

Selected Elements of Contract Law

A. Sources of Contract Law

Contract law in the U.S. can come from federal statutes, state statutes, judicial decisions in either state or federal court, or authoritative commentaries on the law. The roots of modern American contract law lay in English case law stretching back centuries. Until the 20th century, not just contract law, but almost all law in common law countries such as England and the US was found in judicial decisions rather than statutes. With the rise of the modern regulatory state over the course of the 20th century, however, the tables turned and the source of most new law in America is now legislation. As a general principle, however, contract law is considered to be a body of law most appropriately dealt with at the state level rather than the federal level, and through the evolution of case law rather than by enacting statutes. So even in the 21st century, case law remains an important source of contract law.

For the purposes of this course, all cases in the Course Reader will be treated as having equivalent precedential authority even if they are from different states or decided at different times. In the practice of law, however, it is always necessary to consider the strength of the precedential authority of a case. Within a single jurisdiction such as the State of Washington, all state and federal courts are bound by a Washington State Supreme Court decision on a question of contract law, and trial courts are bound by decisions of the appeals courts above them. However, even though a court is not required to follow a case under the formal rules of precedential authority, it is common for courts to follow the precedent of other courts in the State of Washington at the same level (trial-trial, or appeals-appeals) even though they are not required to do so. This is because it promotes stability and predictability in the law, and because too many public disagreements among Washington State courts may call into question the legitimacy of the decision making processes of the courts as a group. If there is no case law on a particular issue in the State of Washington, courts may choose to follow precedent from other jurisdictions merely because they find it persuasive and not because they are under any obligation to follow it.

A system of judicial precedent can be complicated to manage within a single jurisdiction, and in a federal system like the United States with many different local jurisdictions each maintaining their own systems of judicial precedent, it is even more complicated. By the beginning of the 20th century, there were 45 states in the United States, and it was becoming clear that a national system of contract law made up of 45 different systems of judicial precedent was simply unworkable. However, idea of transferring contract law to the federal government to be governed by federal legislation was politically unacceptable, so other solutions had to be found. One solution was the process of states working together in a collaborative process to draft statutes that each state could enact as a state law, producing “uniform” state laws. The National Conference of Commissioners on Uniform State Laws (NCCUSL) was founded in 1898 to promote the creation of uniform laws in areas where conflicts among different state laws were causing problems. Its name was changed to the Uniform Law Commission (ULC) in 2007. Since its creation, it has developed more than 300 uniform laws, many of which address contract law issues.

The other solution was the founding in 1923 of the American Law Institute. The ALI is a membership organization, with members that include distinguished judges, lawyers and academics. The most important work of the ALI is the creation of “restatements” of the law which summarize the law in areas such as contracts. The process of “restating” the law involves collecting all the relevant cases from all the different state court systems, analyzing them and producing a new clear, concise statement of what the law that underlies all the cases really is (or should be). A “restatement” of the law may look similar to a statute in some ways, but because the ALI has no

authority to legislate, its impact on the law is a function of how persuasive it is. Like case law from other states, no state court is ever required to follow the rule contained in a restatement, but like decisions rendered by peer courts in the same state, courts are generally happy to apply rules from restatements in their own cases whenever a relevant one is available. In other words, ALI restatements of the law are highly persuasive authority for state court judges deciding contract law cases.

The first Restatement of Contracts was published in 1932, but it has largely been superseded by the Restatement (Second) of Contracts published in 1981. There sections of the Second Restatement of Contracts that are set forth basic principles of offer, acceptance and consideration are included in this course reader. A complete copy of the Second Restatement of Contracts is available at Gallagher Law Library or through online databases such as LexisNexis and Westlaw. This course will not cover any modern legislation governing contracts, such as consumer protection law or the Uniform Commercial Code, but instead will focus on contract law embodied in the holdings of the individual cases included in the Course Reader and in the selected sections of the Second Restatement of Contracts included in the Course Reader.

B. Selected Sections of the Restatement (2nd) of Contracts (1981)

§ 1 Contract Defined

A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.

§ 2 Promise; Promisor; Promisee; Beneficiary

- (1) A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.
- (2) The person manifesting the intention is the promisor.
- (3) The person to whom the manifestation is addressed is the promisee.
- (4) Where performance will benefit a person other than the promisee, that person is a beneficiary.

§ 3 Agreement Defined; Bargain Defined

An agreement is a manifestation of mutual assent on the part of two or more persons. A bargain is an agreement to exchange promises or to exchange a promise for a performance or to exchange performances.

§ 4 How a Promise May Be Made

A promise may be stated in words either oral or written, or may be inferred wholly or partly from conduct.

§ 5 Terms of Promise, Agreement, or Contract

- (1) A term of a promise or agreement is that portion of the intention or assent manifested which relates to a particular matter.
- (2) A term of a contract is that portion of the legal relations resulting from the promise or set of promises which relates to a particular matter, whether or not the parties manifest an intention to create those relations.

§ 17 Requirement of a Bargain

- (1) Except as stated in Subsection (2), the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.
- (2) Whether or not there is a bargain a contract may be formed under special rules applicable to formal contracts or under the rules stated in §§ 82- 94.

§ 18 Manifestation of Mutual Assent

Manifestation of mutual assent to an exchange requires that each party either make a promise or begin or render a performance.

§ 19 Conduct as Manifestation of Assent

- (1) The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act.
- (2) The conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents.
- (3) The conduct of a party may manifest assent even though he does not in fact assent. In such cases a resulting contract may be voidable because of fraud, duress, mistake, or other invalidating cause.

§ 21 Intention to Be Legally Bound

Neither real nor apparent intention that a promise be legally binding is essential to the formation of a contract, but a manifestation of intention that a promise shall not affect legal relations may prevent the formation of a contract.

§ 22 Mode of Assent: Offer and Acceptance

- (1) The manifestation of mutual assent to an exchange ordinarily takes the form of an offer or proposal by one party followed by an acceptance by the other party or parties.
- (2) A manifestation of mutual assent may be made even though neither offer nor acceptance can be identified and even though the moment of formation cannot be determined.

§ 23 Necessity That Manifestations Have Reference to Each Other

It is essential to a bargain that each party manifest assent with reference to the manifestation of the other.

§ 24 Offer Defined

An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.

§ 26 Preliminary Negotiations

A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent.

§ 33 Certainty

- (1) Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain.
- (2) The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.

(3) The fact that one or more terms of a proposed bargain are left open or uncertain may show that a manifestation of intention is not intended to be understood as an offer or as an acceptance.

§ 38 Rejection

(1) An offeree's power of acceptance is terminated by his rejection of the offer, unless the offeror has manifested a contrary intention.

(2) A manifestation of intention not to accept an offer is a rejection unless the offeree manifests an intention to take it under further advisement.

§ 39 Counter-offers

(1) A counter-offer is an offer made by an offeree to his offeror relating to the same matter as the original offer and proposing a substituted bargain differing from that proposed by the original offer.

(2) An offeree's power of acceptance is terminated by his making of a counter-offer, unless the offeror has manifested a contrary intention or unless the counter-offer manifests a contrary intention of the offeree.

§ 41 Lapse of Time

(1) An offeree's power of acceptance is terminated at the time specified in the offer, or, if no time is specified, at the end of a reasonable time.

(2) What is a reasonable time is a question of fact, depending on all the circumstances existing when the offer and attempted acceptance are made.

(3) Unless otherwise indicated by the language or the circumstances, and subject to the rule stated in § 49, an offer sent by mail is seasonably accepted if an acceptance is mailed at any time before midnight on the day on which the offer is received.

§ 42 Revocation by Communication from Offeror Received by Offeree

An offeree's power of acceptance is terminated when the offeree receives from the offeror a manifestation of an intention not to enter into the proposed contract.

§ 50 Acceptance of Offer Defined; Acceptance by Performance; Acceptance by Promise

(1) Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.

(2) Acceptance by performance requires that at least part of what the offer requests be performed or tendered and includes acceptance by a performance which operates as a return promise.

(3) Acceptance by a promise requires that the offeree complete every act essential to the making of the promise.

§ 51 Effect of Part Performance Without Knowledge of Offer

Unless the offeror manifests a contrary intention, an offeree who learns of an offer after he has rendered part of the performance requested by the offer may accept by completing the requested performance.

§ 63 Time When Acceptance Takes Effect

Unless the offer provides otherwise,

(a) an acceptance made in a manner and by a medium invited by an offer is operative and completes the manifestation of mutual assent as soon as put out of the offeree's possession, without regard to whether it ever reaches the offeror; but

(b) an acceptance under an option contract is not operative until received by the offeror.

§ 71 Requirement of Exchange; Types of Exchange

(1) To constitute consideration, a performance or a return promise must be bargained for.

(2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.

(3) The performance may consist of

(a) an act other than a promise, or

(b) a forbearance, or

(c) the creation, modification, or destruction of a legal relation.

(4) The performance or return promise may be given to the promisor or to some other person. It may be given by the promisee or by some other person.

§ 73 Performance of Legal Duty

Performance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration; but a similar performance is consideration if it differs from what was required by the duty in a way which reflects more than a pretense of bargain.

§ 77 Illusory and Alternative Promises

A promise or apparent promise is not consideration if by its terms the promisor or purported promisor reserves a choice of alternative performances unless

(a) each of the alternative performances would have been consideration if it alone had been bargained for; or

(b) one of the alternative performances would have been consideration and there is or appears to the parties to be a substantial possibility that before the promisor exercises his choice events may eliminate the alternatives which would not have been consideration.

§ 79 Adequacy of Consideration; Mutuality of Obligation

If the requirement of consideration is met, there is no additional requirement of

- (a) a gain, advantage, or benefit to the promisor or a loss, disadvantage, or detriment to the promisee; or
- (b) equivalence in the values exchanged; or
- (c) "mutuality of obligation."