

12.2: Contract Elements

There are three required elements of a contract: offer, acceptance, and consideration. It is important to note that some states and legal scholars expand this list to include whether the subject matter is legal, whether the parties have capacity to enter into a contract, and whether the law requires the contract to be in writing to be enforceable. However, these are best understood as defenses to contract formation, especially in light of the fact that the only elements that all states agree on are offer, acceptance, and consideration.

Offer

All contracts start when an individual or business proposes a deal. It might involve buying or selling goods, performing services, or making an exchange. An **offer** is a conditional promise to do or refrain from doing something now or in the future. In other words, it is willingness to enter into a contract.

Offers can be formal or informal. In some industries, such as retail and restaurants, offers are often posted on menus, signs, and advertisements. For example, a sign hanging above a cash register listing menu items and their prices is the restaurant's offer to sell customers those items at those prices.

There are not a lot of legal requirements about what an offer must contain, but there are some things that cannot be a legal offer:

Type of Invalid Offers	Definition	Example
Illusory Promise	No offer exists because there is no duty to perform	"If I decide to buy a new car, I'll give you my old one."
Pre-existing Duty	A party cannot leverage an existing duty to get more out of someone else	"I agree to teach you business law for \$100 even though you have already paid tuition for the course."
Forbearance	An offer cannot be a promise not to pursue a legal claim that is known to be invalid (Note: if the claim is valid, then forbearance may be a valid offer)	"I know the accident was completely my fault but I promise not to sue you."
Past Consideration	An offer cannot be based on past actions	I paint your house. Two months later you say that you will pay me \$500 for doing it. If you change your mind and decide not to pay me, I cannot enforce your promise because it was in consideration of a past event.

Once made, offers can be terminated in a number of ways. An offer that has been properly communicated continues to exist until it:

1. Is rejected;
2. Is replaced by a counteroffer;
3. Lapses or expires;
4. Is revoked; or
5. Is terminated by operation of law.

Unless it states a specific time, an offer remains open for a reasonable time. A **lapsed offer** is an offer that is no longer valid because a reasonable time to accept it has expired. An expired coupon is an example of a lapsed offer.

Acceptance

To constitute an agreement, there must be an acceptance of the offer. Legally, **acceptance** is an implied or express act that shows willingness to be bound by the terms of an offer. To be effective, both parties must understand and agree to be bound by the contract.

Acceptance can be both express or implied. Express acceptance occurs when a party states that they accept the offer. Acceptance may be implied based on the parties' conduct. For example, a retailer offers to sell a product to consumers for the price listed on the shelf. A consumer may accept that offer by handing the cashier the item and money to pay for it. The consumer does not need to say anything to complete the transaction. But the consumer must do *something* to accept. Silence, without more (such as handing

over payment), is not acceptance. This is because silence may be evidence that the consumer either does not know about the offer or has rejected it.

A common problem in the business community is knowing what constitutes acceptance and what is negotiation. If an acceptance changes, adds, or modifies terms of the offer, it is a **counter-offer** and no contract is formed. The original party may decide to accept, reject, or propose another offer as a result. Although this sounds straightforward, with today's fast-paced communications, parties may respond to part of an offer, negotiate various parts of the contract simultaneously, or agree to terms in installments. As a result, there may be confusion about what the full terms of a contract are.

Offer and acceptance form **mutual assent**, which is also called "meeting of the minds." This is the parties' intention to enter into a binding contract on the terms they agreed upon. If parties do not agree on the essential terms, then there can be no meeting of the minds to enter into a contract. This is the basis for many of the defenses to contract formation.

Consideration

Consideration is the bargained-for exchange of something of value that shows the parties intend to be bound by the contract. There are two elements to consideration:

1. Something of value
2. Is exchanged between the parties.

The "something" that is promised or delivered must be a legal detriment. A **legal detriment** is giving up a legal or property right.

Consideration may be concurrent or a promise to perform in the future. However, it cannot be "past consideration" based on something that has occurred before the formation of the current contract. In other words, an act or promise made before the current contract is not adequate consideration because it was not given in exchange for the current promise.

When bargained-for consideration is not present, a court may validate a promise based on promissory estoppel. **Promissory estoppel** is the principle that a promise made without consideration may nonetheless be enforced to prevent injustice if the promisor should have reasonably expected the promisee to rely on the promise, and the promisee actually relied on the promise to his or her detriment. Promissory estoppel is an equitable doctrine used as a substitute for consideration that allows the imposition of contractual liability to prevent unfairness.

To establish promissory estoppel, a party must show:

1. A definite promise;
2. The party making the promise should have expected that the other party would rely on the promise;
3. A reasonable person would have relied on the promise;
4. The party relied on the promise and it resulted in a substantial detriment; and
5. Basic justice and fairness require that the promise be enforced.

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