

# Checklist

Thursday, December 07, 2006

12:18 PM

## CHECKLIST

### A. Has a Valid Contract Been Formed?

- To establish an enforceable contract, there must be a showing of (i) **consideration** and (ii) **mutual assent**, usually manifested by an **offer and acceptance (RST 17)**
- **Was There Legally Sufficient Consideration?**
  - Look for bargain or other consideration
  - **Bargain**
    - Did the parties make a bargain? **(RST 71)**
    - **Do parties view what they gave as the price of what they got?**
      - **Equal Values Not Required (RST 79)**
      - Is the promised consideration more than **nominal?**
        - **Form of bargain, but lacks substance**
        - **RST rejects nominal consideration except in options and guaranties**
    - If the agreement was based on a promise to forbear from asserting a legal right, did the promisor have an **honest or reasonable belief** in the validity of his claim?
    - Did the agreement involve an **illusory promise? (RST 77)**
      - If the promisor has reserved some right, option, or alternative limiting his obligation, consider whether this right is unqualified, if so, the promise may be illusory...**(any-time termination agreements, "if I want to...")**
    - Did the agreement involve a promise merely to perform some act that the promisor is **already obliged** to do **(preexisting legal duty rule)? (RST 73, 89)**
      - **Public Duty**
        - Performing official duty is not consideration
      - **Contractual Duty**
        - **Performance of Preexisting Contract for Increased Payment**
          - Classical=Unenforceable

- Modern Trend=Enforceability
      - Different Performance
      - Modification based on Unanticipated Circumstances
      - Sale of Goods Modification
    - **Full Performance**
      - Once contract is fully performed, legal duty rule has no application
  - **Other Types of Consideration**
    - If the parties did not make a bargain, was there some **other factor that made their agreement enforceable?**
      - Was there **foreseeable reliance** on the promise?
        - Relied-upon donative promises
        - **Restatement Sec 90**
      - Was there an enforceable promise to pay based on **moral or past consideration**
        - Promise to pay **debt barred by bankruptcy**
        - Promise to pay **debt barred by statute of limitations**
        - Promise to pay a **voidable obligation**
        - **Modern Rule (Enforceability)**
          - **Restatement 86**
            - **Moral Obligation based on a previously conferred material benefit is enforceable**
  - **Was There an Effective Offer (RST 24)**
    - **Intent to Enter into a Bargain**
      - Does it appear that the offeror intended to create **present contractual rights and duties**, or was he merely negotiating or inviting the other party to make an offer?
        - **If expression=offer, the addressee can conclude a bargain merely by giving assent in appropriate manner**
        - **Offer vs. Invitation to Deal**
          - **Preliminary Negotiations (RST 26)**
          - **Advertisements**

- Generally invitations to deal, **NOT OFFERS**
  - **EXCEPTION**
    - **If ad is clear, explicit, and leaves nothing open for negotiation, then ad=offer**
  - **Putting Contracts Out for Bid**
    - Generally NOT OFFERS
    - Bids submitted in response=OFFERS
- **Definite Terms**
  - Does the proposal cover either expressly or impliedly, certain **essential factors? INTENT DETERMINATIVE**
    - **Subject matter**
    - **Price**
    - **Quantity**
- **Was There an Effective Acceptance**
  - **Intent and Manner**
    - Did the offeree **apparently intend by her words or conduct** in response to the offer, **to create a contractual relationship?**
    - Did the offeree manifest her assent to the offeror's proposal in the **manner required?**
      - Does the offer **specify** manner required?
        - **Doing the required act? (Unilateral)**
          - **RST 54 Notification of Performance**
          - **Giving of a promise? (Bilateral)**
        - Is offer **ambiguous** as to whether act or promise?
          - **RST 30**
            - **Any reasonable manner and medium**
          - **RST 32**
            - **Either promise to perform or perform**
    - Does the offeree's **remaining silent** constitute acceptance?
      - Silence and inaction operate as acceptance **in these cases only: (RST 69)**
        - **Offeree takes benefit of services offered w/reasonable opportunity to reject them**
        - **Offeror has stated/given offeree reason to understand that assent may be manifested by silence/inaction AND in**

**remaining silent, the offeree intends to accept**

- **Because of previous dealings OR otherwise, its reasonable that offeree should notify offeror if he does not intend to accept**

▪ **Timeliness**

- Did the acceptance become effective **prior to the termination of the offer?**
  - **Termination may occur by:**
    - **Revocation of Offer**
      - Direct Revocation (**RST 42**)
      - Indirect Revocation (**RST 43**)
      - Firm Offer?
        - Option?
        - Reliance? (**RST 87**)
      - Unilateral Contract?
        - Performance Begun? (**RST 45**)
    - **Lapse of Time**
      - If not stated, then **reasonable time (RST 41)**
        - **Mailbox Rule (RST 63)**
    - **Rejection of Offer (RST 38)**
    - **Counteroffer**
    - **Qualified Acceptance**

▪ **Unconditional**

- Has the offeree given **unqualified assent** to the proposal?
- If not, there may be no acceptance.
  - **Counteroffer (RST 39)**
    - Proposes substitute bargain?
  - **Qualified Acceptance (RST 59)**
    - Conditional on additional terms?
      - No ACCEPTANCE
  - **Exceptions (ALL VALID ACCEPTANCES)**
    - Acceptance w/Request
    - Grumbling Acceptance
    - Implied Terms
    - Sale of Goods

**B. Are There any Reasons Not To Enforce the Contract?**

• **Indefiniteness**

▪ **Generally**

- Is the apparent bargain **too indefinite?**
  - **Terms incomplete or uncertain?**
  - **Terms provide a basis for determining breach/giving appropriate remedy? (RST 33)**

- Has indefinite agreement been **partly performed**?
      - Might be enforced (**RST 34**)
    - **Agreements to Agree**
      - Have parties **explicitly reserved essential term** to be determined in the **future by agreement**?
        - IF term is **material=unenforceable**
        - **Trend towards enforceability (RST 33)**
    - **Is it a Contract for Sale of Goods?**
      - IF yes, **UCC Provisions will fill gaps (UCC 2-204)**
      - **UCC Gap-Fillers are Default Rules**
        - Price (**2-305**)
        - Place of Delivery (**2-308**)
        - Time for Shipment/Delivery (**2-309**)
        - Duration of Contract (**2-309**)
        - Payment (**2-310**)
      - **CAVEAT**
        - **DID PARTIES INTEND TO MAKE A CONTRACT?**
  - **Mistake (RST 152)**
    - Mistake to the **FACTS?**
    - Mistake is to a **Basic Assumption?**
    - Mistake has **Material Effect?**
    - Does the adversely affected party **bear the risk of mistake? (RST 154)**
    - **NOT MISTAKES**
      - **Error in judgment**
      - **Incorrect prediction**
      - **Misunderstanding** between parties
        - Handled by **RST 20 or 201**
  - **Misrepresentation/Nondisclosure**
    - Specific cases only where nondisclosure is a problem
    - **SEE RST 161**
  - **Good Faith**
    - Has party violated his **duty to perform in good faith and according to fair dealing (RST 205, UCC 1-203)**
  - **Unconscionability**
    - An **absence of meaningful choice** for one party while the contract terms are **unreasonably favorable to the other party? (RST 208, UCC 2-302)**
    - **Substantive Unconscionability**
      - Terms SO imbalanced
    - **Procedural Unconscionability**
      - Unfair Bargaining Process
- C. What Remedies Are Available to the Innocent Party?**
- Which remedy will best effectuate the innocent party's **reasonable expectations** under the contract?
    - **Damages**
      - **MOST COMMON REMEDY**

- **Expectation Damages**
  - Put in position had the **contract been performed**
  - Breach for Services (Provider)
    - Cost of completion v Diminution of Value **RST 348**
  - Breach for Services (Consumer)
    - Contract price minus cost save, offset by payments received **RST 347**
  - Breach for Goods (Seller)
    - Cover **UCC 2-712**
      - Difference between cost of cover/contract price plus incidental/consequential, less expenses save
    - Damages **UCC 2-713**
      - Difference between market price at time of breach/contract price plus incidental/consequential, less expenses saved
      - IF COVERED, NO DAMAGES
    - Breach of Warranty **UCC 2-714**
      - Difference between value of goods accepted and value they would have had
  - Breach for Goods (Buyer)
    - **UCC 2-703**
    - Resell and recover damages **UCC 2-706**
      - Difference between resale price/contract price plus incidental/consequential, less expense saved
      - MUST ACT IN GOOD FAITH
    - Difference between market price and unpaid contract price **UCC 2-708**
      - **LOST VOLUME SELLER**
        - **THEN PROFITS**
      - Action for the Price **UCC 2-709**
- **Limitations on Expectation Damages**
  - Foreseeability **RST 351 (HADLEY)**
  - Certainty **RST 352**
    - New business?
  - Mitigation **RST 350**
- **Reliance RST 90**
  - **Was something of value wasted?**
  - Put in the position had the **contract not been made**
- **Restitution**

- MUST BE MATERIAL BREACH OF CONTRACT
- **Restore any benefit conferred** on the other party
  - **MORE APPROPRIATE THAN EXPECTATION IF:**
    - CONTRACT WOULD BE A LOSER
    - CONTRACT IS UNENFORCEABLE
- **Liquidated Damages RST 356**
  - What is the effect of any **agreed damages?**
  - Reasonable in the light of **anticipated OR actual loss AND difficulties of proof of loss?**
  - Unreasonably large liquidated damages=penalty
- **Specific Performance RST 359**
  - Is the legal remedy, damages, **adequate enough?**
  - **Factors affecting specific performance RST 360**
    - Proving damages difficult?
    - Difficulty of procuring substitute?
    - Likelihood that damages award could be collected?
  - P has burden to show damages not adequate