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Who's Afraid of the Big, Bad Contract?

If you aren't, maybe you should be.

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Few people appreciate just how easy it is to make a legally-binding contract. You may imagine making a contract "legal" involves a series of formal steps that, among other things, will warn you that you are about to make a serious commitment. Perhaps you believe a contract must be written and signed by the parties before it's enforceable. Not so!

Many contracts arise simply when you say you'll do something to someone else. You don't even need to receive a benefit from the agreement for it to be binding on you. In other words, you may be bound to perform simply by saying you'll give someone else a gift.

A contract is "an agreement between two or more persons which creates an obligation to do or not to do a particular thing." Agreements may be enforceable whether they are oral or in writing.

Some examples of oral agreements you may not think of as "contracts" include—

- A \$25 pledge to your local public television station.
- "Sure, you can earn extra money by mowing my lawn."
- "I will sell you my car when you graduate from high school."

If the other party relies on your statement or fulfills their end of the deal by cutting your grass or even by doing something that primarily benefits them, you are bound to perform your end of the deal as well.

Terms of contracts may be added, changed or voided by law in the interests of public policy, but don't count on that to save you from keeping your promises. Almost always, contracts are the law between the parties. That means the court will enforce the agreement's terms on behalf of the complaining party in a breach action just as though those terms were the provisions of a statute.

As mentioned, contracts don't need to be written to be binding. You don't even need to intend to make a "legal" contract as long as you meant to do a thing at the time you said so. The fact that you later change your mind doesn't undo the deal unless you notify the other party before he performs or he agrees to let you out of your promise.

The problem with an oral agreement is not only proving its exact terms, but more fundamentally, proving the agreement even exists. While the process of enforcing performance of an oral agreement is not easy (or inexpensive), it is not impossible either.

Imagine, for example, you orally agreed with Able to do something and Able has breached. If Able denies making the deal, you may have to prove what he said and that a *reasonable person* would have understood Able was committing to do something. Once the court is satisfied a contract exists, the next step is to prove enough of its essential terms to

figure out what was actually promised. “Essential terms” include price, time of performance and the nature of what was to be done by the respective parties.

Proof in oral agreement disputes may involve bringing witnesses who know about the deal or who are aware of any partial performance by the parties. Notes, recordings, receipts, etc., are also useful. Once the essential terms are proved, any other needed terms may be implied from the history of dealing between you and Able or by the way such deals are handled in the industry. Lastly, you must prove that Able party failed to perform as promised.

Written agreements make for much simpler court cases if one should ever need to enforce them. With a written contract, the court interprets only the terms that appear within the “four corners” of the document. No other evidence is admitted to prove the meaning of the contract unless a term is vague or ambiguous.

If the court finds ambiguity or vagueness, it may allow evidence from either side to prove what the parties really intended unless the ambiguity rule is applied. The “ambiguity rule” in contract interpretation says an agreement is construed against the drafter. The person who wrote the agreement is assumed to have written all terms exactly as he intended. If any terms are deemed ambiguous, the drafter may not present evidence of the “real” meaning of the term, but the other party may be allowed to prove what *he* thought the term meant.

Because courts use the “four corners” rule to interpret written contracts, you can also see why it is so important ensure everything you discuss in negotiation actually ends up in the document. All talk that led up to signing the contract may become irrelevant once the contract is finalized.

The point, gentle reader, is to be careful when you make promises or let someone believe you are agreeing to do something! First, understand that even your informal promises may become legally binding. Second, when you sign a written agreement, the terms of that document govern your relationship with the other party until the contract is fulfilled.

But, you may ask, “what if I didn’t read or understand the contract?” “What if I didn’t know I was legally obliged to do what I said” or was “pressured into the deal?” Well, there are some claims courts consider “real” defenses to the enforcement of contracts and other claims courts tend to ignore.

Whether you read your contracts or not, courts *presume* you both *read and understood* every document you sign. Reliance on incompetent counsel or the other party’s interpretation of a provision is not a defense either. You are bound to perform the terms as written, even if your lawyer or Able misled you.

Therefore, do not rely on what the other party tells you if you don’t understand a provision of the contract. Even well-intentioned representatives of Able may have no idea what the contract really says. That agent knows only what they’ve been trained to tell you and may fake an answer rather than admit they don’t know.

As noted above, you don’t need to know your promise would be legally-binding for it to be enforceable at law. An enforceable contract only requires that the parties intended to do what they said at the time they said it.

Duress is another misunderstood “defense.” It is true a contract is voidable if it was signed under duress. “Voidable” means a court will consider a claim of duress as a defense to breach, but the contract is not automatically void. If you claim you signed under duress, you have the burden of proving it. If you prove it, all terms of the contract are voided.

Be clear, however, “duress” is not a defense to a bank loan when the bank would have justifiably foreclosed on your house if you refused to refinance at a higher interest rate.

It means something more like the bank loan officer was holding a gun to your kid's head to compel you to sign the new loan agreement.

In most jurisdictions, being drunk or high when you sign an agreement is never a defense in a contract case. Legal insanity or mental incapacity may be a defense, however; especially if one party knew the other party wasn't capable of understanding what he was doing.

Other reasons a court will not enforce a contract, include "illegality." A court will never rule on the rights of parties to an agreement with the express goal of doing something illegal. In other words, a prostitute whose John refused to pay has no recourse in court for breach of contract. Courts will likewise refuse to enforce contracts to engage in illegal gambling, sales of stolen property or contraband, and murder, among other things.

Most contracts involving real estate are also unenforceable unless they are in writing. Someone orally agreeing to buy, sell, or lease real property may walk away from the deal at any time even if you relied on his promise and bought a new house, for example.

Contracting with minors is also tricky. Courts are protective of people who contract under the age of eighteen. While a minor may enforce an agreement against an adult, the same contract cannot necessarily be enforced by an adult against a minor. In most jurisdictions, however, a contract with a minor *may be enforced* by an adult if the contract was for "necessaries" such as food or medical care.

Given all we have discussed, you may agree that casually promising to do things isn't a great idea. Maybe you will even start reading those long, boring written contracts people are always pushing at you. But as you wade through the fine print, what should you look for?

Well, some things you should include are:

- who the contracting parties are and what each party's physical address is;
- when and where each party must perform their part of the deal and what must be done;
- whether either party must give the other a opportunity to "cure" any breach before pursuing legal action;
- where any lawsuits will take place and which state's laws will be used to interpret the contract in the event of a disagreement;
- whether you must go through arbitration or mediation before suing and who pays court or alternative dispute resolution costs and attorney's fees;
- whether the contract can be assigned to a third party and what kind of notice must be given so the remaining party can avoid accidentally defaulting;
- that any blanks on a form contract are completed or filled-in *before* you sign (even if you must draw a line or a "squiggle" through the blank);
- that *everything* you discussed with the other person is written into the agreement *and* that nothing extra has been added;
- that you sign in the proper form if you are contracting on behalf of someone else or a company; and
- that the person you are dealing with has authority to bind the company or person they represent.

If you insist on a change to the agreement, simply handwriting in or crossing out an item on the form may not have any legal effect. The person who has the authority to *amend* the agreement may be different than one with authority to *sign* it. If the agent purporting to alter the contract is not authorized to do so, the alteration may be ignored. Once you are certain the person you are dealing with has authority to modify, be sure both of you initial

any changes.

Finally, when should you have your lawyer review a contract? Factors to consider include the value of the contract, your experience in signing contracts of that type, how clearly written the contract is and whether you understand the *implications* of the agreement.

What are “implications” of a contract? Those are results of the agreement which aren’t necessarily included as terms. Implications may include tax consequences, changes in the agreement upon the occurrence of an external trigger event, or the inability to sell the thing you are buying.

You should always do your homework when preparing to enter into any agreement and give yourself time and space to consider what you are promising after the terms are finalized. Get a review copy of the final version of written contracts to read over in your own space or to bring to your lawyer. Immediately before you sign, be sure to compare the copy you reviewed with the copy you are preparing to endorse.

Beware of dealing with anyone who “needs you to sign right away” or who “can’t let the contract leave the office.” I’m not saying you should drag out or overcomplicate a simple agreement, but taking your time before you sign an important or valuable contract may help you avoid later regret.

Once you finalize your agreement, for goodness sake, immediately get a duplicate of what both parties signed! If a question about the contract “comes to you” later, you will appreciate having a file copy to look at right away.

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