

14.2: ELEMENTS OF A CONTRACT

To be valid, a contract must generally contain all of the following elements:

- Offer
- Acceptance
- Consideration
- Legality

OFFER:

Contracts always start with an offer. An offer is an expression of a willingness to enter into a contract on certain terms. It is important to establish what is and is not an offer. Offers must be firm, not ambiguous, or vague. A person who is making the offer is called the offeror.

Invitation to Treat: Offers are different than an invitation to treat. An invitation to treat is not an offer. When you list your home for sale, you are not making an offer; you are making an offer to treat. You are inviting potential buyers to make an offer to you to buy your home. The same is true with most advertising. The stores are making an offer to treat. They are expressing their willingness to sell you something if you offer them their asking price. However, they are not bound to accept your offer. For example, you place an ad online to sell your automobile for a certain price. Someone makes an offer to buy the automobile from you at full price. Do you have to accept their offer? No. You are making an offer to treat, and you are not bound to accept their actual offer to buy your automobile.

Puffery: Advertisers often use puffery to promote their products. So, was the advertising slogan “Red Bull Gives You Wings” meant to be a true statement or puffery? In a class action lawsuit filed on Jan. 16, 2013 in the U.S. District Court of the Southern District of New York by Benjamin Careathers, Mr. Careathers claimed he had been drinking Red Bull since 2002. His lawsuit argued that Red Bull mislead consumers about the superiority of its products starting with its slogan “Red Bull gives you wings” and its claims of increased performance, concentration, and reaction speed. Red Bull eventually settled the lawsuit and emailed a statement to BevNET.com, Inc., a beverage oriented media company stating, “Red Bull settled the lawsuit to avoid the cost and distraction of litigation. However, Red Bull maintains that its marketing and labeling have always been truthful and accurate, and denies any and all wrongdoing or liability.”

(See <https://www.bevnet.com/news/2014/red-bull-to-pay-13-million-for-false-advertising-settlement/> for more information.)

Courts will determine whether a statement in advertising is false versus puffery by using the “reasonable person” standard. In other words, would a reasonable person believe the exaggerated statement in an advertisement is meant to be true? It is hard to imagine a jury would find that the Red Bull advertisement that by drinking their product one would grow wings was anything but puffery.

Counter-Offers: A counter-offer negates the original offer. It alters the original offer, and by doing, so releases the person making the original offer from any obligation. For example, A makes an offer to treat regarding the sale of A’s automobile for \$10,000.00. B offers A \$9,000.00. If A accepts this offer, B is bound to purchase the vehicle for that price. A does not have to accept B’s offer and is not bound to. However, A then makes a counter-offer to B that A will sell the vehicle for \$9,500.00. B is not bound to buy the vehicle for that price, but A is now bound to sell the vehicle to B for that price if B accepts the counter-offer.

ACCEPTANCE:

Acceptance by the offeree (the person accepting an offer) is the unconditional agreement to all the terms of the offer. There must be what is called a “meeting of the minds” between the parties of the contract. This means both parties to the contract understand what offer is being accepted. The acceptance must be absolute without any deviation, in other words, an acceptance in the “mirror image” of the offer. The acceptance must be communicated to the person making the offer. Silence does not equal acceptance.

CONSIDERATION:

Consideration is the act of each party exchanging something of value to their detriment. A sells A’s automobile to B. A is exchanging and giving up A’s automobile while B is exchanging and giving up B’s cash. Both parties must provide consideration.

Past Consideration: Voluntarily doing something for someone is not consideration. A see’s B’s lawn needs to be cut so A voluntarily does so. B comes home from work and is so pleased that B gives A \$30 for cutting the lawn. The following week A cuts B’s lawn again without B asking A to do so. A now asks B for \$30 for cutting the lawn and B refuses to do so. A claims they

have a contract since A has provided consideration by mowing B's lawn, even though it was voluntary. A is incorrect. B is not obligated to provide consideration to A. There is no contract. However, if B had asked A to mow the lawn, but did not set the price, A would probably be able to enforce the contract after mowing the lawn because B requested he do so.

Performance of an Existing Duty: If a person has a duty to do something, such as a public servant, the performance of the duty is not consideration.

Promissory Estoppel: In some instances, one party is not providing consideration but is relying on a reasonable promise made by another. A party that is induced to action based on the reasonable promise may be able to enforce the promise under the legal theory of promissory estoppel.

This is explained in the Restatement (Second) of Contracts^[1] § 90. Promise Reasonably Inducing Action Or Forbearance:

(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

(2) A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance.

For example, A works for B who has promised to provide A retirement benefits if A works for B for 25 years. After A is employed with B for 15 years, B tells A that the retirement benefits will now be half the amount originally promised. A can enforce the original promise under the theory of promissory estoppel even though A has provided no consideration. A can make the case that A was induced and acted on this promise.

LEGALITY:

The fourth required element of a valid contract is legality. The basic rule is that courts will not enforce an illegal bargain. Contracts are only enforceable when they are made with the intention that they legal, and that the parties intend to legally bind themselves to their agreement. An agreement between family members to go out to dinner with one member covering the check is legal but is not likely made with the intent to be a legally binding agreement. Just as a contract to buy illegal drugs from a drug dealer is made with all the parties knowing that what they are doing is against the law and therefore not a contract that is enforceable in court.

Lack of Mental Capacity: The capacity to enter into a contract may be compromised by mental illness or intellectual deficiency. Issues of dementia and Alzheimer's can blur the lines of competency to sign a contract. Competency to enter into a contract requires more than a transient surge of lucidity. It requires the ability to understand not only the nature and quality of the transaction, but an understanding of its significance and consequences. If a person is found to lack the mental capacity to enter into a contract, then the contract is not automatically void but it is voidable.

Minors and Contracts: Minors under the age of 18-years-old are allowed to sign contracts, but they are voidable at the minor's election. The exception to this rule is that contracts for necessities are not voidable. Necessities are general goods or services necessary for subsistence, health, comfort, or education. The burden to prove a contract is for necessities for a minor is on the plaintiff. Minors can affirm their contract made while a minor formally or by actions upon reaching the age of 18.

Contracts That Must Be In Writing: As already mentioned above, not all contracts have to be in a written format. However, some absolutely do, or they are voidable. Under the common law doctrine of the "Statute of Frauds," which has been codified in the General Obligations Law (GOB), contracts for the purchase of real property (GOB § 5-703), contracts that cannot be performed in less than 1 year, and contracts that guarantee the debt of another (co-signers) (GOB § 5-701) must all be in writing. It is important to understand that just about any form of writing is acceptable. A handwritten contract to purchase real property on a napkin is acceptable if all the elements of a contract are met. The use of email and text message may also acceptable under GOB § 5-701(4).

UNILATERAL VERSUS BILATERAL CONTRACTS: Most contracts are bilateral, meaning both parties are in agreement and the four basic elements of a contract exist. For example, B offers to buy A's automobile for a specific price and A accepts the offer and agrees to give B the automobile upon receipt of those specific funds. Both parties are agreeing to the contractual arrangement. It is bilateral. In a unilateral contract, one party is making an offer and promise if someone does something in return. There is no agreement necessarily between two individuals as there is in a bilateral contract. However, an offer is made and if another individual accepts the offer and performs, an enforceable contract exists. An example would be if A offers a reward of \$100 to the

person who finds and returns A's missing cat. If B finds and returns the cat to A, A would be bound to pay B the \$100 reward. This is a unilateral contract.

GIFT VERSUS CONTRACT:

Gifts are very similar to contracts, but they are different. Gifts do require an offer, acceptance, and delivery of the gift, but are generally not enforceable. If A promises to give B a birthday gift but fails to do so, B cannot enforce the promise. There is no consideration provided by B. However, B is also in no worse position than before the promise was made. From a legal standpoint, if a party does not follow through with the promise of a gift, the parties are in no worse position because of it, and therefore there is no cause of action.

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1. (The Restatement (Second) of the Law of Contracts is a legal treatise often cited by judges and lawyers regarding the general principles of contract common law. It is one of the most recognized and cited legal treatises in American law.) ↵

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