

## Contracts 2, Week 3 Class 1

SQ = student question

### Announcements:

- Review session Mon. Nov. 4, probably at 430-630 (but may change to 530-730). Will be recorded.
- Example 6 on LibGuides - will discuss on Thursday.

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### Quiz recap

This quiz differed from previous quizzes in focusing more on the specific cases read.

(1) Court cannot imply a term merely because it believes the parties would have agreed to it at the start of litigation (only at the time of entering into the contract). Most common error: failing to recognize that duty of good faith & fair dealing is implied in all K under UCC.

(2) Posner believes duty of good faith reduces economic inefficiency. Most common error: believing that Posner believes that the duty of good faith protects against others' immoral conduct.

(3) Illegal but enforceable K (non in pari delicto): mere knowledge of buyer's illegal plan not sufficient to make contract unenforceable. Most common error: Thinking courts could enforce a contract requiring workers not to take usual precautions with hazardous waste (note third party spillover effects).

(4) Halbman v. Lemke allows minor's misrepresentation of self as adult to be used to block infancy doctrine. Most common error: thinking that Halbman v. Lemke doesn't allow minor to demand his/her money back.

(5) Many reasons Baby M contract was illegal, but there is/was NO prohibition on paying for-profit fertility clinics.

(6) K with mentally incompetent persons are voidable only if consistent with equitable principles; however, all K with infants are voidable EVEN IF infant is mentally competent. Most common error: Thinking contracts with infants are void ab initio, rather than merely voidable. (Note: infants can still enforce a contract; it just can't be enforced against them.)

SQ: What is distinction between void, voidable, avoid, avoidable? A: Void=avoid, voidable=avoidable. A void contract is never enforceable; a voidable contract can be avoided at option of a specific party.

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Wil-Fred v. MSD (recap)

- K performance is excused in IL if:
  - (1) mistake is material
    - here, testimony to materiality is uncontradicted
  - (2) mistake occurs despite reasonable care
    - here, evidence suggests reasonable care
  - (3) enforcement would have grave consequences & would therefore be unconscionable
    - here, Ciaglo would go bankrupt. (My Q: if this was only problematic outcome, would K be enforceable since no impact on Wil-Fred?)
    - Telman: "I don't like that fact that the court uses the word 'unconscionable' in this context."
  - (4) AND there will be no significant harm to other party
    - here, MSD loses \$200k, so probably sees things otherwise, but ct. sees this as merely MSD's windfall from WF's error.

Contributing factor: WF tried to back out before the bid was accepted. Offer was irrevocable (i.e. firm), but this still creates some degree of fault for MSD.

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IL law vs. R2d:

IL requires:

- materiality
- reasonable care
- grave consequences to mistaken party
- no real harm to other parties

R2d 153 requires:

- mistake as to a \*basic\* assumption
- material effect
- grave consequences that make K unconscionable OR other reason the other party knew/should have known of mistake OR other party caused mistake
- Note: no due care requirement in R2d (see sec. 157)

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Syester v. Banta

- What is the basis of P's claim? A: Fraud.
- Was there enough evidence to support a finding of fraud?
- Astaire & Murray studios -- lots of similar cases in states w/ many retirees; states have gotten very aggressive with customer fraud enforcement.

Elements of fraud:

- material misrepresentation (R2d 162)
  - material: likely to induce consent, i.e. probably no consent without it
- scienter (knowledge of falsity)
- intent to deceive & defraud
- belief & reliance on misrepresentation
- damage resulting

Q: what is defendant's defense? "Mere puffery." But not just puffery -- they have a procedure for misleading their customers.

Q: What would be an example of something that would have been mere puffery?

Example: "we'll make you a great dancer" (not a professional.).

Q: Was Syester harmed? She was a lonely old lady, got to go to a dance studio & have a good time.

Problem with this: 3 lifetime memberships.

Q: What kind of damages is she getting? A: by voiding K, effectively getting reliance damages -- returning to state as if promise had never been made. (But here, only to extent that she didn't benefit.)

Exemplary = punitive --> tort claim

Moral: Can't argue for punitive damages for breach of contract, but can add a tort fraud claim with punitive damages if some evidence supports it; this increases settlement value.

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Hill v. Jones

Q: How does this case's misrepresentation differ from Syester? A: Here, not lying but mere omission (nondisclosure).

- Tough question: what kind of information do you have to disclose? The line is "materiality": something that would make a difference in whether the other party consents. But not all material facts must be disclosed: see R2d 161.

R2d 161: Material facts MUST be disclosed IF:

- disclosure is necessary to prevent previous statement from being fraudulent
- disclosure is necessary to correct mistaken basic assumption, where failure to disclose would be bad faith
- disclosure is necessary to correct buyer's mistaken assumption as to a writing
- transaction is based on relationship of trust & confidence

SQ: How to reconcile this with good faith & fair dealing (MSA case)?

Here, no GFFD, but do have some duty to disclose; states now have list of what \*must\* be disclosed.

1st issue: PER: we have a written K with integration clause. But "PE is always admissible to show fraud" (in some states).

- Was termite inspector at fault? Possibly, but liability limited.
- Were boxes & plants put in place intentionally? Q for jury.
- Are termites material? Q for jury.
- Was ripple due to termites? Probably not.
- Can the \*buyers\* be charged with knowledge because Mr. Hill was familiar with termite damage? Q for jury.

Issue may be whether the defect was patent (discoverable by Ps) or latent (not discoverable).

Maybe Ds honestly believed that termite damage had been dealt with, no longer an issue -- would there still be a duty? (Depends on state).

What was final outcome? Presumably settled.

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## DURESS

2 kinds: physical and economic

R2d 174: K through threat of physical force is always void.

R2d 175(1): K through economic duress is voidable

- Economic duress consists of "improper threat", e.g.:
  - threat of K breach or tort or breach of duty of GFFD
  - but more generally, can be anything that results in exchange on unfair terms
- very broad, but COULD get out of almost any case on duress grounds; Posner in Selmer helps distinguish actionable cases.

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## Selmer v. Blakeslee-Midwest

SQ: Why wouldn't this K have to be in writing? A: Over \$500 but not a goods K, not under MYLEGS.

"People don't change": will try to keep relationship comfortable & casual, won't put things in writing despite legal risk.

- Is the \$67k offer the kind we want to discourage on policy grounds, because it's a threat?

Can't invalidate on K settlements on this basis: would make a mess of everything.

People in Selmer's position \*need\* to be able to settle; otherwise they'll just go bankrupt right away.

Q: What did Posner think of \_Alaska Packers\_ decision? Isn't AP similar to this case? A: This case distinguished in that Selmer's economic problems were not caused by Blakeslee. (NB: Posner's view not universally accepted, may not be good rule since bankruptcy generally has many causes.)

Posner's 4 factors:

- (1) other party's ability to pay (GP could pay in Capps, Blakeslee could pay here)
- (2) % paid in settlement (50% reasonable, 4% prob. not)
- (3) whether threatening party was the cause of the duress
- (4) whether other remedies are available (here, Selmer could have walked away)