NOTE ON THE FIRST TWO WEEKS OF THE SECOND SEMESTER CONTRACTS COURSE

First Semester of the Contracts Course (Contracts I)

In the first semester, we focused on two things: contract formation and defenses to contract formation.

As we discovered, contract formation is a process by which rights and duties are voluntarily created by parties who see an advantage in one of the parties exchanging a promise or a performance to get from the other party something that the first party him or herself does not have or cannot obtain, or is unable to do efficiently. We also learned that the legal system will enforce the promises – which are full legal rights and duties – once it is satisfied that the parties intended to be bound voluntarily in the contractual relationship. The benchmarks we used to determine whether the parties really, really, really intended to be bound were offer, acceptance [together often referred to as "mutual assent"] and consideration, with a healthy dollop of promissory estoppel. If all are present, we could conclude that the Contract was valid. See Figure 1.

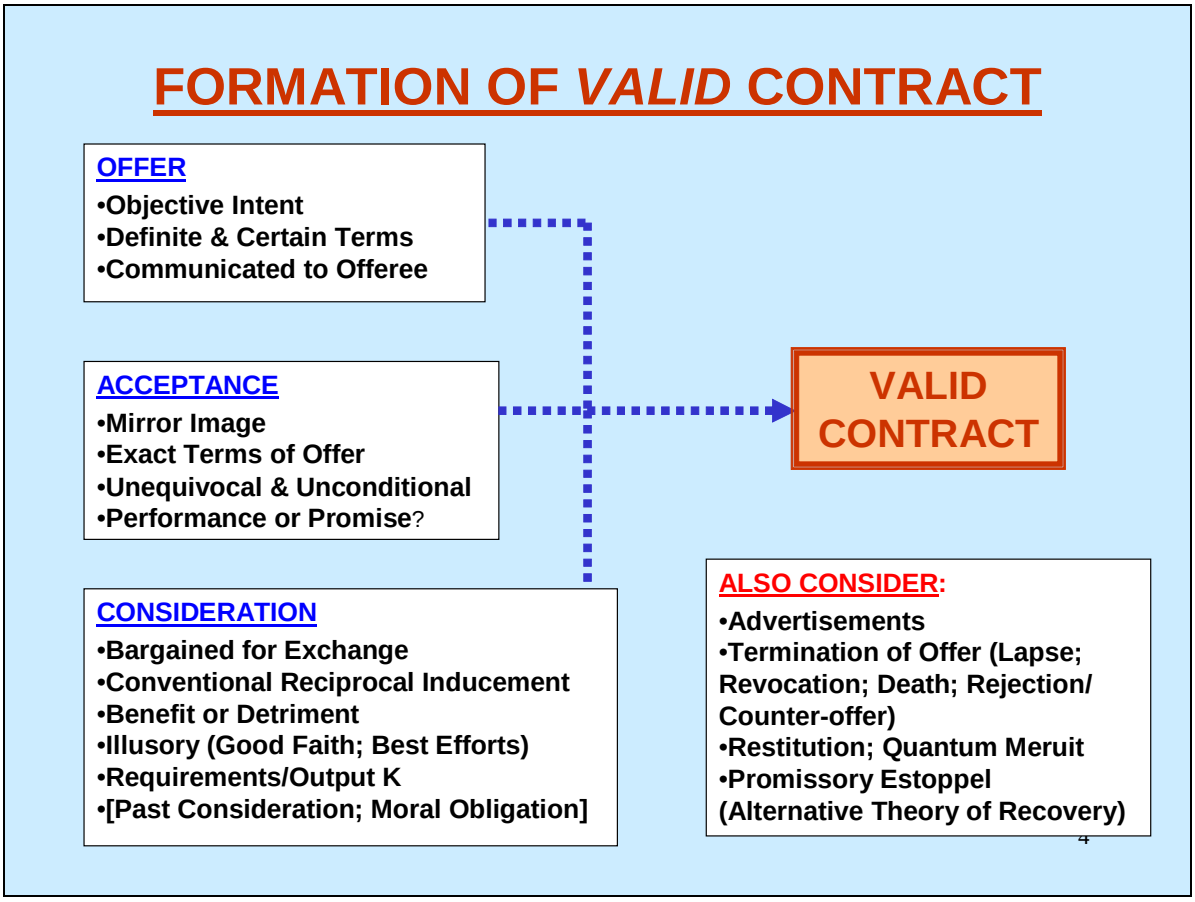

Figure 1. Formation of a Valid Contract

Defenses to contract formation, on the other hand, function to render an otherwise valid contract (i.e., one that on its face appears to satisfy all of the aforementioned benchmarks) unenforceable. As we discussed, there may be issues of status (i.e., capacity of the parties to contract, such as minority or mental capacity); the parties' behavior during formation (e.g., concealment, misrepresentation, fraud, duress), and adequacy of consideration (e.g., *McKinnon v. Benedict*, which discusses the "fairness" of the bargain). Further, there are also defenses that courts have create to counter contracts whose formation or substance offend public policy, such as unconscionability and

illegality. Most of the foregoing defenses depend upon a finding that, because of (i) the conduct engaged in during formation, (ii) the status of the person seeking relief, and/or (iii) the relative bargaining strengths of the parties, the contract cannot be said to have been entered into voluntarily. Finally, there is the Statute of Frauds, which renders a contract unenforceable strictly on form – failure to have reduced the agreement to a writing. In each instance, even though on its face the contract appears valid, the court (legal system) will not enforce it. See Figure 2.

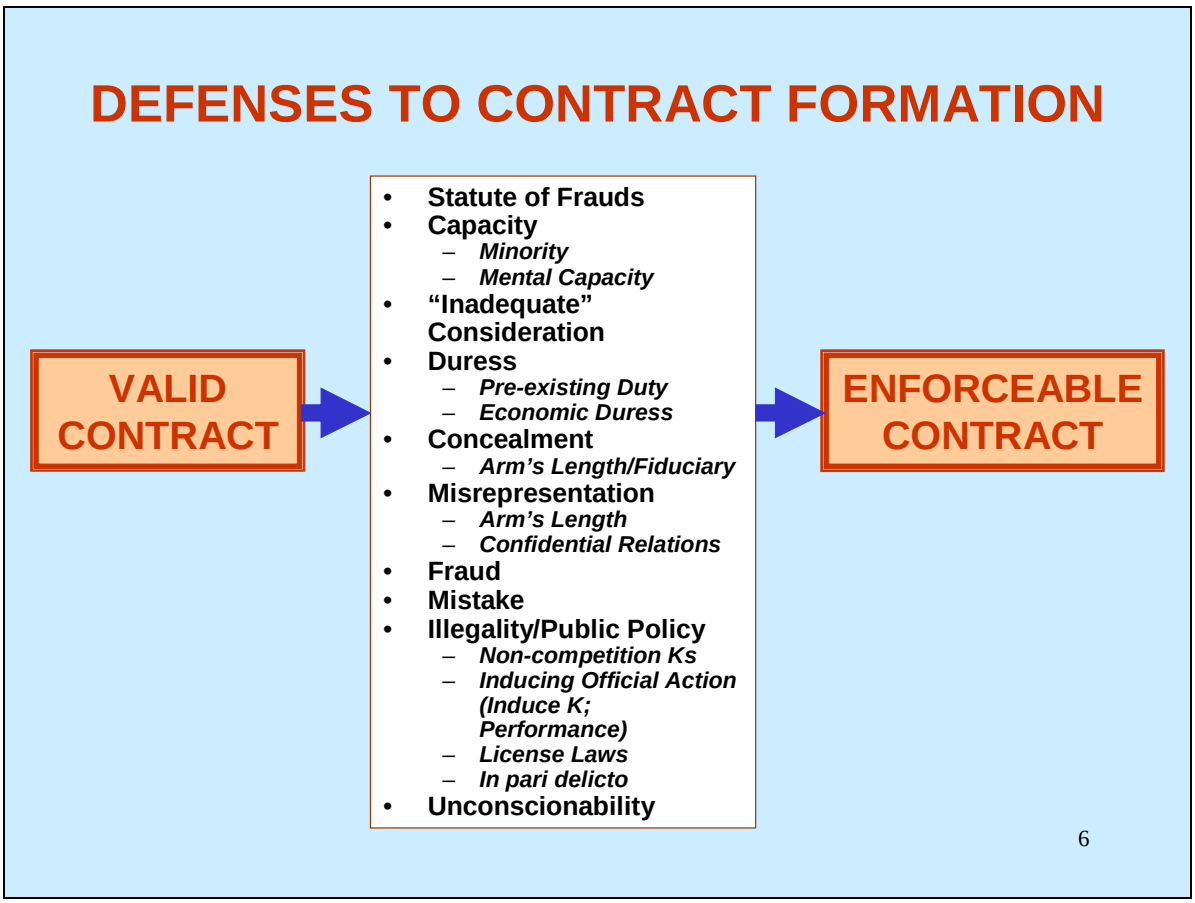

Figure 2. Defenses to Contract Formation

Assumption in First Half of First Semester: Breach. Throughout the first semester, we also assumed that there was a breach. Put another way, we assumed that the conduct of one of the parties (e.g., an uncle refusing to pay the $5,000 promised if his nephew refrained from drinking, smoking, etc., until the age of 21; an estate's trustee refusing to give a niece title in the farm; an owner refusing to sell Bradley Lot, etc.) constituted a breach of his or her promise – IF THEY WERE UNDER AN ENFORCEABLE DUTY TO DELIVER ON THE PROMISE THAT HAD BEEN MADE. Because we assumed a breach, in the first half of fall semester we needed to address only whether a contract had been formed because, if a contract had been formed, it created the legal duty that could be breached. The specific issue might have been whether an offer had been made, whether an acceptance of the terms of the offer had been made, or whether the party seeking to enforce the promise had provided consideration, but the ultimate issue was whether a contract had been formed. If we concluded that a contract had been formed then we had to conclude that the person had a duty and, because we assumed the alleged breaching party's conduct was a breach of duty, we could conclude that that person was liable to the injured party. Conversely, if we concluded that no contract had been formed, then the alleged breaching party had no duty that could have been breached, so the person would not be liable to the injured party.

Assumption in Second Half of First Semester: Breach & Valid Contract. We applied a similar analysis in the second half of the first semester, except then we assumed not only that the allegedly breaching party's conduct would be a breach if there were a valid contract, but also that the contract was valid (i.e., there was mutual assent and consideration): Thus, we assumed there was contract formation. The only issue that remained, then, was whether the court should enforce the contract. If one of the defenses to contract formation was applicable then, notwithstanding that the contract was (at least on its face) valid, its validity was negated by the defense and it would not be enforced.

Second Semester of the Contracts Course (Contracts II)

Assumption for First Half of Second Semester: Valid and Enforceable Contract. In the second semester, we will no longer assume that the alleged breaching party's conduct constitutes a breach. Rather, we will now assume first, that the contract is valid (i.e., a contractual relationship has been formed) and second, that it is enforceable (i.e., there are no defenses to contract formation). Therefore, we are assuming that the parties have voluntarily entered into a contract under which both have enforceable promises, i.e., owe duties to one another (recall that a contract is a promise or set of promises that the legal system will enforce). What we will spend the first half of the semester addressing is **whether a breach has been committed**, i.e., whether the alleged breaching party's conduct/performance under the contract, which imposes upon that party a duty/promise enforceable by the legal system, rises to the level where it can be considered a "breach" of a contract. If yes, then the usual result is that the allegedly injured party's duties are discharged (i.e., if the injured party has not yet performed, his or her promised duty to perform is no longer enforceable) and the injured party will be entitled to damages to put him or herself in the same position as he or she would have been had the contract been performed as promised by the breaching party (or in extraordinary cases will be granted specific performance).

However, before we can get to the issue of whether the alleged breaching party has breached a duty, we must first determine exactly what he or she promised to do. Unless we know what each party promised to do (i.e., precisely what duties each party has assumed), we cannot determine whether one or the other has committed a breach of one or more of those duties. That is what we will address in the first two weeks or so of the course: What Are The Parameters Of The Parties' Contractual Relationship? That inquiry will take place by reference to three questions: (1) What are the express terms of the parties' contractual relationship? (2) What did the parties intend those terms to mean? (3) Is there anything that the parties did not expressly include in their agreement that the court should infer are part of their agreement (implied or gap-filling terms)? Again, answering those questions will enable us to delimit the parameters of the parties' relationship, understand what each has promised to do, and enable us to go to the next step in the analysis: determining whether one or the other of the parties breached, i.e., failed to deliver on the promise(s) made.

In more detail, here are the three questions that we will consider in the first two weeks of the semester:

(1) What express terms should be included in the agreement? This requires us to review not only any writing the parties might have executed, but also any preliminary negotiations in which the parties might have engaged in ultimately reaching the terms contained in the writing. This is the subject matter of the **Parol Evidence Rule**, which is presented in Section 1 of Chapter 5 of your casebook.[1]

(2) How should those express terms be **interpreted**, i.e., what did meaning did the parties intend those terms to have? The answer to this question will tell us what the parties intended each to do in their contractual relationship (e.g., pay $100, detail a professor's car, pay the balance on a house purchase, build a house according to specifications, etc.) To determine this, we can look at the language in the contract itself (Section 1 and part of Section 2) or

[1] All references to "Section ___" are to the sections in Chapter of the Casebook.

look outside the contract language at the parties' preliminary negotiations (Section 2), or the custom of the trade or industry or the parties' previous dealings with one another (Section 3). In addition, the custom of the trade or industry can be used to "qualify" the terms of the agreement (Section 4). There are, however, limits to what a court can do in ascribing a meaning to the parties' words (Section 5).

(3) Are there any implied terms that the parties did not expressly include in their agreement but which a court should include? A court might include, i.e., "add" terms to the parties' expressly agreed terms: (i) because of standard practices (custom) in the industry or trade, or because of prior dealings between the parties (Section 4); (ii) it is required by statute or other law (Section 6); or (iii) because the contract would make little sense unless a court were to infer that the implied terms are part of the contract ("Bonus" Section). Note that the latter section includes cases we have already considered in other contexts: *Mattei v. Hopper* and *Wood v. Lucy, Lady Duff Gordon*.

Again, only after we have understood what the parties promised one another, the subject of the first two weeks or so of this coming semester, can we begin to analyze the critical question of whether one or the other of the parties has breached the agreement. See Figure 3.

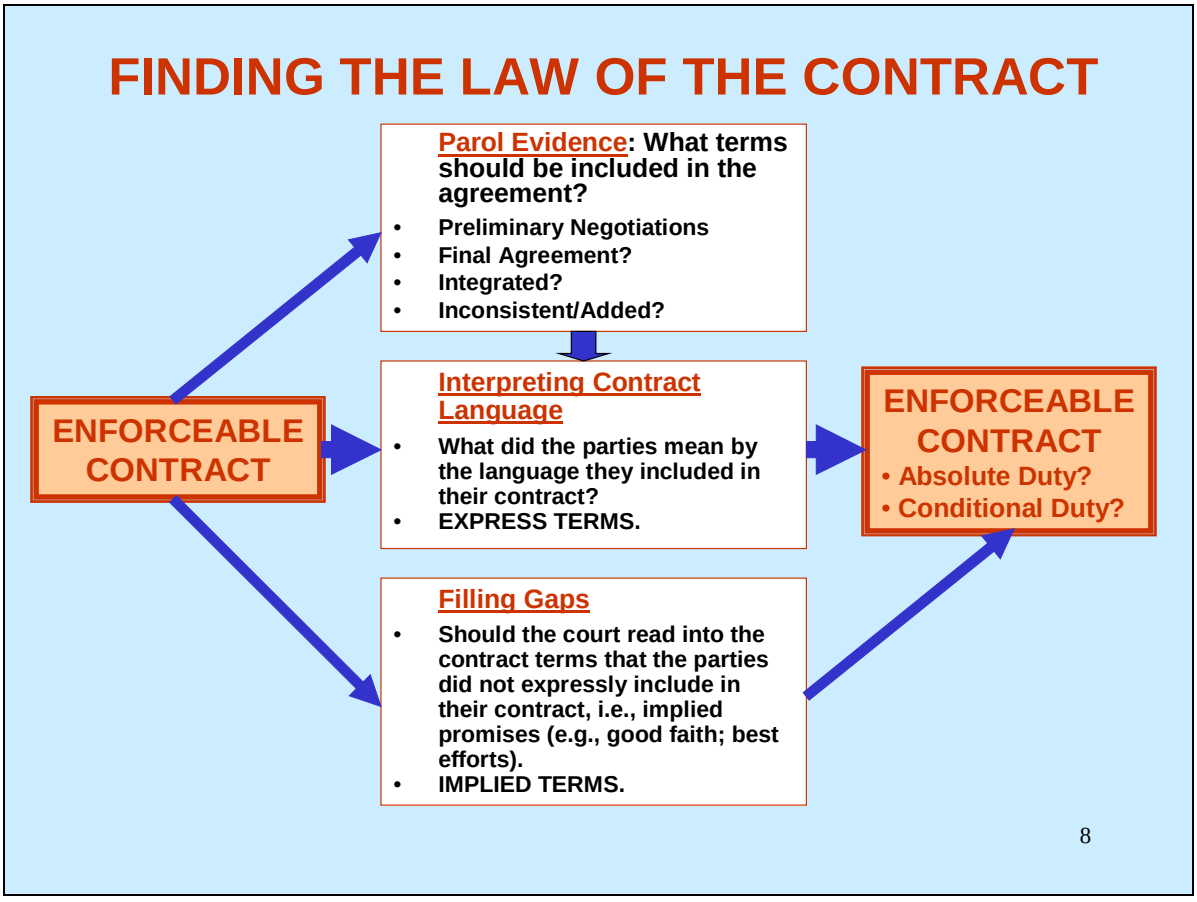

Figure 3. Finding the Law of the Contract