

## **BUT WE HAVE A CONTRACT!**

**By**

**Robert A. Miller, Esq.**

“Contract.” This one word has more impact on your life than almost any other word ever will. We contract for the water we drink and for the food we eat. We purchase gasoline so we may drive vehicles for which we make payments. The fifty cents shelled out for the newspaper is as much a contract as is the indebtedness incurred in purchasing real property. Internet access, cable television and cellular telephones - nearly every human interaction involves the law of contracts.

Yet we seldom consider how significantly this law impacts our lives until a situation arises when we are forced to take heed. A breach of contract can involve anything from a tenant failing to pay rent to the purchase of a multi-million dollar business. Contract laws apply equally from the simplest to the most complex of scenarios, and given the everyday implications, we can benefit from understanding how contracts are formed.

There are six elements to contract formation: offer, acceptance, consideration, capacity, legal purpose and mutuality of obligation.

The process of entering into a contract generally begins with one party making an “Offer.” An offer is the manifestation of willingness to enter into a bargain for exchange. “Acceptance” is the process by which the party to whom the offer is made expresses agreement to the terms of the offer. There are several requirements that must be satisfied before an offer or an acceptance is valid (i.e., certainty of subject matter, price, time for performance), and the lack of facts supporting these requirements often forms the basis for a defense to a breach of contract claim.

In addition, the contract must be for a “Legal Purpose.” No one, for example, can enter into a contract for the sale of illegal drugs. Exercise caution, however, for what is illegal today may become legal tomorrow. The medical marijuana movement is a prime example.

The fourth element is “Mutuality of Obligation” or having a “meeting of the minds”. The parties must have a mutual understanding as to the terms of their agreement. Although this seems simplistic, it may not be so. For example, if Party A offers to sell a vehicle to Party B and Party B accepts, is a contract formed? Maybe. If Party A owns more than one vehicle, it is possible that the vehicle Party A offered to sell is not the same vehicle that Party B intended to buy. In such case, there would not be a meeting of the minds and, consequently, no contract formed.

An often overlooked element to contract formation is having the “Legal Capacity” to contract. There are several reasons why someone may not have that capacity. Persons under the age of majority have historically been incapable of contracting, although this standard has given way to a more common sense standard. A 17 year old purchasing food should not be able raise their age as a defense to payment. Additional reasons may prevent a person from having legal capacity, such as being under a conservatorship or not having sufficient mental capacity to understand their acts. Even intoxication may prevent a person from having legal capacity (though I would not want to rely on intoxication as my sole defense).

The final element to contract formation is “Consideration.” Generally, consideration is the essence of the bargain. In most instances, it consists of a benefit conferred on a party - you purchase a

car and confer the benefit of payment on the seller. However, consideration need not necessarily benefit the other party. Consideration also exists if a party incurs a legal detriment in exchange for a promise or a performance by another. Consider the following example:

Father desires to purchase property for Daughter, but Father does not want to take title in his name. Daughter does not desire to purchase the property for she is short on funds. Knowing this, Father tells Daughter that if Daughter obtains a loan and purchases the property, Father will pay the purchase price on Daughter's behalf. Under these circumstances, Daughter obtains a loan in her name and purchases the property. Father later reneges on his promise and leaves Daughter liable for the loan obligation.

Is there consideration? Most likely, yes. Daughter had no legal obligation to purchase the property. In doing so, she incurred a legal detriment (having to repay the loan) based on Father's promise to pay. Although this example is relatively obvious, what constitutes consideration is one of the most misunderstood contract formation requirements and its application can result in great injustice when its misapplication governs the results.

We each enter into contracts ten to twenty times a day without giving the contract terms a thought. Despite our routine, there are legal implications to every contract and it is a testament to human behavior that we can agree on so much so often without dispute. Even so, when that one situation arises and contract law comes to the forefront of your life, you may have a head start because you have now learned a little about contract formation.