

## Contract Formation

## Contract v. Promise

- Promise
  - Person's Declaration that he will do Something
    - Promisor: Person making Promise
    - Promisee: Person to whom Promise made
- Contract
  - Agreement between Two or More Competent Parties, for valuable Consideration, to Perform or to Refrain from Performing some Act now or in future
    - **Not all Agreements are Contracts**
    - Offeror: Person Proposing Agreement
    - Offeree: Person to whom Offeror Proposes Agreement

## Five Elements of Enforceable Contract

- **C** Consideration
  - Money for Act or even Forebearance to Act
- **O** Offer
- **A** Acceptance
- **L** Legal Capacity
- **L** Legal Subject Matter

## Agreement

- Meeting of the Minds
- Offer
  - Promise to perform or refrain from a future act
    - Clear and certain
- Acceptance
  - Voluntary act by Offeree
    - Unequivocal and communicated
      - Method depends on whether Contract bilateral or unilateral
  - “Mirror Image” of Offer
    - if terms changed could be Counteroffer
- Genuineness of Assent
  - Objective Standard

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## Bilateral and Unilateral Contracts

- Bilateral Contracts
  - Promise for a Promise
  - Accept by Promising
- Unilateral Contracts
  - Promise for an Act or an Act for a Promise
  - Accept by Performing
    - Once Performance started, most Jurisdictions will not let Offer be revoked, saying Offeree substantially performed

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## Express and Implied Contracts

- Express Contracts
  - All terms and Conditions Explicitly Stated
- Implied-in-Fact Contracts
  - Contract Formed in Whole or Part by Conduct of Parties
    - Plaintiff Must Furnish Service or Property to Defendant
    - Plaintiff must reasonably Expect to be Paid
    - Defendant must reasonably have Expected to Pay
    - Defendant had opportunity to Reject the Service or Property

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## Quasi Contracts

- Prevent Unjust Enrichment of one party at expense of another
- Allow party whose actions would unjustly enrich other party to recover in Quantum Meruit

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## Excutory v. Excuted Contracts

- Executed Contract
  - Contract that has been Completely Performed by all parties
- Executory Contract
  - Contract that has not been Fully Performed by all Parties

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## Validity of Contracts

- Void Contract
  - Lacks one of the Five Elements (COALL)
- Valid Contract
  - Has all Five Elements (COALL)
- Voidable Contract
  - May be legally Cancelled or Annulled at option of Injured Party
    - e.g., contract made under duress or false pretenses

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## Requirements of Offer

- Offeror must Objectively Intend to Perform or Refrain from performing as Offered
- Offer must be Definite and Certain
  - Opinions, statements of intentions, preliminary negotiations, agreements to agree, auctions and advertisements are not offers
- Offer must be Communicated

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## Definiteness of Offer

- Offer must include or be able to reasonably infer from Offer
  - Identities of Parties
  - Identity of Object or Subject Matter
  - Consideration
  - Time of Payment
- Offer can be conditioned by specific terms to make contract definite
  - e.g., acceptance must be on desk by 12:00 PM on 9/30/03

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## Revoking an Offer

- Withdrawal of Offer communicated to Offeree any time prior to Acceptance
  - unless Offer is irrevocable
    - e.g., option contract
  - If Offeree has justifiably relied on Offer, Offeror may not Revoke in many jurisdictions

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## Rejection and Counteroffer

- Rejection
  - Terms of Offer may be Rejected by the Offeree and the Offer terminates
  - Rejection must be received prior to any contrary writing or conduct evidencing acceptance
- Counteroffer
  - Rejection by Offeree coupled with new Offer to Offeror
  - “Mirror Image Rule”
    - Offeree’s Acceptance should Mirror Image the Terms and Conditions of original Offer, or it can be deemed a Counteroffer, not an Acceptance

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## Termination by Law

- Lapse of Time
  - Offer terminates automatically when period of time specified in Offer expires
    - If no time specified, Offer Terminates after reasonable time
- Destruction of Subject Matter
- Death or Incompetence of Offeree or Offeror
  - unless irrevocable
    - then Only Offeree death or incompetence will terminate Offer
- Illegality

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## Acceptance by Silence

- Generally not considered Acceptance unless Offer specifies it is or
  - Offeree acts consistently with Acceptance and does not reject when has chance
  - Prior dealings indicate silence has been Acceptance
  - Unilateral Contract (where acceptance requires some action)
    - If Offeror has no means to determine whether requested act has been performed in a unilateral contract or has requested notification, then silence would be acceptance

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## Communicating Acceptance

- Acceptance effective when communicated
- Mailbox Rule
  - Acceptance becomes effective upon dispatch in the mailbox by the Offeree
    - **Revocation effective upon Receipt while Acceptance effective upon dispatch**
- In addition to modes of Acceptance expressly stated in Offer, Common Law recognizes **as fast or faster** method

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## Effective Time of Acceptance

- Acceptance Effective upon being Communicated (Mailbox Rule) with following exceptions
  - If not properly dispatched, it will be effective when received
  - If Offeror conditioned Acceptance on receipt
  - If Acceptance sent after rejection, whichever received first
  - If Acceptance not communicated by authorized means, it is effective when received

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## Consideration

- Must be legally sufficient
  - Promising to do something Promisor has no legal duty to do
  - Performing action that one not ordinarily obligated to do
  - Refraining from exercising a legal right
- Consideration must be bargained for
  - Courts don't consider adequacy of Consideration, unless fraud or duress Involved

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## Inadequate Consideration

- Pre-existing legal duty
  - by contract or job description
    - exception: unforeseen difficulties
    - new superceding contract (UCC)
- Past Consideration
  - Promises made in return for acts or events that have already occurred are unenforceable

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## Promissory Estoppel

- When Promisor makes Clear and Definite Promise on which Promisee justifiably relies, Promisor is bound by the Promise, even if it was insufficient to form a legally binding Contract
- Promissory Estoppel requires
  - Promise was Clear and Definite
  - The Promisee Justifiably Relies
  - Promisee's Reliance was Substantial and of Definite Character
  - Enforcing Promise will Serve Best Interests of Justice

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## Contractual Capacity

- Minimum mental capacity required by law for party to enter a Contract
  - Minors
    - In most States, unmarried persons under 18 permitted to enter into any contract an adult can, provided contract is not one prohibited by law
    - Contracts voidable at minors option
    - Can disaffirm up to 18 years of age in most states; can ratify expressly or by implication at that point
  - Mentally impaired (intoxicated, voluntary or not) or incompetent persons
    - Voidable at their Option

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## Legality

- Contracts Contrary to Statutes
- Contracts in Restraint of Trade
  - If unreasonable in time and geographic areas usually not upheld in employment contracts

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## Genuineness of Assent

- Contract may be Voidable at Option of party who can demonstrate that he did not Genuinely Assent to contract because of
  - Mistake
  - Fraudulent Misrepresentation
  - Undue Influence
  - Duress

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## Mistake

- Parties entered into Contract with different understandings of Material Facts relating to Subject Matter
  - Unilateral Mistake of Fact
    - must have been obvious to other party or a Mistake of mathematical nature only
  - Mutual Mistake of Fact
    - either party may rescind
  - Mutual Mistake of Value
    - either party can normally enforce Contract

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## Misrepresentation

- **Fraudulent Misrepresentation**
  - When innocent party consents to Contract with Fraudulent terms, he may void Contract
    - Elements: (1) misrepresentation of material fact (2) with Intent to deceive (3) on which innocent party Justifiably Relies, and (4) results in injury
- **Innocent Misrepresentation**
  - Statement by person believing it true when it actually Misrepresents a Material Fact
- **Negligent Misrepresentation**
  - Untrue statement made by someone who failed to exercise due care or meet standards of their profession

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## Undue Influence and Duress

- **Undue Influence**
  - arises from Relationships in which one party can influence another to the point of overcoming the latter's free will
    - Essential Element: Influenced Party does not enter into Contract of own free will
    - Courts often presume Undue Influence when the first party owes a Fiduciary Duty to the other
      - e.g., Attorney/Client, Accountant/Client
- **Duress**
  - Forcing party to enter Contract because of fear
    - Grounds for Rescission

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## Adhesion and Unconscionability

- **Adhesion Contracts**
  - Contract written exclusively by one party and given to other on Take-It-or-Leave-It Basis
    - Other side has no opportunity to negotiate
  - Parties have unequal bargaining power
  - Enforcement against adhering party manifestly unfair or oppressive
- **Unconscionable Contracts**
  - One party deprived of meaningful choice of Terms and of Meaningful Remedy in event of breach

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## Statute of Frauds

- A contract must be in writing if it
  - cannot be performed within one year
  - calls for purchase or sale of any interest in real property
  - calls for promise to answer for the debt or default of another
  - contains promise by executor or administrator of a decedent's estate to pay claim against the estate from personal funds
  - makes a promise in consideration of marriage
  - is for sale of goods for \$500 or more

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## Promissory Estoppel and Statute of Frauds

- Doctrine may be employed
  - to enforce Contract
    - despite lack of Writing
    - when Promisee Justifiably Relies

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## Privity of Contract

- Generally only parties to Contract owe any Duties and enjoy any Rights from Contract
  - i.e., Promisor and Promisee
- Three exceptions
  - Assignment of Rights
    - Assignor's Rights extinguished
    - Terminology: assignor, assignee
  - Delegation of Duties
    - Delegation Remains Liable
    - Terminology: Delegator, Delegatee
  - Third-Party Beneficiary Contract
    - Intended beneficiary of Contract

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## Scope of Assignment

- All Contract Rights may be Assigned unless
  - Prohibited by Statute
  - Personal Services Contract
    - Exception: all that remains is payment of money
  - Assignment materially increases risk or alters Duties of Obligor
  - Contract forbids Assignment
    - Exceptions: right to receive money, right in real property, negotiable instruments, and right to recover damages under UCC

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## Scope of Delegation

- All Contract Duties may be Delegated unless
  - Delegator owes Fiduciary Duty to Delegatee
  - Performance depends on personal skills or talent
  - Performance by Delegatee would vary materially Performance expected by Obligor
  - Contract forbids Delegation
- If Delegation enforceable, Obligor must accept performance
  - unless Delegatee fails to adequately perform, then Delegator remains liable

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## Third Party Beneficiaries

- Intended Beneficiary
  - Third party for whose benefit Contract formed
- Incidental Beneficiary
  - Third party who benefits from Performance of Contract, but whose benefit was not reason for Contract
- Courts ask whether Reasonable Person would have intended to confer on Third Party the Right to Bring Suit and Right to benefit from Contract
  - Consider whether performance was directly to third party, whether third party had right to control, and whether third party is expressly designated in contract

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