

FUNDAMENTALS OF CONTRACT LAW

WHAT IS A CONTRACT?

Conceptually – promises must be kept – *pacta sunt servanda*

Benefit + Detriment + Consideration = Contract

Offer & Acceptance = Contract

A contract is a legally-binding agreement to do, or not do, a certain thing.

[15 OS §1](#)

CHARACTERISTICS OF A CONTRACT

- ❖ Parties capable of contracting.
- ❖ Consent.
- ❖ A lawful object; can't involve illegal activity.
- ❖ Sufficient cause or consideration.

15 OS §2

PARTIES CAPABLE OF CONTRACTING

All persons are capable of contracting, except:

- ❖ Minors
- ❖ Persons of “unsound mind”
- ❖ Persons deprived of civil rights

[15 O.S. §11](#)

MINOR DEFINED

A “minor” is defined as a person under the age of 18 years of age. The period is calculated from the first minute of the day on which a person is born to the same minute of the corresponding day completing the period of minority.

DEFINE UNSOUND MIND

15 O.S. §16

– Prior to 1998, “Persons of unsound mind” was defined to mean “idiots, lunatics, and imbeciles.” In 1998, the definition changed to “incapacitated persons or partially incapacitated persons” which means a person impaired because of mental illness or mental retardation, physical illness or disability, or drug or alcohol dependency.

“Who determines incapacity?”

15 O.S. §24 – Incapacity is judicially determined

PERSONS DEPRIVED OF CIVIL RIGHTS

Incarcerated individuals.

CONSENT

Consent must be free, mutual and communicated. [15 O.S. §51](#)

Consent to contract is not real when obtained through:

- ❖ **Duress** - “Duress” means unlawful confinement of a person or the person’s parent, spouse, or child; or unlawful detention of property; or confinement that is lawful but fraudulently obtained.
- ❖ **Menace** - “Menace” is defined as a threat of duress; a threat of violent injury to a person or property; or a threat of injury to the character of a person.
- ❖ **Fraud** - Intentional act to deceive.
- ❖ **Undue influence** – “Undue influence” is taking an unfair advantage over someone due to a confidence you have obtained or apparent authority you have over someone or taking unfair advantage of someone’s weakness of mind or distress.
- ❖ **Mistake** - Mistakes can be either mistakes of fact or mistakes of law.

[15 O.S. §53](#)

OFFER

Offer – A proposal to do something or pay an amount; a promise.

Example:

- ❖ I will pay you \$10.00 to mow my lawn.

ACCEPTANCE

Acceptance – Compliance with terms and conditions of offer.

- ❖ I tell you I will mow the lawn
- ❖ I go over and mow the lawn

Oklahoma courts will not enforce contracts involving illegal activity. 15 O.S. §102 states “The object of a contract must be lawful and possible and ascertainable by the time the contract is to be performed.” In section 103, it defines possibility as “everything except that which is impossible.”

Examples:

I promise you \$10,000 to promise to do away with my spouse – unlawful contract

I promise you \$10,000 to promise to send me back in time to purchase Google stock – impossible contract

CONSIDERATION

Consideration – The reason or cause of a contract; a benefit and detriment to both parties.

- ❖ Basic monetary consideration (\$10.00)
- ❖ Services provided by both parties (i.e. I will draft your Will if you will cut my hair)
- ❖ The value of the consideration is at the discretion of the parties

“How do you create a contract?”

- ❖ Statute of Frauds
- ❖ Oral Contracts

The term Statute of Frauds comes from an Act of the Parliament of England authored by various Lords and Sirs passed in 1677 by the Cavalier Parliament under the title of **An Act for Prevention of Frauds and Perjuries**. Many common law jurisdictions have made similar statutory provisions, while a number of civil law jurisdictions have equivalent legislation incorporated into their civil codes.

Certain contracts must be in writing:

- ❖ An agreement that cannot be fully performed within a year;
- ❖ A promise to answer for the debt of another;
- ❖ An agreement for the sale of real property;
- ❖ An agreement made upon consideration of marriage.

15 OS §136

All contracts may be oral except those that are governed by the Oklahoma Statute of Frauds. The issue becomes how you would evidence the existence of the agreement.

For purposes of Oklahoma procurement, the Central Purchasing Rules do not explicitly say that a contract has to be in writing. The contract, however, is made up of the solicitation and the successful bid and bids have to be either hand written, typed or electronically conveyed, all of which would count as “in writing”.

Avoid ambiguous language.

The following is an example of ambiguous language.

I'll pay you \$100.00 per pig for 100 pigs. What did you just buy? (healthy vs. sick, baby pigs, guinea pigs.)

Punctuation matters!

In fact, Punctuation saves lives. Lets eat, Grandma or Lets eat Grandma.

- ❖ Intent controls. [15 OS §152](#)
- ❖ When the contract is in writing, intent is determined by the language of the contract. [15 OS §155](#)

Lawyers love to argue intent because intent can be changed based on punctuation, circumstances, mistakes, technical interpretation, inconsistencies, etc.. Please draft your contracts clearly, use plain English, use non-technical terms when possible, consult a friend or a lawyer as to whether your words reflect your actual intent and or whether your words could be interpreted to mean something different. Remember to check your punctuation.

[15 OS §170](#) – The language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. In a contract between a public officer or body and a private party, it is presumed that all uncertainty was caused by the private party.

Although we have this presumption to lean on, it is not an absolute. The presumption can be overcome, or rebutted, with evidence that the state, in fact, caused the uncertainty in the contract's language – has to be decided judicially.

LIMITATION OF LIABILITY CLAUSES

- ❖ **Definition of Limited Liability Clause:** Clauses where the state agrees not to seek damages against another party to the contract or to limit the damages it seeks against the other party.
- ❖ **Past Position on Limitation of Liability Clauses:** Prior Attorney General Opinions found that the State Constitution (Article X, Section 23) wouldn't allow these types of clauses that limited a private vendor's liability to the state in any manner.

WHY: Because it can create a possible unknown “future debt” which is unconstitutional.

LIMITATION OF LIABILITY CONT'D

- ❖ **Current Position on Limitation of Liability Clauses:** Attorney General Opinion 2012-18: Concluded you could limit a vendor's liability and not be in violation of the state constitution.

WHY: The clause does not contain an affirmative promise on the state to pay “anybody” in regard to the contract. It simply defines the responsibilities that the parties “have to each other under the contract”.

- ❖ **Example of Limitation of Liability Clause:** “In case of a breach of the contractual agreement between the State of Oklahoma and Vendor, the State agrees to limit the amount of damages it will seek to (BLANK) times the amount of the contract price”.
- ❖ **Personal liability of person creating contract:** As long as you are acting within the scope of your authority you are not incurring personal liability with these clauses.

Limitation of Liability provisions are not recommended.

Oklahoma Law prohibits contracts which exempt a party from its own fraud, willful injury or a violation of law, whether willful or negligent

- ❖ **Definition:** A breach is a failure by one party to live up to his or her responsibilities under a contract without a legal defense or excuse (or a note from their mother).
- ❖ A breach will usually involve a failure to perform as promised or committing an act that keeps the other party from performing as promised.

BREACH OF CONTRACT CONT'D

FAILURE TO PERFORM: The failure needs to be more than just an incidental failure on the part of the person who was supposed to perform it. It needs to be a **MATERIAL** failure.

EXAMPLE: You hire a roofer to fix a leak in your roof by replacing shingles. He fixes it but leaves the old shingles laying around in your yard.

The failure to clean up the yard is not a “material” breach of your agreement (UNLESS you specifically made cleaning-up an essential part of the contract).

The roof still leaks! That is a **material** breach

TIME OF PERFORMANCE: This is often an area of dispute between parties.

In general, even if a specific time for performance is described in a contract (“Vendor will deliver the widgets on Monday”), the failure to perform on that date won’t be considered a material breach.

Why? Because courts will usually allow a “reasonable” amount of time, after the time specified in the contract, to fulfill the performance.

When you absolutely, positively, have to have it there overnight (as the commercial says) you need to use a “Time is of the Essence” Clause.

EXAMPLE: “Time is of the essence in this contract; if either party fails to perform its obligations agreed to herein, at the time fixed for the performance of such respective obligations by the terms of this contract, such failure shall be deemed a material breach of this contract.”

Courts will review a standard to determine if a breach occurred and in many instances, the standard the court will consider is the Reasonable Man Standard.

IMPOSSIBILITY OF PERFORMANCE: This occurs when the other person won't let you perform your promises under the contract.

Example: You have contracted to mow the yard of your neighbor. When you arrive, the crazy neighbor has erected a 10 ft. tall electric fence around the yard and bought a new guard dog that is ominously eyeing you as its next human chew toy.

The other party is not letting you perform your obligations; it's the other party, not you, who is in breach of the contract.

ANTICIPATORY REPUDIATION: A close relative to the previous concept. One party tells another that, before his/her performance is due, that he will not perform a material part of his/her obligations under the contract.

Example: You have contracted to have your car painted on Monday by Peter Painter. On Friday, you see in the local bargain post newspaper that an auction will be occurring Saturday where Peter Painter will be selling off all of Peter Painter's painting paraphernalia (say it quickly!).

Peter Painter is anticipating repudiating the contract by selling his equipment.

OK, ... so the other guy breached the contract. Now what?

In the real world that we live in, you should always notify the breaching party you consider them to be in breach and give them a chance to remedy the breach. If that doesn't work, you may need to sue for breach of contract.

For every legal wrong there is a legal remedy. Remedies may be nominal which is really just a symbol that a wrong occurred. The State may no longer want to do business with that entity. Remedies may be punitive which are used to punish malicious or willful and wanton conduct.

OR

The general standard for breach of contract is to seek compensatory damages”

REMEDIES

Ok, you sued the no-good, back stabbing, contract breaching galoot, and you WON! What are you entitled to as a result of your victory?

COMPENSATORY DAMAGES: This is the amount of money necessary to put you in the same position as if the contract had not been breached. In other words to give you the “benefit of the bargain.”

EXAMPLE: You sold the rights to your life story as a state employee to a famous Hollywood producer in exchange for installment payments of \$100,000 a year for five years. The buyer failed to make the fifth payment. Why? Because the buyer decided your life story (which he had hoped to turn into an adventure movie with the title of “Oklahoma Jones”) wasn’t quite creating the “buzz” they had hoped for.

A court would award you \$100,000 in compensatory damages.

I. Define Contract

An Agreement to do or not to do something.

II. Define Characteristics of a Contract

A. Capable Parties (all, but for....)

1. Minors (under 18)
2. Persons of unsound mind (judicially determined)
3. Persons deprived of Civil Rights (incarcerated)

B. Consent

1. Free (voluntarily given)
2. Mutual (offer and Acceptance)
3. Communicated

C. Lawful Object

1. Lawful
2. Possible
3. Ascertainable

D. Consideration

1. Mutual benefit and
2. Detriment

III. Manner of Creating Contracts

- A. Statute of Frauds (Written contracts)
- B. Oral Contracts

IV. Interpretation

- A. Clarity v. ambiguity (Punctuation matters)
- B. Intent Controls

V. Limitation of Liability

Future debt is no longer deemed unconstitutional but the use is discouraged.

VI. Breach of Contract

- A. Failure to perform
- B. Time of Performance (Reasonable Standard)
- C. Impossibility of Performance
- D. Anticipatory Repudiation

VII. Remedies

- A. Compensatory (Court enforces benefit of the bargain)

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CONSULT A LAWYER!

QUESTIONS