

LEGAL BRIEF:

Know the Basic Contractual Obligations to Protect Yourself and your Practice

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As chiropractors, from a contractual standpoint, we are joining HMO panels and signing a variety of contracts to be included in those panels. In addition, we sign contracts for associates, leases, and employees, **etc.**

Contract law is complex and varies from state to state, but there are common aspects. One of the most important issues in contracts is the term *consideration*, which is used to mean an enforceable bargain or it refers to any part of a bargain that makes a promise enforceable. The question in contract law usually involves a broken promise that was legally enforceable. When a promise was not given as part of a bargain, it is usually unenforceable. There are four elements that may make a promise enforceable and include:

- 1) Reliance: did the **promisee** rely on the promise to a detriment?
- 2) Past consideration: was the **promisee** given in recognition of a benefit given previously by the promisee?
- 3) Waiver: was a waiver of a nonmaterial condition under a bargain?
- 4) Form: was the promise in a legal form that was binding to the parties?

All Things Considered

Consideration in contract law is required to make a promise or contract enforceable. Consideration is equivalent to a bargain, but bargains have limits and not all are enforceable. Most contracts treat consideration as an element that makes a promise or contract enforceable. Consideration deals with enforceability of a bargain or a promise and is essential in contract law.

Bargains include the following:

- Unrelied upon donative: an example would be a gift and unenforceable due to a lack of consideration;
- Relied upon donative: relied upon by promisee; enforceable and induces reliance by what the person promised the promisee;
- Bargain promise: an exchange, in which each party relies on the promise and performance made by each. This is enforceable and constitutes consideration.

Offered and Accepted

In order for a contract to be formed there must be mutual **assent**. Offer is a willingness by each party to enter into a bargain, made in a way that a reasonable person would believe that a bargain could start and conclude, by word or by an act. Two elements that an offer must meet are: 1) intent—to enter into a bargain or promise and 2) certainty: terms of the bargain, promise, or contract.

Intent is an offer or invitation to talk about a bargain, promise, or contract rather than an actual offer, such as preliminary negotiations. Certainty or definiteness to an offer includes subject matter of the bargain, price, and quantity. These items must be clear by both parties before an offer is made.

If there is an offer, and it has met the criteria **for a contract, then the contract is enforceable**. The next question is whether the offer has been accepted. Acceptance deals with the kind of acceptance, a promise, or an act—this is also known as a bilateral contract. An offer, as a general rule requires acceptance by a promise or an act by full performance prior to the termination of the offer by the person offering the promise. It can also be implied from the person's conduct making the promise or act **which may** constitute a promissory acceptance.

As a general rule, silence on an offer does not constitute acceptance. However silence will constitute acceptance where a party, by prior words or conduct, gives the other party reason to think silence as an acceptance, subjectively intending to accept. Silence may also result in the formation of a contract where the offeree has solicited the offerer and drafted its terms; and the offer, as drafted by the offeree, is worded that a reasonable person in the offeror's position would believe that the offer was deemed accepted. Unless the offeree notifies the offerer that the

offer is rejected, there may be acceptance. A lack of prompt rejection may **also** constitute acceptance.

It is important in contract law to determine when acceptance, revocation, or rejection takes effect. Spell it out before taking a contract for review. Set a time as to how long it will take you to review or reject it. In general, an acceptance is effective upon receipt. Both revocation and rejection in general are effective only upon receipt.

The Best Defense

When a contract has been formed, issues of defense **develop** when there is a problem **surrounding** the enforceability and performance of the contract and include the following:

- Mistake: misunderstanding, transcription error in the contract, and mutual mistakes;
- Indefiniteness: terms of the contract must be defined **by** both parties;
- Fraud and misrepresentation;
- Nondisclosure;
- Duress;
- Undue influence and unfairness in bargaining process;
- Illegal contract;
- Lack of capacity of either party to enter into a contract (eg. minors); and
- Perjury and false contracts.

In the event a contract has been formed and has consideration, there is an offer and acceptance and there are no defenses to the formation, then the issue arises whether each party has performed under the contract in good faith.

Each party to a contract has an obligation to perform in good faith and deal fairly in its performance and enforcement. Good faith performance and enforcement of a contract deals with faithfulness to an agreed common purpose and consistency with the expectation of each party to honor the contract. Judicial systems recognize bad faith as: evasion of the bargain, lack of diligence, willful lack of performance, abuse of power to the terms of the contract, failure to cooperate in the performance of the contract.

Expressed condition refers to an explicit contractual provision in the contract that a party to the contract does have a duty to perform, unless some events occur or fail to occur, the obligation of a party to perform the duties under the contract is suspended or terminated.

A promise is to perform some designated act. An express condition is a provision in a contract whose fulfillment creates or extinguishes a duty to perform under the contract. This is something that has to be in writing in the contract. For example, when you place a contract on a house with the provision of you selling your house first. If you do not, the contract would be extinguished. Another would be an unexcused "failure to perform a promise," which is always a breach of contract and gives rise to liability. If one party breaches a contract, it does not excuse the other party to perform under the contract. Expressed conditions are explicit contractual provisions in a contract.

Implied or constructive conditions mean that there is a duty to perform under a contract and is conditional upon occurrence of some state of events that take place through the contract, but does not explicitly state the events in the contract.

Once More Unto the Breach

Actual breach of a contract, at the time performance is due, always will have a cause of action for damages. However, this does not excuse the other party in his or her performance or duties under the contract. Generally a breach can be material, which is more severe and includes performance issues, willful and negligent under the contract. Innocent mistakes are usually minor breaches.

Material breaches give rise to an immediate cause of action for breach of the entire contract and will excuse further performance of the innocent party. Minor breaches will also give rise to immediate cause of action for damages caused by the breach, but does not give rise of action for the entire contract. A minor breach does not excuse the nonbreaching party of further performance under the contract.

There are three basic damages of breach of a contract:

1) Expectation damages: based on the contract price and is a usual means of compensation to the victim of a breached bargain.

2) Reliance damages: based on the nonbreaching party's cost to put the nonbreaching party in the position they would have been as though the promise or contract had not been made.

3) Restitution damages: based on reasonable value of the benefit conferred by the promisee on the promisor. This type of damage is the most commonly used. In addition, there can also be general, special, liquidation, and punitive damages and emotional distress associated with breached contracts.

If an employer discharges an employee in breach of an employment contract, or otherwise commits a material breach, the employee is entitled to recover the remainder of his or her wages minus the wages the employee actually received. If the employee quits in breach of an employment contract or commits a material breach, the employer is entitled to recover the difference between the employee's wages and the wages the employer must pay to a replacement employee. For example: Doctor A contracts to work for Doctor B for a period of 1 year at \$2000 per month, but Doctor A quits after 1 month to take a better job. Doctor B has to pay \$2,500.00 per month for a qualified replacement for Doctor A. Doctor B's damage is \$500.00 per month for 11 months or \$5,500.00.

Due to the great variation in contract law from state to state, the general information in this article may not be specific to your state contract law. Check your state contract law and as with any contract, know what it says.