

Contracts

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A. Mutual Assent

a. Assent

i. Bargain

1) Mutual assent + consideration

a) R §17 Requirement of a Bargain (278)

ii. Manifestation

1) Each party makes a promise or begins/renders performance

a) R §18 Manifestation of Mutual Assent (278)

iii. "Reasonable man"

1) Assent exists if the conduct of one party would have been taken by a reasonable man to be an agreement

a) *Embry v. McKittrick* (264)

iv. Objective vs. Subjective

1) Party must know or have reason to know that other party may infer from conduct that he assents

2) Manifestations must be known to other party

3) Secretive or unknown manifestations of assent do not matter

a) R §19 Conduct as Manifestation of Assent (278)

b. Offer

i. Formula of Assent

1) Offer + Acceptance

a) R §22. Mode of Assent: Offer and Acceptance (290)

2) Manifestation of willingness to enter a bargain, so another person would justifiably understand his acceptance is invited and will conclude it

a) R §24. Offer Defined (290)

ii. Preliminary Negotiations

1) Person receiving negotiation knows or has reason to know the person does not intend to conclude bargain without further confirmation of assent

a) R §26. Preliminary Negotiations (290)

2) Offeror decides who receives power of acceptance

a) R §29. To Whom an Offer is Addressed (290)

- 3) Terms of an offer must be "reasonably certain" to form contract
 - a) R §33 Certainty (290)

iii. Sale of Goods - Open Terms

- 1) Creates default rules relating to definiteness that considerably relax the common law standard of certainty and definiteness.
 - a) In lieu of a standard that parties completely resolve issues of definiteness relating to K, UCC assumes certain terms by default (unless otherwise specified) and fills other potential gaps w/standard of reasonableness.
 - b) UCC §§2-204, 2-206, 2-305, 2-308, 2-309, 2-310 (291-93)

iv. Letters of intent

- 1) If enough of the definite terms of an agreement are adopted in a written memorial to establish intent of the parties, the written memorial can be enforced as a contract
 - a) R §27. Existence of Contract Where Written Memorial is Contemplated (296)

v. Revoking

Types of Offers	Acceptance only by Promise	Acceptance only by Performance	Acceptance by Promise or Performance	Same as last + Promise to Remain Open	Offer by Merchant "Firm Offer"
When can offeror <u>or</u> revoke?	Any time before return promise	Any time before performance begins	Any time before return promise or performance begins	Never	Never
When does offeror become bound?	When there is return promise	When performance is complete	When there is a return promise or performance begins	When there is a return promise or performance begins	When there is a return promise or performance begins
Rule	R §§35-36	R §45.	R §62.	R §87.	UCC §2-205.

- 1) Methods to Terminate Power of Acceptance
 - a) Rejection
 - b) Revocation
 - c) Counteroffer
 - d) Lapse of Time
 - e) Death

- i) R §36. Methods of Termination of the Power of Acceptance (308)
- 2) Terminated when offeree receives from offeror a manifestation of intention not to enter contract
 - a) R §42. Revocation by Communication from Offeror Received by Offeree (308)
- 3) Terminated when offeror takes definite action inconsistent with intention to enter contract and offeree learns of the action
 - a) R §43. Indirect Communication of Revocation (308)
- 4) Meets requirements of K, but limits power to revoke offer
 - a) R §25. Option Contracts (307)
- 5) Can only terminate power of acceptance under Option Contract unless a contractual duty is discharged
 - a) R §37. Termination of Power of Acceptance Under Option Contract (308)

c. Acceptance

i. Mirror Image

- 1) Acceptance must be the mirror image of the terms of the offer
- 2) If request for change of terms accompanies an acceptance, the acceptance is invalidated only if it is dependent upon the requested changes. (Creates a counteroffer)
 - a) R §61. Acceptance Which Requests Change of Terms (312)

ii. Mailbox

- 1) Acceptance is made when it leaves the offeree's possession (dispatched)
 - a) R §63. Time When Acceptance Takes Effect (315)
- 2) Same rules apply on the phone as if acceptance is in person
 - a) R §64. Acceptance by Telephone or Teletype (315)
- 3) Reasonable medium if used by offeror or customary in similar transactions
 - a) R §65. Reasonableness of Medium of Acceptance (315)
- 4) Must be properly addressed and other precautions must be taken to ensure delivery
 - a) Ex. Priority mail, tracking, insurance
 - b) R §66. Acceptance Must Be Properly Dispatched (316)

- iii. By Performance or "Unilateral Contracts"
 - 1) No notification is necessary unless set out in offer
 - 2) If offeror has no adequate means of learning of performance, he is not bound unless:
 - a) Offeree makes reasonable effort to notify him; **OR**
 - b) He learns w/in reasonable time; **OR**
 - c) Offer indicates notification is not required
 - i) R §54. Acceptance by Performance; Necessity of Notification to Offeror (330)
 - 3) Notify w/in reasonable amount of time or offer may lapse
 - a) UCC § 2-206(2) Offer and Acceptance in Formulation of Contract
- iv. Promise or Performance
 - 1) Offer may require acceptance specifically by promise or by performance, or allow offeree to choose
 - 2) If not indicated, acceptance may be in any manner or by any medium reasonable
 - a) R §30. Form of Acceptance Invited (336)
 - 3) If there is doubt, offeree has the choice
 - a) R §32. Invitation of Promise or Performance (336)
- v. By Silence
 - 1) Where the offeree takes benefit of offered services w/reasonable opportunity to reject and reason to know they were offered w/expectation of compensation
 - 2) Where offeror made clear that silence would be considered assent and offeree intending to accept, remains silent
 - 3) Where previous dealings make it reasonable that offeree should provide notification if he does not intend to accept
 - 4) Offeree does any act inconsistent w/offeror's ownership
 - a) R §69. Acceptance by Silence or Exercise of Dominion (343)
- vi. E-Commerce (344) - *Specht v. Netscape*
 - 1) Shrink-wrap
 - a) If plastic wrap is broken, you agree to terms
 - 2) Click-wrap

2) Click-wrap

- a) Click to agree to terms and have access to software

3) Browse-wrap

- a) Scroll onto different page to see terms, but still have access to software regardless

vii. Knowledge of Conditions (353) - *Register.com v. Verio*

- 1) UCITA §112. Manifesting Assent; Opportunity to Review
- 2) UETA §14. Automated Transaction

i. Statute of Frauds

1) **Elements of Basic Statute of Frauds Analysis**

[1] Is the alleged K w/in the enumerated types of contracts subject to statute of frauds?

- i.e., w/in **the scope prong**
 - **Marriage license**
 - K for more than one **Year**
 - **Land**
 - **Executor (Estate)**
 - **Goods**
 - **Surety**
- If no, then the alleged K need not comply w/the SOF

[2] If yes, then: is the alleged K evidenced by a sufficient form of "signed writing"?

- i.e., **the signed writing prong**
 - **WRITING**
 - ▶ Can take many forms (i.e. a letter)
 - ▶ Must reference the essential terms of K (room for dispute - what terms are essential?)
 - ▶ May be in several parts, only one of which is signed
 - ▶ Variability in jurisdictions re: significance of pre-contractual negotiations
 - **SIGNATURE**
 - ▶ Must be signed by party against whom enforcement is sought
 - ▶ Many forms sufficient (i.e. initials or electronic signature)
- If yes, then SOF is satisfied

[3] If no, then: is the non-SOF compliant K subject to any statutory or judicially recognized exceptions to the principle of non-enforceability?

- i.e., **exceptions prong**
 - Effect of partial or completed performance of non-SOF compliant K
 - Promissory estoppel

- a) R §§125, 130-31, 133, 139, 143; UCC §2-201

- 2) A party to K for transfer of interest in land may request specific performance

- 2) A party to a contract for transfer of interest in land may request specific performance in the case of a breach.
 - a) R §129. Action in Reliance; Specific Performance (488)

B. Consideration

a. Bargain Theory - R §§17, 71

i. "Bargained for" Exchange

- 1) Performance or return promise must be bargained for
 - a) If sought by promisor in exchange for his promise and is given by promisee in exchange for that promise
- 2) Performance may consist of
 - a) Act other than a promise
 - b) Forbearance
 - c) Creation, modification, or destruction of a legal relation
- 3) Performance or return promise may be given to promisor or 3rd party, given by promisee or 3rd party
 - a) R §71. Requirement of Exchange; Types of Exchange
- 4) **Change in behavior**
 - a) Promise is a reason for promisee to *do something* he wouldn't otherwise have done

ii. Gratuitous Promises

- 1) Promise which seeks nothing in return
 - a) No bargain
 - b) No change in behavior
 - i) *Kirksey v. Kirksey*

iii. Past Consideration

- 1) Cannot change behavior that has already taken place
 - a) *Moore v. Elmer*

iv. Moral Obligation

- 1) Promise for previous benefit binding to the extent necessary to prevent injustice
- 2) Not binding
 - a) If promisee conferred benefit as gift or for other reasons, promisor has not be unjustly enriched
 - b) To the extent that its value is disproportionate to the benefit

- b) To the extent that its value is disproportionate to the benefit
 - i) R §86. Promise for Benefit Received
 - ii) *Webb v. McGowin*
- 3) *MINORITY RULE*
 - a) Not usually binding consideration

b. Contract Modification and the Preexisting Duty Rule

i. Performance of Legal Duty

- 1) If owed to a promisor (and not subject to honest dispute) --> not consideration
 - a) R §73. Performance of Legal Duty

ii. Modification

- 1) Under K not fully performed
 - a) If fair and equitable in view of unforeseen circumstances when K made
 - b) To extent provided by statute
 - c) To extent that justice requires enforcement in view of material change of position in reliance on promise
 - i) R §89. Modification of Executory Contract
 - d) Additional "sweeteners" to both parties
- 2) Agreement modifying K w/in [UCC] needs no consideration to be binding...
 - a) Need only meet standard of reasonableness
 - i) UCC §2-209. Modification, Rescission, and Waiver

c. Adequacy of Consideration

i. No requirement of adequacy

- 1) Do not need benefit to promisor and/or detriment to promisee
- 2) Exchanges need not be equivalent
- 3) Do not need "mutuality of obligation"
 - a) R §79. Adequacy of Consideration; Mutuality of Obligation

ii. Settlement of Claims

- 1) Promise not to bring or to surrender a claim or defense which is invalid is not consideration unless
 - a) Claim or defense doubtful b/c of uncertainty as to facts or law
 - b) Surrendering party believes claim or defense may be fairly determined to be valid
 - i) R §74. Settlement of Claims

C. Promissory Estoppel

a. "Elements" of PE

i. Promise Reasonably Inducing Action or Forbearance

- 1) Promise which promisor should reasonably expect to induce action or forbearance on part of promisee or 3rd party and which does induce action or forbearance is binding if injustice can be avoided only by enforcement of promise

a) R §90. Promise Reasonably Inducing Action or Forbearance

ii. Promise

- 1) Clear, definite, substantial

iii. Reasonable Reliance

- 1) Induces action or forbearance
- 2) Foreseeable to promisor

iv. Injustice of Non-enforcement

- 1) Make something up**

b. Common Examples

i. Family Promises

ii. Promises to Convey Land

iii. Promises of Pension

iv. Construction Bids

- a) Reasonably expect to induce action prior to acceptance

a) R §87. Option Contract

v. Charitable Subscriptions