. 87: can become an optional contract if there is recitation of nominal consideration (I will give you a dollar to keep in open, don't have to give dollar.)
- v. Unilateral contracts – you would choose this for a reward. Otherwise, you wouldn't really choose this. Must know about reward to claim it.
- vi. Under UCC you don't need nominal consideration if you are a merchant selling your normal goods.
  - 1. so if I say promise to keep in open for three days, guarantee it. Not in force, unless the offeree start performance before revocation.

**II. Acceptance:** Offeror is the master of this offer and the terms by which it is accepted.

- a. Who is accepting: has to be a person to whom the offer was made. Offeree must know of the offer (rewards situation)
  - i. *Diamond Jim II*: If you know of offer of reward and you perform that action sought, you are deemed to have been induced by the offer
- b. How is that person accepting? Offeror can control how acceptance happens. Most exam situations, offer does not say how offer is to be accepted.
  - i. *Bilateral v. Unilateral contract issues*: When it is not specified offeree can accept by either method. (UCC-206)
    - 1. *Davis v. Jacoby*: D sends letter to P, come and take care of me and will give you everything. P assents, but D dies before P can perform
      - a. If unilateral contract/**option contract**: promise is void. Also can revoke up until actual performance. But **MUST** give notice to party of acceptance after performance is complete.
        - i. Issues raised as to what constitutes start of performance... prep?
      - b. Found to be bilateral: promise not void because he accepted by return promise.
    - 2. When in doubt contract interpreted as bilateral.
  - ii. *Mailbox rule*: parties are contracting with each other from a distance. Where it is reasonable to respond to an offer by mail, the acceptance dates from the time it was posted.
    - 1. Rejection or counter-offer does not terminate offer until received.
    - 2. Option contract exception: acceptance of option contracts is effective on receipt by the offerer not upon dispatch
    - 3. rejection and acceptance sent: if rejection sent first, acceptance only valid if received before rejection.
      - a. If acceptance sent first, it is effective on dispatch even if offeror receives rejection first.
  - iii. *Mirror Image rule*: your acceptance has to mirror the offer. If not rejection or counter offer under common law

1. UCC battle of the forms: UCC allows variation.
- iv. *Notice of Acceptance*: If accepting by promising, acceptance must be communicated to each party. If accepting by performance, must notice if parties has no reason to know you have finished performance.
- v. *Silence*: silence is acceptance when: Rest. 69
  1. offeree (1) takes some benefit of offered services (2) has opportunity to reject (3) reason to know they were offered in expectation of compensation – unordered newspaper example. If D uses newspapers he must pay for subscription.
  2. offeror has stated or given reason to offeree to know that assent may be manifested by silence
  3. previous dealings have used silence as acceptance and reasonable for offeree to assume this is the same thing

### III. Terminating Acceptance - Rest 36

- a. Lapse of time: hard issue is situations where nothing is said about when you have to accept. Even if there is no express time limit, courts will impose reasonable time limit. Watch for: (1) when offer made (2) length of gap for response
  - i. *Cobaugh*: hole in one at golf course for car. Def intent to end contest does not matter, objective standard for a reasonable man conclusions under the circumstances. Pltf performed actions sought - considerat.
  - ii. If bargaining face to face or over the phone, power of acceptance only during conversation.
- b. Death of a party: when person dies her offer dies with her.
- c. Rascal Knowledge: Offer's power of acceptance is terminated when (1) offeror takes definite action inconsistent with an intention to enter into the contract and (b) offeree acquires reliable information to that effect (constructive or actual notice)
- d. Condition not occurring: will take you to game 7 but no game 7.
- e. Revocation of an offer
  - i. How revocation happens: two player game. Essential that the offeree be aware of the revocation as well as the offeror making the revocation. Must come before acceptance.
  - ii. When revocation can not happen:
    1. Option contracts or firm offers: both a promise not to revoke and some consideration for that promise.
    2. Part performance or detrimental reliance:
      - a. *Partial performance under unilateral*: only to the beginning of actual performance, not preparations
      - b. *Prep under bilateral*: offeree's making of prep will cause the offer to be irrevocable but only where offeror could reasonably expect to induce action of substantial character to the extent to avoid injustice
        - i. Offer by sub becomes irrevocable where gen can say offered lower price because of sub.

Gen not bound, but sub is. Award Gen damages between bid and next lowest.

3. Rest. 90 – promise which p-sor expects to induce action of a substantial character on the part of the p-see, and which does induce the action is binding, to the extent injustice is avoided.
- f. Rejection: Never going to see direct rejection. Once you reject, can't come back and accept.
- g. Counteroffer: counteroffer's kill, except if additional term or inquiry into the terms. Counter offer doesn't kill a firm contract (except if there is reasonable reliance on your rejection)
  - i. unless the response by the offeror is renewal of the offer, or there is language of wanting to keep offer open if counter offer rejected
- h. Conditional acceptance: changing the deal kills the deal. Something new added and insisted upon, unlike additional term below.
  - i. BUT: if parties act like there is a deal, their conduct can make an implied contract. No express contract

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## DISPUTES OVER CONTENT OF CONTRACT

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### I. What words make it into the deal

- a. **Parol Evidence Rule (UCC 2-202)**: Impact of a written agreement on earlier agreements. Superiority of per.
- b. Vocab:
  - i. *Parol evidence*: evidence of some agreement prior to the writing, not necessarily mean oral.
  - ii. *Integrated agreement*: (1) it is written (2) intended by the parties to be their last word.
  - iii. *Complete integration*: writing that is final and complete. Merger clause – may not be final complete integration because issue if that was assented to (unconscionable, procured by fraud)
  - iv. *Partial integration*: written and is final as to what it covers but may not be full deal, does not include all details of agreement.
- c. Parol evidence NOT allowed when:
  - i. Contradicts any part of an integrated agreement
  - ii. Modifies any part of a complete integrated agreement.
  - iii. Agreement barred must be within the scope of the com. integrated agreement
- d. Parol evidence allowed when:
  - i. Adding additional terms to a partially integrated agreement, that are not inconsistent with. (rest. 213)
  - ii. Explanation of ambiguous terms: even if complete integration, you can use pe to explain ambiguous terms
    1. courts allow broad range of evidence in this, jury determines meaning
    2. If unambiguous word... judge decides meaning.

- iii. Mutual mistake, fraud, duress, illegality, lack of consideration... (under 2-202). Here showing no contract at all, not that additional terms need to be added.
- iv. Existence of a condition: oral agreement on a condition to the enforcement of the contract not included in the written agreement... court will allow in.
- e. Partial v. complete integration: Always a question for the court.
  - i. *Williston*: look only to four corners of the agreement
  - ii. *Corbin*: look at all evidence: agreement, prior agreements, and any other circumstances. Rest. has adopted this view
  - iii. *Partial integration*: courts will find when no strict business experience, when obviously a bad deal for the seller/buyer, arms length of deal, etc...

**II. Meaning of ambiguous words:** Course of Performance, Course of Dealing, Custom and Usage:

- III. Gap fillers:** somehow the deal is more than what the parties have said and written.
- a. Implied duty of good faith: (common law) *Wood v. Lucy Lady Duff Gordon*. – obligation to use reasonable efforts. Nothing in the contract that he as to do anything, only that he can use her names. Court holds that there is an implied duty to use good faith. UCC 2-306 (2) – when you have these questionable contracts always an implied warranty of good faith.
  - b. Implied warranty of merchantability: (2-314) “goods fit for ordinary purpose for which such goods are used.” Seller must be in the business of this kind.
    - i. Can waive if you expressly say merchantability.
  - c. Warranty of fitness for particular purpose: where seller at time of contract has reason to know the purpose for which the goods are acquired and that the buyer is relying on the seller’s judgment to select suitable goods, there is a implied warrant that goods shall be fit for such purpose

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## REASONS NOT TO ENFORCE

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### I. Consideration

- a. Bargain and exchange theory: performance or return promise is bargained for if it is sought by the p-sor in exchange for his promise and given by p-see in exchange for that promise. Must be reciprocal
  - i. Performance may consist of an (1) act (2) forbearance (3) or promise to act
  - ii. *Earle v. Angell*: promise to give P \$500 if he attends her funeral induces his promise to attend.
- b. Benefit detriment theory – did parties receive some benefit and detriment
  - i. *Hamer v. Sidway* – D promises P \$ if he doesn’t act bad till 21. Court says P incurred detriment and D a benefit so consideration
- c. Illusory Promises: i.p. does not constitute consideration unless each of the alternatives would have been K if it had been bargained for. (rest. 77) See *Obering*.

- i. *David squib*: Sally homemaker can not enforce GF promise because they have not promised anything in return
    - 1. **BUT**: because on parties promise is illusory does not mean other party K is void.
  - ii. *Obering v. Swain*: If we buy X land, we promise to sell to P for \$ after we remove the timber. P says promise illusory, courts says no D limited himself in a meaningful way
  - iii. *Right to terminate contract*: if one party has right to terminate traditional view is that there is no consideration, more modern if there is an implied obligation of notice more likely to find consid.
  - iv. Alternate options: issue of illusory promise difficult, instead ask one of the following questions?
    - v. *Did promisor limit himself in any meaningful way?*
      - 1. Court will find implied promise: Wood v. Lucy LDG: courts avoid striking promises for lack of consideration so find implied promise. Implied promise by Wood here to use reasonable efforts to market LDG designs. **UCC-2-306 (2)**
- d. Exceptions to consideration
- i. Preexisting legal duty rule: doing something that you are already legally obligated to do is not consideration for promise to pay you more money to do it. In real world typically avoided by the making of some additional promise that you are not already legally obligated to do. Slight additional duties overrides the ldr.
    - 1. whole idea is that he has not incurred a detriment because was already doing it. Then no consideration.
    - 2. Exception: modification of contracts that is fair and not anticipated by the parties when the contract was made.
  - ii. Rest. 74: Settlement of a promise that is no longer valid is not consideration unless the original claim is based in some foundation in law **or** made in good faith.
    - 1. Laura hits a car, thinks it is mine. She says I will pay you \$5000 to not tell insurance. Laura then finds out she didn't hit my car and says I won't pay you. She is on the hook because made in good faith.
    - 2. *Black v. Duncan*: promised to sell farm with 65 acre allotment. Duncan only got 49 acres so I will sue you, Black says I will give you \$1500 not to sue.
      - a. Exchange of 1500 was a one time thing
  - iii. Promise to pay past debt: if you promise to pay past debt that is no longer legally enforceable because of sol or bankruptcy, courts will hold you to that promise.
  - iv. Promise for action that was voidable: if you promised originally through fraud, duress or infancy but promise again.
  - v. Promisory Estoppel
  - vi. Promise for benefit received: Rest. 86 promise made in recog. of benefit already received is binding as necessary to prevent injustice

1. *Not binding*: if p-see conferred the benefit as a gift or other reasons where promisor is not unjustly enriched.
  2. *Harrington*: neighbor saves wife by putting hand in front of ax. Court says not enforceable. Nothing to determine damages on. Unlike employer-employee situation where we have wages and employer was paying him forever before he died.
- vii. Option Contract: when you want to hold it open and you are a merchant, you don't need consideration.
- e. Gifts: must be a bargained for exchange to be enforceable (i.e. promisor makes his promise in exchange for the promisee doing or not doing something)
- i. gift with condition not consideration – poor sister Antillica
  - ii. Occurrence of condition that is benefit to promisor – upheld then like *Hamer v. Sidway*. Uncle got something out of his nephew being good.
  - iii. Benefit detriment: D promises to give money if P goes to Europe, court uses ben/det theory to say there was consideration (Devecom)
  - iv. Promisory Estoppel: can use this as in granddad case
  - v. Charity exception: if written agreement to contribute... don't need anything else. Courts won't usually uphold oral agreements.
- f. Unequal sums of money: no consideration when promise for this. Except items of fixed value, pay a lot for a rare penny.
- g. Sham or nomicnal consideration: courts will not uphold.

**II. Undue Influence** – like an implied duress based on known relationship. Look for known relationship.

**III. Impracticability**

**IV. Death**: only if it frustrates the purpose of the contract.

**V. Capacity**: Who made the deal. Deal not enforceable because party is not in capacity to do so. Person who as the ability to disaffirm the agreement that he or she has made.

- a. Infants: under the age of 18 can only enter into voidable contracts (important note not void, infant can choose but other party can't)
  - i. *Damages*: when infant is D, P has right to restitution only.
- b. Mental incompetence: person can void contract if (1) lacks cognition or (2)lack volition and the other party has reason to know that.
- c. Exceptions:
  - i. *Implied affirmation*: enters into contract at 17, continues to retain benefits of the contract after gaining capacity – just like you made a new deal .
  - ii. *Necessaries*: essential of life. Promote contracting for necessary life items with infants. Not a contract obligation, but a quasi contract obligation. Even people without capacity are legally obligated on agreements for necessaries.

**VI. Duress** – principles have expanded beyond physical duress to economic duress. Four elements

- a. **threat** – manifestation of intent to put loss or harm on another (implied or express)
- b. **improper** – threat has to be improper what is an improper threat?
  - i. Improper if: (a) threatens a crime or tort, (b) criminal prosecution, (d) use of civil process and in bad faith, or (e) threat is a breach of duty and good faith
    - 1. *Wolf* (p. 566) want someone to return the deposit, they refuse. If you don't I will sell property to someone who will be an undesirable neighbor, that will reduce the value of your property. Threat unrelated to transaction and has sole purpose of hurting other property.
  - ii. Improper if resulting exchange is not on fair terms and: (a) threat harms recipient and benefits party making threat, (b) effectiveness of threat is increased by prior dealings, (c) threat is use of power for illegitimate ends.
  - iii. Subjective standard.
- c. **induce a manifestation of assent** – threat must have caused the victim to assent to something, subjective approach
  - i. question isn't would this have caused a reasonable person to assent, question is did this cause this victim to assent.
- d. **leave victim with not reasonable alternative** – no escape, grave enough to justify the victim's assent.
  - i. *Smithwick v. Whitley* (p. 565) Dispute over purchase and sale of land. Party agrees under improper threat to overpayment. Then brings an action to recover overpayment. Court says that may have been the case, but you had a reasonable alternative (action for specific performance), so not entitled to excuse the contract based upon duress
- e. *Duress Cases*
  - i. *Austin Instruments v. Loral*: Contractor says: if you don't give me contract for all 40 items under contract 2, I will not perform contract 1 (economic duress). Under this Austin is making a threat for one contract on related to the original contract.
    - 1. Issue: is there reasonable alternatives: Threatened party can not obtain goods from another supply, and ordinary suit for breach of contract would not be adequate. (sounds like specific performance)
  - ii. *Alaska Packers Assn v. Domenico*: Fisherman sign for one deal, ship sails, and they demand another. They fish, and end of season Company refuses to pay based on legal duty rule. Court: no consideration for increase in pay. Fishermen were simply promising to do what they were already obligated to do.
- f. Exceptions to duress: Where you have unforeseen burdensome conditions not anticipated at the time of contract, the additional work is the consideration for the new agreement. (Brighenti rule)

VII. **Misrepresentation (fraud)** – Unlike torts don't need to show intentional or negligent. All you need to show a (1) material and (2) relied on misrepresentation (must be fact not opinion)

- a. *Cushman* – husband did not speak up about problem in house, new it was relied on – contract voidable.
- b. *Eytan* – couple buys three paintings, turns out they are fakes. Such low price, found not reliance.

VIII. **Mistake**

- a. Mistake must be about basic assumption, and has to do with existing fact, not what will happen in the future. But if a merely a question, misunderstanding about what something is worth... no matter how big never b.a.
  - i. Existence of subject matter is b.a.
  - ii. Mistake as to quality will be a b.a. (crappy violin vs. Stradavarius)
  - iii. Mineral in land: seller bears risk that they will be found there
- b. **Mutual mistake**: if (1) mistake made at the time of contract (2) basic assumption of the K (3) material effect on the exchange (4) no allocation of risk – then contract is voidable.
  - i. *allocation of risk*: allocation when allocated expressly, party knows the have limited knowledge of risk but proceed anyways, looking to the party seeking to breach.
  - ii. Damages: reliance or restitution
- c. **Unilateral mistake**: same conditions as above, but also that either (1) unconscionable to enforce; or (2) other party had reason to know of mistake; or (3) other party fault caused the mistake
  - i. Generally courts don't like to use this b/c open can of worms, usually try for something else, like failure of implied merchantability or warranty.
  - ii. Damages: reliance or restitution
- d. *Shirwood v. Walker* - parties thought there was an infertile cow... turns out when she was sold she was with calf. Where there is a mutual mistake about a *basic material fact* then deal not enforceable.

IX. **Unconscionability** –

- a. **Rule**: Where a contract is unconscionable at the time the K was made (\*\*), the court can strike the uncons part and enforce the rest of the K (2-302).
  - i. Courts will consider unequal bargaining power, insufficient consideration, and ethical oppressive terms, unfair surprise, clause buried in fine print, represented by counsel
  - ii. Key time is to look at when the contract was made
  - iii. Catch all if you can't find mistake or duress, or something else.
- b. **Must have both**:
  - i. Procedural unconscionability: how deal was made. Hidden terms, unequal bargaining power.
  - ii. Substantive unconscionability: what the bargain says. Are their *oppressive terms*?

- iii. Always decided by a judge... by and large fact driven but never goes to the jury.
- c. Cases:
  - i. *Woolums*: Poor farmer gets taken advantage of by big shot real estate guy. There is a break-down of mutual assent, which leads the court to determine that the k is unconscionable.
  - ii. *Williams v. Walker-Thomas*: single mom buys stereo in a k with a cross collateral clause in it whereby the seller could repossess all goods previously purchase. Uncon due to lack of mutual assent. She didn't know the clause was there, she didn't read the k, no one explained it to her, etc.

#### IV. Promisory Estoppel

- a. Four elements (1) promise (2) foreseeable reliance (3) actual reliance (4) enforcement necessary to avoid injustice
  - i. Whole key is whether the person who made the promise is asking for something in return. When p.e. applies nobody as asked promisee to do it, she is doing it because of the promise not the request for action by promisor.
  - ii. Would it be unjust not to enforce the promise?
    - 1. *Forrer v. Sears*: employee canned after leaving his great farm. No p.e. because he was at will employee. Questionable here, go both ways.
- b. Damages: usually reliance, only enough to prevent injustice so usually not expectation damages.

#### V. Statute of Frauds: lack of writing. Examiner favorite!

- a. General notion that oral agreements are okay. The SofF is a notion that there are certain kinds of agreements that courts are particularly concerned about. Issues within the statute of frauds:
  - i. *Sale of goods and the purchase price is \$500 or more*
    - 1. exception if specially manufactured goods for the buyer, goods have been accepted and paid for.
  - ii. *Personal services contract not capable of being performed within one year.*
    - 1. If no time specific, then not within statute of frauds just when you are bound to more than a year
    - 2. time measured from making of contract, not when performance begins
    - 3. possibility: if not time state, only w/i SOF if impossible to complete in one year (not just impractical)
    - 4. Promise to employ someone for life prob not w/i SOF
- iii. *Transfers of interests in real estate* – regardless of the dollar amount. Has to be real estate interest that has a term of duration that is more than one year.
  - 1. Vendees part performance: taking possessing and making improvements (courts will waive SOF requirement) but

payment is not sufficient (although vendee can recover the purchase price in restitution.)

- b. Satisfying the statute of frauds: look to -
  - i. *Contents of the writing*: not enough that there is a writing.  
Requirements:
    - 1. if other than sale of goods: in order for the writing to satisfy the statute of frauds *all material terms must be in writing*.
      - a. From the writing alone you can answer (1) indicates contract has been made (2) identification of the subject matter (3) essential terms of contract (4) signed on behalf of the party to be charged.
    - 2. if for sale of goods for: writing just sufficient to indicate that contract for sale as been made between two parties and signed by the party against whom it will be enforced.
  - ii. Does not need to be contract, a memo is okay.
- c. Remedies for no contract under SOF
  - i. Quasi contract recovery: recover value of benefit conferred upon D
  - ii. Promissory estoppel

## **VI. Standardized Form**

- a. Adhesion contract – doc contain non bargained for clauses that are in fine print, complicated and exceptionally favorable to the drafter Take it or leave it contracts.
  - i. (1) are the terms within the reasonable expectations of the party (2) unbargained for (3) contract unconscionable?
  - ii. Reasonable expectation of parties
    - 1. look at prior negotiations
    - 2. term is bizarre or oppressive?
    - 3. undermine purpose of the contract?
  - iii. If term the drafter believes P would not have agreed to then not upheld.
  - iv. Usually not enforced where non drafter does not even know he is entering into a contract. (i.e. ticket at valet service)
- b. There is a duty to read – so not a defense.
- c. Avoid by saying either this is an adhesion contract or unconscionable.

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## **EXCUSES OF A BREACH**

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### **I. Unmet condition of contract:**

- a. Condition: some event which isn't certain to occur, but which must occur in order for performance to be due. Unless it is excused before the obligee's performance is due.
  - i. 3 exclusions:
    - 1. An event that has to occur before contract comes into existence. i.e. Acceptance of offer must occur before K exists, but it's not a condition
    - 2. Doesn't include an event that's certain to occur
    - 3. Doesn't include events that extinguish a party's duty after performance has become due ("condition subsequent").

- ii. Can be express or implied: If express, explicitly agreed to by parties.
- b. Rule: A failure of a condition, justifies the party in not performing-can suspend performance until the condition occurs or if sufficient time passes can treat the duty as being discharged by failure of the condition
- c. Court Preference: In cases of doubt, an interpretation is preferred that will reduce the D's risk of forfeiture (no condition), unless the event is within the D's control or the circumstances indicate that he has assumed the risk
- d. Cases:
  - i. *Mascioni*: Subcontract and contractor contract for sub to build a wall. Payment to subcontractor is to be made upon receipt by the contractor of payment by the owner. It is a condition and the sub assumed the risk, so the contractor is released from paying the sub if the owner doesn't pay
  - ii. *Ewell v. Landing*: Landing lends Payne 550 to be repaid when Payne sells timber. Payne dies before selling timber. Time provision is a convenient time and not a condition. Landing should be paid. The estate has been unjustly enriched.
  - iii. *Amies v. Wesnofske*: Deal between buyer and seller doesn't go through, so real estate brokers lose out on fees and wants to get fees. Language says "to be paid when title passes." This is a condition and not a convenient time for payment. Custom of the industry
- e. Excuse -an area in which courts find language of condition but avoid forfeiture by saying the condition was excused
- f. Rule: to the extent that a nonoccurrence of a condition would cause disproportionate forfeiture, the court can excuse it unless it is a material part of the contract. (rest)
  - i. Disproportionate forfeiture-similar to unconscionability. Forfeiture is disproportionate because the consequence is too hard.
    - 1. Unconscionability-measured at the time the contract is made
    - 2. Disproportionability-look at a subsequent time
- g. Waiver -doesn't usually require consideration. To alter the agreement there must be consideration. But not to waive a condition.
  - 1. *Porter v. Harrington* Repeated practice of accepting late payments constitutes a waiver of insisting of the condition of timely payments. It would be unconscionable to insist upon timely payments when looking at the party's behavior.
  - 2. *Clark v. West*: West waived the condition. It knew he was drinking and didn't say anything. Further, the clause was to ensure drinking didn't effect his worth but was more of a safety clause.
- h. Conditions of Satisfaction -may excuse a condition if it is not a material part of the contract

- i. Satisfaction-2 standards
  - 1. Subjective standard-is the party satisfied
  - 2. Objective standard-would a reasonable person be satisfied
- ii. *Grenier*: The letter for city engineers approval was not a material part of the contract, so the court will excuse the condition. Forgives condition because it became impractical to get the letter and it was not a material part of the contract. The main condition of the work being done was met.
- iii. *Jacobs & Young*: wrong pipe put in house. Where the failure to perform is a trivial part of the contract, it can be covered by paying damages and by deciding the case to avoid forfeiture. In this case, there was substantial performance and the mistake was trivial and innocent.
  - 1. Doctrine of Substantial Performance-where there's been substantial performance, the party that hasn't totally performed, is entitled to be paid for the performance done-subject to the other side's right to offset for damages.

i. **Hypos:**

- i. B agrees to buy S's house provided it is appraised at 100,000. Appraised at \$90,000. Does B still have to buy the house. No, this is a condition of the agreement.
- ii. B contracts to build building for O. Typical feature of contracts where monthly progress payments for previous dependant on architect certificate. Architect does not approve work: don't need to make payment because it was a condition that was not met.

**II. Impracticability:**

a. 4 elements:

- i. Event must have made performance impracticable, which usually means it's due to some act of God or a third party: fire, death, something unusual
- ii. No requirement of impossibility; just something that makes performance unreasonably difficult - war, embargo, crop failure, etc
- iii. Must arise by circumstances the party couldn't control
- iv. Party seeking to be excused can't have assumed a greater risk than the law imposes "unless the lang and circumstances indicate the contrary"

b. When it comes into play:

- i. Destruction, deterioration or failure to come into existence something which is necessary for the performance of the duty
- ii. Incapacity of a person
- iii. Government regulation or order makes performance in possible, and the non-occurrence of that order was basic assumption of the contract

- iv. Extreme cost increases suffered by sellers in fixed price contracts. Seller usually loses. You assumed the risk in making fixed contract.
- c. Cases:
  - i. *Louisville v. Crowe*: If the government says that you can't do something, performance is impracticable because the government made the performance impossible
  - ii. *Kel Kim*: Since the plaintiff would have been able to foresee that they might not be able to get insurance, the risk is allocated to them and the defense of impracticability is not available. Assumption of the risk by the party

### III. Frustration of Purpose

- a. Elements:
  - i. A substantial frustration of the principal purpose of the party through which there is a basic assumption that some event would not occur.
  - ii. Failure of the basic assumption to occur.
  - iii. No fault of the party seeking excuse
  - iv. Party didn't assume the risk
- b. Question: was the event that which prevented the performance of the k of such a character that it cannot reasonably be said to have been in the contemplation of the parties at the date of the k? Could he foresee it happening
- c. Cases:
  - i. *Krell v. Henry*: Guy leases apt to someone to watch the coronation parade. Parade is cancelled; lessor wins.
- d. Note: distinguish from impossibility, here not impossible to perform, just does not make sense
- e. Damages: courts usually allow restitution, and rarely reliance if they feel party should be compensated for preparations. Same for imposs or impract.

### IV. Impossibility: performance becomes impossible – destruction of subject matter, death or incapacity of a party, failure of the agreed upon means of performance.

- a. Destruction of subject matter: must be specifically referred to in the contract.
- b. Failure of agreed upon means of performance: must be intangible and essential. Bankruptcy of a middle man.

### V. Illegality

- a. Covenants not to compete can't be overly broad.

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## REMEDIES FOR BREACH

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### I. Enforcement in Equity (i.e. Specific Performance or injunction): order someone to do what she agreed to do. Equitable remedy therefore employed only where legal remedy (damages) are inadequate. Real estate usually or unique sale of goods (art or custom made). Rarely in service contract. Applied when

- a. Difficulty in assessing damages with reasonable certainty:

- b. Can't find suitable substitute performance with money
  - i. Curtis brothers: they were the only ones with the tomatoes to can for the company (often in output and requirement contracts)
- c. Likelihood that award of damages will not be collected.
- d. Exceptions: if contract is too indefinite to show what specific performance would look like, they are not going to award it. Courts also don't want to put two parties together again that don't like each other. Don't want to supervise personal service contracts.

**II. Liquidated Damages:** contract provision as to what the damages

- a. Generally recognized. Liquidated damages not upheld if punitive in nature.

**II. Expectation Damages:** make the world just like it would have been had the contract been properly performed.

- a. Formula: contract price minus the cost P avoided by not having to complete the contract.
  - i. Does not include overhead.
  - ii. Diminution in value v. cost of completion (anti-economic waste)
- b. Hard cases: Hawkins v. McGee – what is value of hairy hand and 100% hand? You may give reliance here.
- c. **Limitations on expectation damages:**
  - i. Duty to mitigate: once n.b. knows breach, must stop and avoid further expenditure.
    - 1. *Avoidable damages:*
      - a. To the extent n.b.p can limit damages to b.p. law imposes duty to do so
      - b. If n.b.p. doesn't enter into substitute transaction but could have award reduced by amount they could have mitigated..
    - 2. *Employment context* – Duty to take alternate employment that is not inferior or different. (Shirley McLean case)
  - ii. Foreseeability: special damages (something else than expected to happen) recoverable only if foreseeable, by both parties.
    - 1. Objective test: what knowledge a party is deemed to reasonably have known.
    - 2. *Hadley v. Baxendale:* broken shafts. Mill closed due to negligent delay by the courier that they could have never foreseen. Court said not recoverable because not reasonably foreseeable by both the parties.
    - 3. Even if foreseeable: still exempt if there is disproportionate loss, or a super formal dealings where you can assume risk were allocated.
  - iii. Economic Waste (Peavyhouse and Groves):
  - iv. Efficient breach –
    - 1. Acme: def says will sell wheat for 1.03, he breaches before performance, market goes up so he can sell for 1.16. That is efficient breach. Then at time of scheduled delivery, wheat falls to 1.00 – had he gone through original contract

plaintiff would have had a bad contract. So all in all an efficient breach. Plaintiff can't get the difference between 1.03 and 1.16. Could have recovered if amount less than market.

- a. If other guy not going to be better off you pay him. And if you can still pay him and be better off, then you are.

v. Volume sellers:

1. seller is only hurt by contract when contract price is greater than the market. Applying 2-708(1) seller does not get recovery if market price greater than K
2. If you are a volume seller you can recover loss profit even though same market price or less.

III. **Restitution:** Although normally, restitution is the least generous – there are some instances in which it is to a party's advantage to recover with restitution (i.e. only measure available or a losing contract)

- a. Measure restitution: The party in breach may recover in restitution for the amount of benefit they have conferred on the non-breaching party. (Rest. § 374)
  - i. Market price of goods and services
  - ii. Value that you have increased someone's assets.
- b. Losing contract
  - i. *Quantum meruit*: measure of recovery is the reasonable value of performance. Recovery is undiminished by any loss which would have been incurred by completing performance (i.e. a losing contract). Type of restitution. Contract price is not always a ceiling. Case where breacher recovers and losing contract.
    - a. Damage rule: amount for which such services could have been purchased from one in plaintiff's position at the time and place the services were rendered.
  - ii. *Exception to recovery quantum meruitly*: Restitution isn't available if the party has fully performed their obligations, and the only performance that is remaining is payment of an agreed sum.
  - iii. Divorce attorney in losing contract. So he wants to work till he has spent as much money as needed, then breach and recover quantum meruit. Rule: you can't get more than the contract. Can't get restitution for the value of the \$9999. Can't do better than what he contracted for.
- c. Breaching party trying to recover:
  - i. Labor rule: Absent express stipulations, hired labor should be compensated for the work actually performed, subject to the right of the non-breaching party to reduce the damages by the amount he has suffered.
  - ii. when seller justifiably withholds goods due to buyer breach: buyer can recover in the absence of l.d.c. 20% of the value of the total

performance for which the buyer is obligated under K or \$500, whichever is smaller. (2-718) Offset by damages seller can show

- IV. **Reliance:** to put the promisee in as good a position as he was in if the contract was never made.
- a. *Measuring rule:* between the value of the item before the contract and value of the item now with the contract unfinished, plus other losses incurred.
  - b. *Occasion for use:* parties can't show what expectation would have been, promissory estoppel (really no contract)
  - c. *Rest. §349:* recover expenditures made in preparation for performance or in performance, less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed.
  - d. *Dempsey v. Chicago Club:* Court restricts P to reliance interest, because P can't prove what its profits would have been. P is limited to recovery of costs incurred between time of K and time of breach
  - e. *Security Stove & Anglia* cases: Courts allowed recovery for items before K was entered into. But the courts didn't really give reliance, but expectancy with zero profits. Because they were awarded damages that would have brought them to promise land without profits.

V. **Repudiation**

- a. Anticipatory Breach
    - i. If party makes it clear that even before performance is due, the he will not perform, he anticipatorily repudiates
      1. Vague doubt about your performance is not enough.
    - ii. Non breaching party and sue at that moment, and not wait until performance is due.
  - b. Other Repudiations
    - i. After performance is due: non-breacher can insist on performance rather than canceling for a reasonable amount of time.
  - c. Mitigation required: duty to secure alternative contract if one is available
  - d. Damages for buyer where seller antic. Repudiates: difference between the market price at the time the buyer learned of the breach and the contract price plus incidental and consequential damages.
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