Legally Speaking -- "The Tie that Binds:" The Nuts and Bolts of Contract Formation

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Contracts are the basic agreements that allow us to function as a society. Forming a “meeting of the minds,” contracts are important to many day-to-day aspects of librarianship, publishing, and book distribution. Some of the areas that are affected by contracts include employment, collection development, licensing agreements, and intellectual property. Before learning about other topics, it is important for us to begin with a strong base of contract law.

This article will discuss the elements of contract law in a straightforward, easy-to-understand format. I will begin by explaining what a contract is and what constitutes an agreement, followed by a discussion of some of the issues that we need to understand in order to do our jobs. Some of the concepts that I will discuss include offer, acceptance and rejection, counter-offer, and consideration.

Definition

Let us start with the definition of a contract. A contract is a promise to do something or not to do something, but with some important distinctions. There is a formal set of rules for the formation of a contract, and the law provides for legal consequences in the event that a contract is not fulfilled. Lawyers refer to contracts as being “a meeting of the minds,” since both parties agree on what is to be done. In both popular and legal usage, a promise is an assurance, in whatever form of expression given, that a thing [an action] will or will not be done. The parties concerned undertake a legal obligation when a contract is formed, and there are legal ramifications if the contract is not fulfilled.

Here is an example of the difference between a promise and a contract. If promised to come over to my friend’s house on Monday to paint his living room, but I didn’t do it, my friend would not be able to sue me in court. However, if my friend had paid a decorator to paint his living room and the decorator didn’t do the work, my friend could sue in court. The contract is more than just a promise because of the legal obligations that it creates.

Offers

Contracts are formed when two or more interested parties agree. One party makes an offer, and the other party accepts or rejects the offer. For example, suppose that Bob has an old stereo. Bob tells his friend, Sally, that he will sell it to her for $35. At this point, Bob has made an offer. Sally can either accept the offer, reject or decline the offer, or make a counter-offer.

An offer is a legal willingness to enter into a contract. At the time that the person makes an offer, he or she is ready and willing to enter the contract if both parties agree. Making an offer is different from an invitation to enter into negotiations. An invitation to enter into negotiations is not an “offer” which, together with acceptance thereof, forms a “contract”.

Many governmental entities and large businesses use a system known as a “Request for Proposal,” or RFP. These documents are not considered to be offers. The RFP contains specific information as to the mission of the agency (or business). The RFP contains specific requirements, standards, and deadlines. Sometimes an RFP is published in a legal newspaper, and sometimes it is circulated to a pre-qualified list of vendors. One drawback of using an RFP is that writing and responding to proposals takes a lot of time. As a result, some agencies and businesses have moved to a system called a “Request for Information,” or RFI. The RFI is basically a shorter version of the RFP, and takes less time to process.

Most state and local governments specify that agencies use either an RFP or RFI so that competition will result in the lowest possible bid. Although private businesses are not required to request bids, they usually circulate RFPs or RFIs in order to obtain the best price or the most favorable terms. An RFP or an RFI is not an offer. The response of the bidder is the offer. An RFP or RFI simply indicates a willingness to enter into negotiations.

For example, suppose that the Greenpoint Public Library wants to buy furniture for a reading room. The library administration creates an RFP requesting bids on five 72-inch walnut reading tables with attached glass lamps. The RFP also states that the tables must be delivered within ten weeks of signing the contract. Companies that sell furniture respond to the RFP by creating a proposal that includes specifications and price. The Greenpoint Public Library can then choose the proposal with the lowest cost.

Acceptance, Rejection, and Counter-Offer

Before a contract can be formed, the offer must be accepted and the parties must agree to enter into the contract. If the offer is rejected, no contract is formed. Once an offer has been rejected, it cannot be accepted later.

For example, suppose that Letargetow Public Library wanted to sell a valuable first edition from their collection. They offer the book to Lake University for $100,000. Lake University rejects the offer. The following week, Lake University realizes that the book is actually worth $1.5 million. Since the offer has already been rejected, Lake University can’t go back and accept the offer from Letargetow Public Library. However, if Lake University tells Letargetow that they would now like to buy the book for $100,000, the university has made a new offer that Letargetow can either accept or reject.

Another possible scenario involves a counter-offer. A counter-offer is actually a rejection of the original offer, along with a new offer. Suppose that Letargetow offers Lake University the rare book for $100,000. Lake University replies that they would like to take the book for $85,000. Letargetow can either accept Lake’s offer, reject the offer, or give Lake an...
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other counter-offer. Until Langetown and Lake University both agree on the price and the terms, no contract has been formed.

Another important requirement for a contract is “consideration.” Consideration consists of both parties giving up something that they are not required to give up, or doing something that they do not need to do. For example, Sally’s agreement to pay $35 constitutes consideration.

Bob’s agreement to give up his stereo constitutes consideration. In employment contracts, the organization agrees to pay money, and the employee agrees to perform work. These actions constitute consideration.

In order for a contract to be formed, there must be consideration on the part of both parties. This is why a mere promise is not enforceable as a contract. For example, suppose that Bob tells Sally he would give her a stereo for her birthday. He does not ask for money from Sally. Since there is only consideration on one side, no contract has been formed. If Bob doesn’t give Sally a stereo, she can’t take him to court to obtain the stereo.

To illustrate the difference between entering negotiations and forming a contract, let’s take a look at the following example. Let’s assume that we have two libraries in adjacent communities, the Greenpoint Public Library and the Langetown Public Library. Both libraries decide to build new branches. Let us assume that the two towns have different bidding rules, so that Greenpoint is required to use an RFP and award contracts to the lowest bidder, while Langetown is allowed to enter into direct negotiations with any vendor on its pre-qualified list. (Assuming that both libraries comply with all applicable rules and regulations, and that everything was done correctly.)

Greenpoint uses an RFP that specifies what type of work the library wants to have done and that details the requirements the library has for its new building. The lowest bidder is the XYZ Construction Corporation. One of the provisions in the XYZ bid specifies that even if the project is canceled for any reason whatsoever, Greenpoint will still have to pay 10% of the contract price. The director of the Greenpoint Public Library tells XYZ that the board will take 10 days to consider the document.

Langetown also wants to build a new branch, but it selects the contractor differently. Since Langetown has worked with XYZ Construction Corporation in the past, the library’s leaders go directly to XYZ. They know exactly what they want and how much they want to spend, and so they create a document specifying that XYZ will build the branch within certain specifications, and for a particular price. The document specifies that even if the project is canceled for any reason whatsoever, Langetown will still have to pay 10% of the contract price. Langetown signs the document, and so does XYZ Corporation.

Five days later, the state decides to cut the budget for local libraries. Both Greenpoint and Langetown are affected by the cuts, and are forced to cancel their branch-building projects. XYZ sues both Greenpoint and Langetown for 10% of the contract price, despite the fact that no work has been done and the contractor has spent no money. Who wins?

Because the two libraries used very different bidding procedures, the results would be very different. A “Request for Proposal” is exactly what a request that the contractor enter into negotiations with the library. As such, the RFP does not constitute an offer that XYZ can accept. Instead, the proposal by XYZ was an offer that Greenpoint had not yet accepted. Therefore, there was no contract. Greenpoint would win, and XYZ would not be successful in its lawsuit.

Langetown, on the other hand, proposed that XYZ build a branch for a specific price. There were details as to how the branch would be built, and both the library and XYZ signed the document after it was presented to the contractor. The library made an offer to XYZ, and XYZ accepted its offer. As a result, a contract was formed. Therefore, XYZ will win its lawsuit, and the library will have to pay 10% of the construction fee as a penalty for not fulfilling the contract.

Conclusion

This article illustrates some of the requirements for the formation of contracts. There are several other issues that have not been covered, including the need for some contracts to be in writing if they are to be enforced. These issues will be the subject of a future article.

The formation of contracts is one of the most basic parts of our legal system, one that applies to every entity and every person. Yet we don’t always think about the way we enter into or write a contract. In order to have a contract, there must be a meeting of the minds. There must be an offer, followed by an acceptance. Once an offer is rejected, it can’t be accepted later. A counter-offer constitutes both a rejection and a new offer. Without consideration by both parties, no contract has been formed. Both parties must give up something or do something that they are not required to do in order to create consideration. Contracts are truly the glue that holds society together; the “meeting of the minds” creates the tie that binds.

Endnotes


Cases of Note

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Copyright — Term Extension Passes Supreme Court


Petitioners were not pleased with the Copyright Term Extension Act (CTEA), which in 1998 tacked on twenty years to both existing and future copyrights. Pub L. 105-298, § 102(b) and (d), 112 Stat. 2827-2828 (amending 17 U.S.C. §§ 302, 304).

Petitioners had to concede that attacking the new life plus-70 as going beyond “a limited time” would be an exercise in illogic. “Whether 50 years is enough, or 70 years too much is not a judgment meet for this Court.” Brief for Petitioners 14 n.1.

Instead they attacked the extension of the existing copyrights.

Ruth Ginsburg’s clerks, writing for the Court, led off with the usual boilerplate of the Patent Clause of the Constitution, Art. I, §8, cl. 8, with says re copyrights “Congress shall have Power... to promote the Progress of Science...” by securing [to Authors] for limited Times... the exclusive Right to their... Writings.”

Then cited the 14-year term of the first copyright statute of 1790 noting that it applied to both existing works and those not yet published. Act of May 31, 1790, ch. 15 § 1, § 1 Stat. 124 (1790 Act).

Then still in the same paragraph noted the 1831 extension to 42 years and the 1909 extension to 56 years each time applied to existing and future works.

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