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Legally Speaking — Consideration and the Statute of Frauds: Necessary Elements in the Formation and Enforcement of Contracts

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Column Editor’s Note: In my last column, I began discussing the formation of contracts. This column will continue discussion of the details of forming a contract. In order to form a contract, there must be a “meeting of the minds” — there must be an offer, followed by an acceptance. Once an offer has been rejected, it cannot be accepted later, as a counter-offer constitutes both a rejection and a new offer.

However, this is not all there is to the formation of contracts. One of the most important points is the topic of consideration. Still another important question is whether the contract needs to be in writing in order to be enforceable. You need to pay attention to these two key concepts whenever you are negotiating a contract. — BC

The Concept of Consideration

According to American Jurisprudence 2d, the definition of the term consideration is “Some right, interest, profit, or benefit [owed] to one party or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other.”1 Since a contract is a legally enforceable promise, consideration is the price each party pays to one another for the promise. Therefore, consideration is a big part of the differentiation between promises that are not legally enforceable and promises that are.

The legal system provides for two situations in which a promise can be enforced in court: either the contract was formed with consideration, or else one of the parties has relied upon the promise in some fashion to their detriment.2 If one of the parties gives up something of legal value3 that he or she is not legally obligated to in exchange for a contract, they have given consideration. This item of legal value can be a physical item (cash, check), a benefit or a detriment,4 something the party will do, or something the party will refrain from doing.5

Likewise, in order for consideration to be sufficient, it must be the result of bargaining between the parties. The promisor (the party that makes the promise) must receive a benefit or the promisee (the party to whom the promise was made) must suffer a detriment. As an example, suppose the Greentown Public Library wants to purchase two computers from the North American Computer Company. Greentown makes an offer that North American accepts. North American promises they will send the computers to Greentown in exchange for $2,000. In this instance, North American is the promisor and Greentown is the promisee. Greentown’s consideration consists of giving up $2,000, a benefit to the computer company (promisor) and a detriment to the library (promisee).

However, consideration does not have to be the payment of money. It could be refrain from doing something the promisee is entitled to do, such as an act of forbearance. For example, there was a famous 19th century case in which a man promised to pay his nephew $500 if the nephew agreed not to smoke or drink until he turned 21. (This would have been the equivalent of $11,020 in current dollars.) The legal drinking age was lower in those days, so the nephew had the legal right to smoke and drink. Because he gave up his legal right to smoke or drink, he had satisfied the requirements for consideration.6 Of course, the nephew also received the health benefits of not smoking or drinking, but since he had a legal right to use alcohol and tobacco, not using them in exchange for $500 was considered a legal detriment.

Contracts can be formed with consideration, even when the benefit or the detriment is very slight. For example, consideration may even be formed by as simple an act as naming a child after your uncle in exchange for being named in his will.7 The only requirement is the consideration must be something of value in the eyes of the law. “Any real consideration, however small, will support a promise. So long as a man gets what he has bargained for, and it is of some value in the eyes of the law, the courts will not ask what its value may be to him, or whether its value is in any way proportionate to his act or promise . . . .”

A promise to do something in the future may also be used as consideration. In this case, the future promise serves as consideration for the other party’s promise. “In other words, as a rule, a promise to do a thing is just as valuable a consideration as the actual doing of it would be.”8 On the other hand, the person must actually have the legal right to do what he or she is promising. There is no consideration if the party doesn’t have a legal interest in the item, or if the promise is for something that is illegal.9 For example, suppose that a farmer agrees to allow one acre of his farm to remain fallow (not used for growing). It is an enforceable promise for a farmer to agree not to grow corn in his field in exchange for $400 per acre. However, a promise by the farmer not to grow marijuana in exchange for $400 is not enforceable, since growing pot is illegal.

In order for a contract to be valid, both parties must provide consideration. A publisher agrees to send books to a library in exchange for money, and the library agrees to give up money in exchange for books. This mutual consideration is the basis of the bargain and is often a part of why contracts are sometimes called a “bargain for exchange.” After all, each party in a contract gives up something. Another example involves an employment contract. “Any labor promised by the employee will be adequate consideration for the employer’s promises of compensation, and the employer’s promise of any remuneration will be adequate consideration for the employee’s labor or promise to provide labor.”10

The Statute of Frauds

One important question that must be answered for every contract is whether it is required to be in writing. Unless the legislature decrees otherwise, contracts need not be in writing. Nonetheless, a written contract is much easier to enforce, since it eliminates the potential for mistakes or miscommunication. As a result, England began requiring certain types of contracts to be in writing in order to be enforced.

continued on page 73
Legally Speaking
from page 72

Since the primary purpose of this statute at the time it was enacted was intended to prevent fraud in the formation of contracts, the law became known as the “Statute of Frauds.”

The Statute of Frauds was passed by Parliament in 1677. According to Parliament, “some agreements are deemed of so important a nature, that they ought not to rest in verbal promise only; which cannot be proved but by the memory (which sometimes will induce the party) is witness.” The Statute of Frauds was one of the most important laws ever passed by Parliament. As a result, this law has been passed in almost all Common Law jurisdictions. In general, the kinds of contracts that are subject to this rule include:

- Contracts for the sale of land.
- A contract that cannot be performed within one year or a contract that is greater than one year in duration. This includes contracts for employment and contracts for personal services. However, a contract for at-will employment, where either party can terminate the relationship at any time, is not subject to the Statute of Frauds because it has the potential of being completed in less than one year.
- Contracts for the sale of goods or securities worth more than a specific amount. In 1677, this amount was 10 pounds sterling. The Uniform Commercial Code and many states are currently requiring written contracts for the sale of goods over $500.
- Contracts in which one of the parties is agreeing to be responsible for someone else’s debt, both when the party is acting as a surety (a person who guarantees a debt) and when the promise is made by an executor to pay a debt from an estate.

Technically speaking, the Statute of Frauds is not a requirement for the formation of a contract; rather, it is a requirement for certain contracts to be enforced. “There are certain situations in which a promise that is not in writing can be denied enforcement. In such situations, an otherwise valid contract can be unenforceable if it does not comply with the formalities required by the Statute of Frauds.” If you want to enforce your contract, you will need to comply with the provisions of this law.

The two ways in which publishers, book distributors, and libraries are most affected by the Statute of Frauds are employment contracts and contracts for the sale of goods. This means that if you sell books that total over $500, you need to put the agreement in writing. The Uniform Commercial Code specifies that: “[A] contract for the sale of goods for the price of $500 or more is not enforceable. . . unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker.” A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.”

When writing a contract for the sale of land or of goods (or securities) over $500, always put it in writing. Similarly, if the contract is not capable of being performed within one year (including employment contracts), put it in writing. Finally, any agreement to assume the debt of another person must always be in writing. Although other kinds of contracts don’t need to be written, remember always that “prudence is the better part of valor.”

Conclusion

In order to form a contract, you must have consideration. You also need to pay attention to the Statute of Frauds in order to determine whether the contract needs to be in writing.

Consideration involves the promise, the person receiving the promise, giving up something of legal value that he or she is not obligated to give up, or providing a benefit to the promise, the person who has given the promise. Consideration can involve paying money, providing goods or services, or even agreeing not to do something. A promise to provide a future benefit is still considered valid consideration provided the person has the right to make the promise and the promise is not illegal. The consideration in the contract is the bargain that has been negotiated. Each party must provide consideration in order for the contract to be valid.

Although contracts are not required to be in writing in order to be valid, many types of contracts are required to be in writing in order to be enforced. This legal provision is called the Statute of Frauds. Agreements that must be written include a contract for the sale of land, contracts for the sale of goods or securities over $500, a contract that can’t be performed within one year, and an agreement to assume the debt of another. This law is for the protection of both parties.

You must have consideration in your contract, and some contracts must be in writing, so you should always keep these two items in mind. I especially recommend that whenever possible contracts be placed in writing. The basic thing to remember is that an oral contract is worth the paper it is written on.”

Endnotes

4. “Consideration,” 8A Words and Phrases 236; quoting Smaller War Plants Corp. v. Queen City Lumber Co., 27 So.2d 531, 535, 200 Miss. 627.
15. id.
17. Id. at §5.3.
18. Rain.
19. id.

Rumors
from page 63

And — in case you don’t notice — this issue of ATG is the biggest ever — 112 pages! You needed some summer reading, right?

Read “Visions: The Academic Library in 2012” by James W. Maranuzzo (University Librarian, Fairleigh Dickinson University), D- Lib Magazine (May 2003, volume 9, number 5). In the fall of 2002, the New Jersey ACRL and Fairleigh Dickinson University Libraries initiated a search for “fresh thinking about the future” by organizing an essay contest with the topic “The Academic Library in 2012.” "Cybrarians in InfoSpace” was the theme of the winning essay, submitted by library school professors Tom Surprenant and Claudia Perry (Queens College). Some food for thought — “Communicating through Virco continues on page 109