



Weekly Information Sheet 06

Consideration

Definition of Contract:

“An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.”

Elements of a Contract include:

- *Agreement,*
- *Between Competent Parties,*
- *Based on Genuine Assent,*
- *Supported by Consideration,*
- *for Lawful Purpose Subject Matter,*
- *in Legal Form.*

Definition of Consideration:

“Something (such as an act, a forbearance or a return promise) bargained for and received by a promisor from a promisee, that motivates a person to do something.”

It's a “Bargained-for-Exchange” and requires “Mutuality of Promises”

Purpose and Function of Consideration:

- *The purpose of consideration is to distinguish between those promises that are enforceable, and those promises that are not.*
- *Promises to make a gift are unenforceable because they lack consideration.*
- *There are two primary functions of consideration – evidentiary and cautionary.*

Measure and Adequacy of Consideration:

Measure of Consideration: Legal Detriment and Bargained for Exchange

Adequacy of Consideration:

- *Amount of Consideration Considered Immaterial*
- *Sufficiency of Consideration Not Reviewable*
- *Exceptions –*
 - *Past Consideration, Pre-existing Legal Obligations and Moral Obligations*
 - *Sham, Incidental, Unconscionable or Fraudulent Consideration*

Forbearance, Illusory and Conditional Promises Consideration

Forbearance – Positive Consideration and Forbearance Consideration

Illusory Promises – Not Consideration because not a Promise

Bilateral Contracts - To be enforceable, there must be mutuality of obligation.

Conditional Promises: Depends on the occurrence of a future specified condition in order for the promise to be binding. Such promises are enforceable.

Exceptions:

- *Charitable Subscriptions - A charity's reliance on the pledge, will be a substitute for consideration*
- *Uniform Commercial Code - In some situations, UCC abolishes the requirement of consideration.*
- *Promissory Estoppel - This doctrine known as detrimental reliance, is applicable when:*
 - *The promisor makes a promise that lacks consideration;*
 - *The promisor intends, or should reasonably expect, that the promisee will rely on the promise;*
 - *The promisee in fact relies on the promise in some definite and substantial manner; and*
 - *Enforcement of the promise is the only way to avoid injustice.*

Legality

Definition of Legality:

Requirement: To be a valid Contract, it must be for a lawful purpose subject matter.

Legality Defined: “Strict adherence to the law, prescription or doctrine, and the quality of being legal and/or being in compliance with the law.”

Subject Matter Defined: “The issue or topic presented, represented or performed in the contract.”

Illegality Defined: “An act that is not authorized by law, or a state or condition of being unlawful (in contravention of the law).”

Effect of Illegality:

Generally: An agreement is illegal when its formation or performance is a crime or a tort, or when it’s provisions are unconscionable, oppressive, unfair or made in bad faith.

Effect of Illegality: Ordinarily, an illegal agreement is void. When an agreement is illegal, the parties are usually not entitled to the aid of the courts.

Exceptions to Effect of Illegality:

Protection of One Party: When the law that the agreement violates is intended to protect one of the parties, that party may seek relief.

Unequal Guilt: When the parties are not in *pari delicto*—equally guilty—the least guilty party may be granted relief when public interest is advanced by doing so.

Partial Illegality: An agreement may involve the performance of several promises, some of which are illegal and some legal. The legal parts of the agreement may be enforced, provided that they can be separated from the parts that are illegal.

Crimes and Civil Wrongs:

There is a difference between illegality and criminality.

Criminal Conduct in Contract: A contract to commit a crime (such as where one of the parties pays the other to murder someone) is not enforceable and its making, or performance, will lead to criminal prosecution.

Non Criminal but Unlawful: Not all illegal contracts are criminal. A statute or the common law could simply forbid a type of contract or a contract term without making the violation of the law a criminal offense. For purposes of contract law, it is not concerned with whether the transaction attracts criminal penalties.

Good Faith and Fair Dealing:

Implied Covenant: This means that in every contract there exists an implied covenant of good faith and fair dealing. This means each party a duty of good faith and fair dealing in its performance and its enforcement.

General Obligation: The general obligation of good faith and fair dealing is imposed by law on both parties in the performance and enforcement of the contract. This duty is expressly recognized in both case law and the UCC.

Based Upon the Reasonable Expectation of the Parties: the determination of whether a party acted in good faith must be made with reference to the reasonable expectations of the parties in the context of the transaction.

Legality Continued

Unconscionability:

Defined: Black's Law Dictionary defines "unconscionability" to mean:

"Contract terms that unreasonably favor the other party, and where such are so unreasonably unfair or oppressive, that they shock the conscience of the court"

Generally: Ordinarily, a court will not consider whether a contract is fair or unfair, is wise or foolish, or operates unequally between the parties.

However, in certain unusual situations, the law may hold a contract provision unenforceable because it is simply too harsh or oppressive to one of the parties.

What Constitutes Unconscionability: A provision in a contract that gives what the court believes is too much of an advantage over a buyer may be held void as unconscionable, if it "shocks the conscience of the court".

An Equitable Remedy: Unconscionability originated as discretionary equitable relief in a contract suit. It is the function of a court of equity to do justice between the parties, and thereby decline relief to a plaintiff who had unfairly taken advantage of the other party.

Under the principles of equity, the court has the power to refuse enforcement of an unconscionable contract or to adjust the contract by removing or modifying the unconscionable provision.

Public Policy

Definition of Public Policy:

Requirement: To be a valid Contract, it must be for a lawful purpose subject matter.

Contracts which are deemed invalid because of **Public Policy** are the same as those which fail for the lack of a lawful purpose subject matter.

Public Policy Defined: *"Broadly, principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society"*

Agreements Affecting Public Policy:

Agreements Contrary to Public Policy: The law will not recognize certain agreements that a legislature or the courts deem are substantially against the public interest, and harmful to society as a whole. These agreements, that may harm the public welfare, are thereby condemned as being contrary to public policy, and are therefore held not to be binding.

Types of Agreements that Are Not Upheld: Agreements that interfere with public service or the duties of public officials, obstruct legal process, or discriminate against classifications of individuals may be considered detrimental to public welfare and, as such, are not enforceable. These agreements are struck down by courts in the same manner as if they were illegal.

No Clear Delineation

Unenforceable Contracts:

- **Societal Protections:** The protection of the public welfare, health, or safety;
- **Personal Protections:** The protection of persons or property; and
- **Institutional Protections:** The protection of recognized social institutions.

Courts Are Hesitant to Use This Remedy

Public Policy Continued

Gaming Wagers and Lotteries:

Gaming Generally Illegal

Exception: State regulated casino gambling and contracts involving such, are enforceable and valid.

Exception: In many states, public lotteries (lotteries run by a state government) have been legalized.

Promotional Sweepstakes with Purchased Tickets – Illegal

Free Gift Promotions – Lawful so long as no purchase is required

Skilled Activity – Is not gambling.

Regulation of Business:

Business Regulations: These laws can take the effect of everything from licensing, to operational limitations on the business and its employees, to disclosure requirements, to consumer protections.

Effect of Violation: Whether an agreement made in connection with business conducted in violation of the law is binding or void, depends on how strongly opposed the public policy is to the prohibited act. Most courts take the view that the agreement is not void unless the statute expressly specifies such.

Consumer Protection Statutes: Consumer protection legislation often gives the consumer the right to rescind the contract in certain situations.

Licensed Callings or Dealings:

Required Licenses: Some professions and trades require that a person to obtain a license before engaging in such professions or trades. These professions and trades often require a high degree of education, training and/or skill to be deemed proficient.

Licensed Professions and Trades: Such professions and trades include law, medicine, accountancy, real estate brokers, stock brokers, insurance agents, hotel keepers, pawn brokers, electricians, and plumbers. In most jurisdictions, a license is required by law in order to practice these professions or trades in order protect the public from unqualified persons.

Contracts with Unlicensed Persons Unenforceable: A contract made by an unlicensed person in these types of enterprises would be unenforceable.

Quantum Meruit: The doctrine of Quantum Meruit is an equitable remedy that allows a person who performs services to recover the reasonable value of services, and damages incurred, in compensation for work performed in a quasi contractual relationship.

Certain business regulations of home improvement contractors, however, forbid an unlicensed contractor from not only enforcing a home improvement contract against a home owner, but also prohibit any recovery in quantum meruit as well.

Contracts in Restraint of Trade:

Restraint of Trade: Restraint of trade is an action that interferes with competition in a free market. Agreements (contracts) that unreasonably restrain trade are illegal, and void on the ground that they are contrary to public policy. In addition to the illegality of the agreement based on general principles of law, both federal and state statutes explicitly declare monopolies illegal and subject the parties to various civil and criminal penalties.

Agreements Not to Compete:

Permissible Under Certain Circumstances But Disfavored Enforceable Non-Compete Contracts if:

- It is narrowly drawn to protect the employer's legitimate business interests;
- It is not unduly burdensome on the employee's ability to earn a living;
- The geographic restriction is not overly broad, and
- A reasonable time limitation is given.

Usury:

Defined: According to Black's Law Dictionary, Usury is defined as "charging of an illegally high rate of interest".

New York Usury Rates: Section 5-501 of the New York State General Obligations law establishes a civil usury rate cap of 16 percent per year. Section 190.40 of the New York State Penal Law established a criminal usury rate cap of 25 percent per year. Certain borrowing transactions are not subject to civil usury, including credit cards.