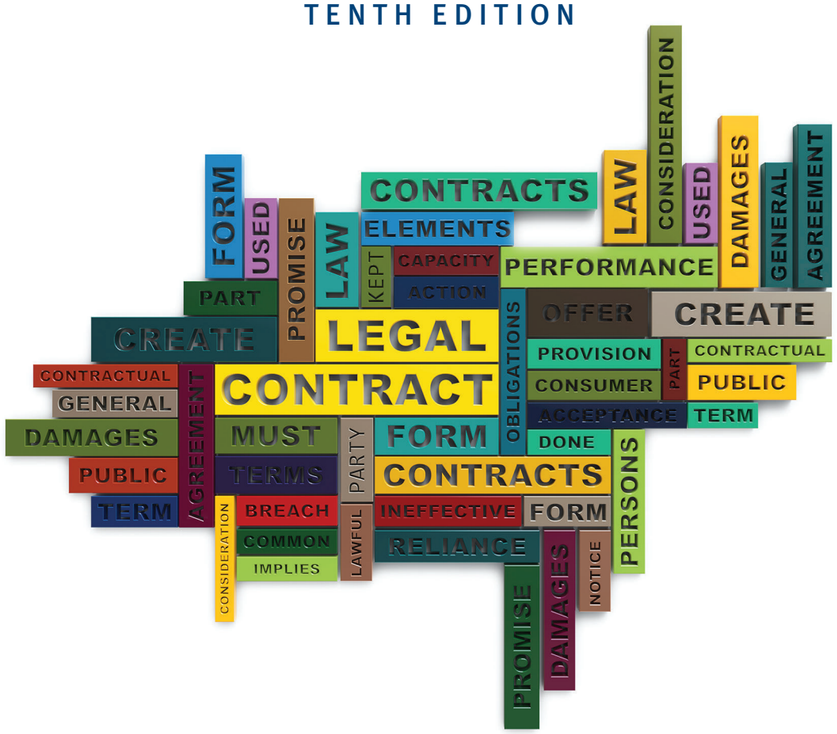
Jeffrey A. Helewitz

Basic Contract Law for Paralegals

TENTH EDITION



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Year after year, ***Basic Contract Law for Paralegals*** is a favorite of teachers and students for its lively and clear text and examples. Written and crafted by **Jeffrey A. Helewitz** specifically for paralegal students, the Tenth Edition balances coverage of case law with professional skills development, which culminates with a chapter that asks students to draft a standard contract.

Readable and engaging, *Basic Contract Law for Paralegals* features:

- **Timely and realistic examples** that illustrate legal concepts
- **Chapter overviews, summaries, and review questions**
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- **Sample clauses for analysis**
- **Stimulating assignments** that reflect current practice
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Basic Contract Law for Paralegals

Basic Contract Law for Paralegals

Tenth Edition

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Special Referee, New York State Supreme Court (Ret.)

Wolters Kluwer

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To Sarah—my first, and best, teacher

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Acknowledgments

I wish to thank all of the people at Wolters Kluwer who worked on this edition, especially Nicholas T. Lasoff, Stacie Goosman, and Joe Terry. In addition, I would like to thank Barbara Lasoff for her part in the production of this book.

Introduction

This book provides the paralegal student and practitioner with a quick, simple, and straightforward text on the law of contracts. It helps to clarify this very complex area of law using numerous practical examples of how to draft and interpret different types of contracts. This book is not intended to discuss every nuance of contract law, nor is it designed as a casebook for law students. *Basic Contract Law for Paralegals* is meant to be an easy-to-use, readable reference tool for the legal assistant.

The reader should be aware of the fact that there are two legal sources of law with respect to contract formation and interpretation. The first, and traditional source, is the common law, that law that has developed over the centuries based on judicial precedent (and sometimes codified by specific state statute). The second source of contract law is the Uniform Commercial Code (UCC), a form of which has been adopted by every jurisdiction in the country. The UCC regulates contracts for the sale of goods and contracts between merchants. Contracts for services or between nonmerchants are still governed by the common law. Throughout the text, the distinction between these two sources, whenever significant, will be specifically addressed.

The most important aspect of all laws is the relationship between the parties in dispute. The law is primarily concerned with relationships between and among individuals. In contract law, the value of the contract in monetary terms is of secondary importance; the relationship between the contracting parties is the most important determining factor. The simple contract for the sale of a morning newspaper and the multipage document for the development of a $20 million shopping center both involve identical legal principles. Because the law is concerned with principles and relationships, the logical starting point for the analysis of any legal problem is the legal relationship of the parties.

The most common problem encountered in analyzing a legal situation is that everyone immediately wants to jump to the end result—"What

can I get?"—rather than discerning the actual rights and liabilities of the parties. It is more important to identify each element of the relationship to determine whether or not a legal dispute exists.

Contracts is only one area of law that defines particular relations between persons; it is not the exclusive area of law applicable to a given situation. To determine a person's rights and liabilities, first you must determine what area of law—for instance, contracts, torts, bankruptcy—best applies to the problem. Then you must determine that all of the requisite elements of the legal relationship, as defined by that area of the law, exist. You cannot bend the law to fit the facts; if the facts do not fit into a particular legal theory, that theory is incorrect and a new one must be found. Keeping this general principle in mind will help in your analysis of all legal problems.

The role of the paralegal with respect to contracts is multidimensional. A paralegal is often called on to draft the initial agreement for the client and, as negotiations develop, to see that all subsequent changes are incorporated into the document. If a problem arises, the paralegal is generally responsible for making the initial analysis of the contract in dispute to determine all potential rights and liabilities of the client. And finally, the legal assistant will work with the attorney to determine the appropriate remedies available to the client. To perform these tasks, the legal assistant must be conversant with all of the elements of basic contract law and drafting.

Basic Contract Law for Paralegals

1 Overview of Contracts

Learning Objectives

After studying this chapter, you will be able to:

- Define a legally binding contract
- Identify the six basic requirements to forming a valid contract
- Explain the concept of offer and acceptance
- Define and exemplify "consideration"
- Classify contracts into bilateral or unilateral agreements
- Understand how a contract is created
- Explain the difference between executory and executed contracts
- Differentiate between valid, void, voidable, and unenforceable contracts
- Discuss various contractual provisions
- Know what is meant by the term "contractual capacity"

CHAPTER OVERVIEW

This chapter discusses the six basic requirements for every valid contract and then indicates the various classifications into which all contracts fall. The chapter is intended to give a general overview of, and introduction to, contract law. The specific details involved in analyzing contractual situations are covered in the following 11 chapters.

The law of contracts is one of the most complex and important areas of substantive law taught in law school. Every law school in the country teaches contracts as part of the first year of required courses because, more than any other course of law, contracts affect everyone's daily existence.

Think of everything that you do each day: You wake up in your home, brush your teeth, dress, eat breakfast, read the morning newspaper, and travel to work or to school. Each of these activities involves contract law. Rent or mortgage payments involve a contract with a landlord or lender; brushing your teeth requires the purchase of a toothbrush and toothpaste; getting dressed is accomplished only after buying the clothes worn; buying the newspaper is a simple sales transaction; and even taking public transportation involves a contract with the municipality. Every aspect of normal life is dominated by contractual principles, but few people realize the extent to which they are, in fact, contracting parties. To the nonlaw professional, a contract is a long and complicated legal document that is drafted by an attorney and involves huge sums of money. Yet, in reality, most contracts involve little, if any, written documentation, no lawyer, and only small amounts of money (if money is involved at all). It is this all-pervasive element of contracts that makes contract law both interesting and challenging.

Contract Defined

A **contract** is a legally enforceable agreement that meets certain specified legal requirements between two or more parties, in which each party agrees to give and receive something of legal value. It is distinguishable from a gift, in that each party gives and receives something. In a gift situation, only one party gives; the other one receives. Also, a contract is more than just an agreement. An agreement may not meet all of the specific requirements needed to create a contract; hence, it will not be legally enforceable under a contractual claim.

Basic Contract Requirements

To determine whether a contractual relationship exists between two persons, it is necessary to ascertain that all six of the requisite elements of a valid contract exist. If *all* of these elements are not present, the parties do not have a contractual relationship (although they may have a relationship described by some other theory of law, which, if true, then would have to be addressed). Even if all of the elements are present in the agreement, the contract may be unenforceable because of some other statutory reason, such as the Statute of Frauds or the Statute of Limitations.

The six requisite elements of every valid contract are:

1. offer;
2. acceptance;
3. consideration;
4. legality of subject matter;
5. contractual capacity; and
6. contractual intent.

Offer

An **offer** is a proposal by one party to another manifesting an intention to enter into a valid contract. Every valid contractual relationship starts with an offer.

EXAMPLE:

One student asks another, "Will you buy my used Contracts book for $5?" The student has stated a proposal to sell a particular object (the used book) at a particular price ($5). Without this initial proposition, the two students could not possibly develop a contractual relationship.

The offer defines the boundaries of the potential relationship between the parties and empowers the other party to create the contract by accepting the proposition.

Acceptance

To create the contract, the party to whom the offer is made must **accept** the proposal. If she does not, then no contract comes into existence. The law will not force a person to fulfill an obligation to which she or he has not agreed.

EXAMPLE:

The paralegal student in the example above says "OK, I'll take the book." In this case, a contract has been created because the student has agreed to the proposal of the seller.

The concepts of offer and acceptance go hand in hand in determining whether a contract exists. The offer and acceptance together form the **mutual assent** of the parties—the agreement that they do intend to be contractually bound to each other. Without this meeting of the minds, no matter what else may exist, there is no valid contract.

Consideration

Consideration is the subject matter of the contract; it is the thing for which the parties have bargained. Most people assume consideration to be the price, but that is not completely accurate. Although money may be part of the bargain, it is not always the complete bargain. Nor is money itself always necessary. The crucial aspect of consideration is that each party both gives and receives consideration. Each must give something of value.

EXAMPLE:

In the example given above, the consideration is both the $5 and the book itself. The seller is bargaining for the money; the buyer is bargaining for the book.

Consideration is deemed to be anything of legally significant value—monetary worth is not the ultimate determining factor of legal value.

EXAMPLE:

In the example above, instead of asking for $5, the student says "Will you exchange your used Torts book for my used Contracts book?" If the second student agrees, a contract is formed. In this instance, the books themselves are the consideration—no money changes hands.

These first three elements—offer, acceptance, and consideration—are the three most important aspects of every valid contract because they form the provisions of the contract itself. Without these three components, there can be no contract.

Legality of Subject Matter

To be valid, a contract can only be formed for a legal purpose and must fulfill any statutory regulations with respect to form.

EXAMPLE:

Acme, Inc., a major producer of automobile tires, enters into an agreement with Goodyear to run Dunlop out of business by fixing prices. Although this contract may meet all of the other contractual requirements, it is not enforceable because it violates U.S. antitrust laws. This contract is not formed for a legal purpose.

Contractual Capacity

Contractual capacity refers to the ability of a person to enter into a valid contract. The most typical examples of capacity (or rather, the lack of capacity) deal with the age of the party and the person's mental condition.

EXAMPLE:

John, a precocious 14-year-old, wants to buy some woodland for potential real estate development. Although it may be a good idea and may possibly bring in millions of dollars, the law considers a 14-year-old incapable of entering into a contract. His age and presumed lack of experience make him contractually incapable.

Contractual Intent

Contractual intent is the last of the requisite elements of a valid contract, but the one that is all-pervasive. Even if the contract meets all of the other requirements enumerated above, if it can be shown that the parties did not subjectively intend to form a contractual relationship, there will be no contract. Many times, this aspect of intent is not readily discernible by the words of the parties themselves, and surrounding circumstances must be analyzed to determine whether a contract exists.

EXAMPLES:

1. Kevin agrees to sell Bruce his house for $50,000. The contract is in writing, describes the house, and specifies the method and terms of payment. On the face of it, the contract appears valid. But what if it were shown that Kevin was forced to sign the contract at gunpoint? Under these circumstances, Kevin obviously did not willingly intend to enter into the contractual relationship with Bruce.
2. William agrees to pay Sally $500 a week to be his housekeeper. Once again, on its face, this appears to be a valid contract. However, what if William were 85 years old, and Sally had convinced him that none of his relations wanted anything to do with him? She also told him that if he didn't hire her, he'd be all alone and helpless. Under these circumstances, it would appear that William was the victim of mental coercion. Consequently, his intent to enter the contract of his own free will is suspect.

The above-mentioned six elements must exist if there is to be a valid contract. Each of these elements will be discussed in detail in the following

chapters. The foregoing is intended only as a general overview. However, it is necessary to keep all six of these elements in mind when discussing contracts because each one is necessarily intertwined, regardless of the type of contract created.

Classification of Contracts

All contracts fall into a certain number of classifications, or types. Generally, it is a good idea to classify the contract in question prior to analyzing its validity and provisions. This classification process is like making selections from a restaurant menu. Take one item from each category, and when completed, a meal (that is, a contract) is formed.

Type of Obligation: Bilateral or Unilateral

The type of obligation refers to the kind of duty imposed on the parties to the contract. This category defines every contract as belonging to one of two classifications.

All contracts are either **bilateral** or **unilateral.** A bilateral contract is a promise for a promise. A unilateral contract is a promise for an act. This division into bilateral or unilateral is important with respect to what performance is expected from the parties and at what point the contract comes into existence. With a bilateral contract, the parties are expecting a mutual exchange of promises, with the performance to be carried out only after the promises have been given. Most contracts are bilateral, even though it is rare that the parties actually use the word "promise" (except in the most formal of situations).

EXAMPLE:

In the situation discussed above, with respect to the sale of the used textbook, the actual words used were "Will you buy my used Contracts book for $5?" "OK." These words created a bilateral contract. What the parties legally said were: "Will you promise to pay me $5 if I promise to sell you my used Contracts book?" "I promise to pay you $5 if you promise to sell me your used Contracts book." The contract was created when the promises were given. The performance—the exchange of the book for the money—is intended to take place *after* the agreement has been made.

Conversely, in a unilateral contract, the contract is only created when one side has performed a requested act. Instead of an exchange of mutual promises, a unilateral contract is an exchange of a promise for an act.

EXAMPLE:

Allison promises to pay Tim $1,500 if Tim paints her apartment on Wednesday. In this instance, Allison is requesting a specific act: Tim's painting the apartment on Wednesday. Allison does not want Tim's promise that he will do the painting; she wants to see the job done. Until Wednesday arrives, and Tim actually paints the apartment, no contract exists. When Tim does the painting, Allison must fulfill her promise to pay him $1,500.

There tends to be a lot of confusion in identifying a contract as bilateral or unilateral, simply because most ordinary contracts are formed and completed simultaneously. Consequently, it is difficult to distinguish between the promise and the act. This determination is crucial, however, because it times the start of the contractual relationship. If the contract is bilateral, the relationship is formed at the exchange of promises. The parties are entitled to contractual remedies if one side does not fulfill his promise. (This is the "What can I get?" as discussed in the Introduction.) On the other hand, if the contract is unilateral, the contractual relationship is only formed when one side actually performs the requested act. Until that time, no contractual remedies are available to the parties. If, in the example above, Tim does not paint the apartment on Wednesday, Allison has no recourse to sue him because he is under no contractual obligation.

To determine whether a contract is bilateral or unilateral, it is necessary to determine the intent and the specified wishes of the parties involved. Courts will generally go along with what the parties could most reasonably expect under the circumstances because that would indicate the true meeting of the parties' minds with respect to the manner of acceptance sought. Note that the law is generally pro-contract; that is, it favors contractual relationships and consequently presumes contracts to be bilateral. This creates the contractual relationship sooner than in a unilateral contractual situation.

Method of Creation: Express, Implied, or Quasi-Contracts

How does a contract come into existence? A contract is formed either by the words or conduct of the parties and is classified accordingly.

An **express** contract is one in which the mutual assent of the parties is manifested in words, either orally or in writing. An **implied-in-fact** contract is one in which the promises of the parties are inferred from their actions or conduct as opposed to specific words being used.

EXAMPLES:

1. Eric leases a house from Lisa. The parties use a standardized written lease purchased at a stationery store. This is an express contract because the rights and obligations of the parties are described in written words.
2. In the previous example of the sale of the used Contracts book, the parties have entered into an express contract. Their promises are given orally.
3. Louise goes to a newsstand to buy her morning paper. She picks up the paper and gives the news agent 50 cents. Louise and the news agent have completed an implied-in-fact contract. The contract was entered into by their actions, and no words were used or necessary.

In addition to express and implied-in-fact contracts, the law has also created another category known as **implied-in-law**, or **quasi-contracts**. As the term "quasi" might indicate, these are situations that look like contracts, but, in truth, are not contracts because one of the requisite elements is missing. However, in the interest of fairness, the law has determined that a party should be entitled to some remedy if injured by such a situation.

Whenever the words "quasi" or "estoppel" are used, terms that will be discussed in subsequent chapters, the court is using its equitable jurisdiction. The difference between law and equity is basically the difference between justice and mercy. There are times and situations in which the legal result might be "just" under the laws of society—that is, reasonable under the circumstances—but it would not be "fair"—a party would be injured without recourse. In these situations, the concept of **equity** takes over. Equity was designed to right wrongs, to prevent unfairness and unjust enrichment. Equity was created specifically for those situations in which the application of the law would result in an injured party still suffering. For a more complete discussion of the equity courts, see Chapter 11, "Remedies."

With respect to the classification of contracts, the courts have created the concept of quasi-contractual situations—situations in which the parties do not have a contractual relationship, but in which it would be most fair to treat them as though a contract did exist. For a quasi-contractual situation to arise, it must be shown that one party unjustly benefited from the other party under circumstances in which a mutual benefit had been expected.

EXAMPLES:

1. Joan has just completed her paralegal training, but before she starts work, she receives a telephone call from her elderly aunt in the Midwest. Her aunt tells Joan that she is very ill, not long for this world, and needs someone to take care of her. The aunt

promises Joan that if Joan comes to the Midwest and looks after her, she'll remember Joan in her will.

Based on the foregoing, Joan moves to the Midwest, and for the next ten years cooks, cleans, and takes care of her aunt. When her aunt finally dies, Joan is simply "remembered fondly" in the aunt's will. All the aunt's cash goes to her cat, Fluffy.

Can Joan sue the estate for breach of contract? No. Why? Because no contract existed—the aunt merely said she would remember Joan in the will—there was no mutual benefit, and no consideration given to Joan, despite what Joan might have hoped for.

In this instance, the court will probably apply the doctrine of quasi-contract and permit Joan to recover the value of the services she provided for the aunt. Because Joan never intended to make a gift of her services to her aunt, if the aunt received them without compensating Joan, the aunt would be unjustly enriched. This would be unfair to Joan.

2. Sal opens the door to his house one morning and discovers a newspaper on his doorstep. He picks it up and takes it to work with him. For the next week, every morning a newspaper appears at his door. At the end of the week, Sal receives a bill from the publisher for the newspapers.

Does Sal have a contract with the publisher? No. However, the court, applying the doctrine of quasi-contract, will permit the publisher to recover the cost of the papers. Sal accepted the benefit of the papers by taking them and reading them, and now must pay. If Sal did not want the papers, it was his responsibility to contact the publisher to stop delivery.

Note that there are laws that would make the outcome different if the U.S. mail were used to deliver the goods. Several years ago, a statute was enacted stating that if the mail is used to send unsolicited merchandise, the recipient may keep the merchandise as a gift. Also, many states have consumer protection laws prohibiting the delivery of unsolicited goods.

To apply the concept of quasi-contract, it must be shown that no contract exists because a requisite element is missing, and one party is unjustly enriched at the expense of the other.

Type of Form: Formal and Informal Contracts

A **formal** contract is a contract that, historically, was written and signed under seal. The concept derives from a time when few people could read or write, and the solemnity of a seal gave importance to a document. The seal was used as the consideration for the agreement. Nowadays, seals

are no longer used, and this term refers to a limited group of contracts that different states have declared valid and enforceable if certain statutory requirements are met. Some examples of formal contracts are negotiable instruments (such as checks and certificates of deposit) and guarantees.

EXAMPLE:

Fidelity Bank issues printed checks to its customers, which the customers use to pay their bills. These checks do not contain the words and elements of a contract, but they are enforced as a formal contract because of statutory regulations. The contract is between the bank and its customers.

Informal contracts are, simply put, all nonformal contracts. Despite the terminology, informal contracts are agreements that meet all the requirements of valid contracts; they can be quite specific and stylized in and of themselves.

EXAMPLE:

The contract for the sale of the used Contracts book is an example of an informal contract. All the contractual requirements are present, and its form is not regulated by a statute.

Timing: Executory and Executed Contracts

One of the most crucial questions for the parties to a contract involves the timing: "*When* are the contractual obligations to be performed?" This timing element indicates when the parties have enforceable rights and obligations. Contracts are categorized by indicating whether or not the parties have uncompleted duties to carry out. An **executory** contract is a contract in which one or both of the parties still have obligations to perform. An **executed** contract is complete and final with respect to all of its terms and conditions.

EXAMPLE:

When the two paralegal students discussed above agree to the terms for the sale of the used Contracts book, the contract is formed, but it is still executory. Once the book and the money have changed hands, the contract is complete with respect to all of its terms, and is now completely executed. Note that the term "executed" is also used to indicate the signing of a document; in that context, the obligations are still executory even though the contract is executed (signed).

Enforceability: Valid, Void, Voidable, and Unenforceable

Finally, getting to the "What can I get?" element, the law classifies contracts in terms of their enforceability. Can a party to a contract have that agreement enforced in a court of law, and which party to the contract has that right of enforceability?

A **valid** contract is an enforceable contract that meets all of the six requirements discussed above: There is a proper offer and acceptance; legally valid consideration is given and received; the parties have the legal capacity to enter into a contract; the contract is for a legal purpose; and the parties genuinely intend to contract—it is complete under the law. Either party can bring suit for the enforcement of a valid contract.

A **void** contract is, in reality, a contradiction in terms because there is no contract, and therefore the law does not entitle the parties to any legal remedy. The agreement has not met the contractual requirements.

In a **voidable** contract, a party to the agreement has the option of avoiding his legal obligation without any negative consequences, but could, if he wished, affirm his obligation and thereby be contractually bound. A contract entered into by a minor is an example of a voidable contract. Legally, a minor does not have contractual capacity and can avoid fulfilling contracts into which he has entered. (There are exceptions for certain types of contracts. See Chapter 5.) However, if, upon reaching majority, the former minor affirms the contract, he will be contractually bound.

EXAMPLE:

Seventeen-year-old Gene enters into a contract with Bob, an adult, to buy Bob's used car. If Gene changes his mind, he can avoid the contract. However, if, on Gene's 18th birthday, Gene affirms his promise to Bob by giving Bob a payment, the contract will be totally enforceable. The option of avoidance is with Gene, who is under the disability, not with Bob, who is not.

A voidable contract may become valid and enforceable if the party under the disability—a minor, or a person induced by fraud, duress, or like condition to enter the agreement—later affirms his obligation when the disability is removed. A void contract, on the other hand, can never be made enforceable, regardless of what the parties do; any addition to the agreement that the parties attempt in order to meet contractual requirements actually creates the contract at that time; it does not validate what was void.

An **unenforceable** contract is a valid contract for which the law offers no recourse or remedy if its obligations are not fulfilled. For instance, a contract may exist in which one party failed to meet her contractual obligation; by the time the aggrieved party decides to sue, the Statute of Limitations

has run, meaning that the law has determined that the proponent has waited so long to bring the suit that the court will not hear the question. Or, parties agree to open a store at a particular location, but before the contract can be fulfilled, the town rezones the area for residential use only. Even though the contract is valid, it can no longer be enforced because of a subsequent change in the law that makes its purpose incapable of being legally performed.

In classifying any given contract, remember that it will consist of elements of each type discussed above. The following chart summarizes these five types:

Type of Obligation	*Method of Creation*	*Form*	*Timing*	*Enforceability*
Bilateral Unilateral	Express Implied in fact Implied in law (quasi)	Formal Informal	Executory Executed	Valid Void Voidable Unenforceable

Every contract will have one item from each of these five categories; the terms are not mutually exclusive.

SAMPLE CLAUSES

1 **Bilateral Contract**

Dear Irene,

Pursuant to our telephone conversation yesterday, I hereby agree to buy the pearl necklace you inherited from your Grandmother Rose for $500. Come to my house for dinner next Monday, and I'll give you a check.

Love,
Jeannette

P.S. Don't forget to bring the necklace.

The above letter constitutes an example of a bilateral contract between Jeannette and Irene. Irene made an offer for the sale of her necklace, which Jeannette has acknowledged and accepted in writing. The consideration Irene is giving is the necklace; the consideration Jeannette is giving is the $500. In terms of classification, this is an informal bilateral express contract that is executory until the consideration changes hands. Remember that to be legally enforceable, a contract does not have to take any particular form or include words of overt legality. Even a handwritten note may constitute a valid contract.

2 **Bilateral Contract**

This contract dated the _____ day of _____, 20_____, is made between Samuel Smith, hereinafter Smith, whose address is _____, and Peter Jones, hereinafter Jones, whose address is _____.

Jones hereby agrees to paint the exterior of Smith's house, located at _____, on the _____ day of _____, 20_____, in consideration for which Smith hereby agrees to pay Jones the sum of $2,500, inclusive of all expenses, upon the completion of said painting.

In Witness Whereof, the undersigned have executed this contract the date and year first above written.

_____
Samuel Smith

_____
Peter Jones

The preceding is a more formalized version of a simple bilateral contract, this time for services instead of for the sale of goods. Why is it bilateral instead of unilateral, since services are being requested? The answer is that both parties are making present promises to each other: Jones to paint the house, and Smith to pay for Jones's painting services. The contract is formed on the date indicated; performance is merely delayed until the date specified. Whenever there is a mutual exchange of promises, the contract is bilateral.

Note that Smith has included the cost of all of Jones's expenses in the contract price. This means that the $2,500 is all that Smith is liable for, and Jones is responsible for paying for all paints, brushes, and so forth, that are required to do the work. This is a written example of an informal express, executory, bilateral contract.

3 **Express Unilateral Contract**

Dear Mr. Whitson:

This concerns the parcel of land I bought from you last month. On making a personal inspection of the property, I noticed that the drainage ditch was clogged. I will be out of state for the next two months and can't clear it myself. Please clear the ditch for me and send a bill to my office for $500.

Sincerely,
Alfred Brace

The following week, Mr. Whitson cleared the drain and sent Mr. Brace a bill for $500.

This is an example of an express unilateral contract. Mr. Brace has requested a service from Mr. Whitson and has agreed to pay Whitson upon completion of the requested task. Mr. Whitson accepted the offer by doing the act requested and now is waiting for payment. The contract is still executory because Mr. Whitson has not yet received Mr. Brace's check.

This example differs from Sample 2 in that here, the offering party has requested an act, not a promise, and the offer became a contract when the other party accepted by cleaning the ditch. Once again, the correspondence was more informal than a signed and printed document. This does not negate the fact that it is a binding contract between the parties.

In analyzing information that is presented, always go through the checklist of five contract classifications given above to determine the exact form of the documents you are handling. Do not be put off or swayed by the physical appearance of the materials. Handwritten letters, notes, and typed agreements all may be valid contracts, depending on the substance of the material itself. Remember, the classifications only help to organize the material; they do not determine the agreement's legal effect or the relationship created between the parties. That determination involves a minute examination of the six contractual requirements examined earlier in the chapter.

CHAPTER SUMMARY

The law of contracts is one of the most complex, yet most elemental, of all areas of the law. Contract law forms the basis of most people's daily existence, and therefore it is of paramount importance as a field of study.

To create a valid contract, the agreement must contain the following six elements: offer, acceptance, consideration, legality of the subject matter, contractual capacity of the parties, and the contractual intent of the parties. Without these elements, the parties are not in a contractual relationship and, if injured, must rely on a different legal relationship to resolve the dispute.

All contracts can be classified according to five different categories, and in analyzing a contractual situation, it is best to classify the agreement prior to determining the rights and liabilities of the parties. The five classifications are: type of obligation (bilateral or unilateral); method of creation (express, implied in fact, or quasi); type of form (formal or informal); timing of obligation (executory or executed); and enforceability (valid, void, voidable, or unenforceable). Once the situation has been appropriately classified, analysis of the specific provisions can begin.

SYNOPSIS

Six requirements of every valid contract

1. Offer
2. Acceptance
3. Consideration
4. Contractual capacity
5. Legality of subject matter
6. Contractual intent

Classifications of contracts

1. Type of obligation
   a. Bilateral
   b. Unilateral
2. Method of creation
   a. Express
   b. Implied
   c. Quasi
3. Type of form
   a. Formal
   b. Informal
4. Timing
   a. Executory
   b. Executed
5. Enforceability
   a. Valid
   b. Void
   c. Voidable
   d. Unenforceable

Key Terms

Acceptance: manifestation of assent to the offer proposed
Bilateral contract: a contract in which a promise is exchanged for a promise
Consideration: the bargain of the contract; a benefit conferred or detriment incurred at the request of the other party
Contract: a legally enforceable agreement between two or more parties in which each agrees to give and receive something of legal value
Contractual capacity: the legal ability of a person to enter into a contractual relationship
Contractual intent: the purposefulness of forming a contractual relationship
Equity: the branch of the law that deals with fairness and mercy to prevent unjust enrichment
Executed contract: a contract that is complete and final with respect to all of its terms and conditions

Executory contract: a contract in which one or both of the parties still have obligations to perform
Express contract: a contract manifested in words, oral or written
Formal contract: historically, a written contract under seal; currently, any contract so designated by a state statute
Implied-in-fact contract: a contract in which the promises of the parties are inferred from their actions, as opposed to specific words
Implied-in-law contract: see Quasi-contract
Informal contract: any nonformal contract
Mutual assent: agreeing to the same terms at the same time; the offer and acceptance combined
Offer: a proposal by one party to another manifesting an intent to enter into a valid contract
Quasi-contract: a legal relationship that the courts, in the interest of fairness and equity, treat in a manner similar to a contractual relationship, even though no contract exists
Unenforceable contract: a contract that is otherwise valid, but for a breach of which there is no remedy at law
Unilateral contract: a contract in which a promise is exchanged for an act
Valid contract: an agreement that meets all six contractual requirements
Void contract: a situation in which the parties have attempted to create a contract, but in which one or more of the requisite elements are missing, so no contract exists
Voidable contract: a contract that one party may avoid at his option without being in breach of contract

EXERCISES

1. Give three examples of bilateral contracts from your everyday life that are not mentioned in the text.
2. What elements would you look for to determine that an agreement is an enforceable contract?
3. Why would a valid contract be unenforceable? Give examples.
4. Create a bilateral contract for a situation that involves barter.
5. How would you attempt to prove the existence or nonexistence of contractual intent?

Cases for Analysis

To elucidate certain points discussed in Chapter 1, the following judicial decisions are included. The first case, *Casale v. Nationwide Children's Hospital,* discusses the differences between express and implied contracts and promissory estoppel. *McCabe v. ConAgra Foods, Inc.* highlights the difference between a bilateral and a unilateral contract.

Casale v. Nationwide Children's Hosp.

682 Fed. App'x 359 (6th Cir. 2017)

Plaintiff Anthony Casale appeals the district court's order of summary judgment in favor of defendant Nationwide Children's Hospital (NCH) on his Ohio law contract and tort claims. Casale, a successful physician, alleges NCH persuaded him to leave a stable career in Kentucky for the promise of a prominent hospital leadership position, but "pulled the rug out from under him" and withdrew its offer before he started. Like the district court, however, we must acknowledge "the law does not provide redress for every act of unfairness." Finding no error requiring reversal, we affirm.

I.

In early 2010, with its Chief of Urology set to retire, NCH reached out to Dr. Anthony Casale to gauge his interest in running its urology program. Initially, Casale was a reluctant candidate. He already had "a pretty good job" as a tenured professor and acting Chair of the Department of Urology at the University of Louisville's School of Medicine, and he "intended to stay at the University of Louisville." Still, knowing his position as acting Chair remained "quite unsettled," plaintiff decided to pursue the offer. After two days of interviews, NCH's Chief Operating Officer, Dr. Rick Miller, informed Casale that NCH planned to make him an offer.

Defendant sent Casale a draft offer letter in late July. Miller emphasized the letter was just "the first offer." "[I]f it's something that's not adequate," he added, "I want you to come back and ask for it, and we'll probably meet it." Over the next few days, he and Casale discussed salary and bonuses. NCH proposed that Casale's annual bonus be tied to his productivity, including the number of patients he treated. Casale recognized it would take him time to build his practice as a doctor new to the Columbus area, and instead asked that NCH guarantee his bonus for the first two years of employment. NCH agreed. It also agreed to plaintiff's request for "academic support," including funding for educational conferences and research.

In its final form, the offer letter included no express durational term, or limit on defendant's ability to terminate Casale's employment—a topic plaintiff acknowledged he did not discuss with Miller. Casale was also free to terminate his employment under the agreement, provided he repay his signing bonus and relocation expenses "if for some reason [he] decided to leave NCH prior to eighteen months of service." Plaintiff signed the offer letter and faxed it to NCH on August 4, 2010.

Shortly after Casale's acceptance, NCH sent him an information packet regarding its medical staff credentialing procedure and instructions for obtaining an Ohio medical license. Casale's offer letter specified his employment was "contingent upon verifying [his] Ohio medical license and obtaining and maintaining medical staff privileges at NCH."

The packet warned that securing a license and staff credentialing was a "lengthy" process which could take 10 to 12 weeks to complete. Given his January 1, 2011, start date, Casale understood he had limited time to submit his application materials.

Yet by early December, plaintiff was neither licensed to practice in Ohio, nor credentialed as an NCH medical staff member. The parties "vigorously dispute[d]" the cause of the delay before the district court, and dispute it further on appeal. Defendant faults Casale for failing to submit complete application materials in a timely manner. Plaintiff maintains he did "everything within his power" to provide the necessary information, and instead pins the blame on Pam Edson—an NCH employee whose assistance with the process was "so inadequate" and "erroneous[]," it resulted in "[m]onths of licensing delay." Whatever the cause, defendant told Casale it could not "employ [him] until [his] licensure and credentialing is complete," and delayed his start date until February 1, 2011.

Meanwhile, plaintiff's former colleague Dr. Stephen Wright sent NCH a peer review reference to be considered as part of the credentialing process. Karen Allen, a member of NCH's medical staff services team, flagged the review as "very poor" and forwarded it to Drs. Brilli (NCH's Chief Medical Officer), Teich (NCH's Staff President), and Rothermel (Chair of NCH's credentials committee). Plaintiff contends the disclosure of this information outside the credentialing process violated Ohio's peer review confidentiality restrictions. *See* Ohio Rev. Code § 2305.251-52. He also suspects that NCH improperly relied on the reference in withdrawing its offer of employment, and suggests Allen's characterization of Dr. Wright's comments "poison[ed] the well" against him. "In my opinion," Allen wrote in an email to Rothermel, "there is no way we should hire this man!!"

Casale also attended two meetings at NCH in late 2010—one to assist with his licensing and credentialing applications, and another to meet with future NCH colleagues. At the first, plaintiff met with NCH employees Kelly Wheatley and Julie Zaremski. Both employees described the meeting as uncomfortable and unproductive; plaintiff appeared "visibly frustrated" and did not answer their questions concerning certain "holes" and "discrepanc[ies]" in his work history. Plaintiff agreed the meeting was "a negative experience for everyone," but attributed this to Wheatley and Zaremski, who "had no experience" with NCH's credentialing process. At the second meeting, plaintiff spoke with some of NCH's surgeons, including those "who might refer [patients] to him." Upon leaving, Casale purportedly told another NCH staff member "this is a waste of my time." Plaintiff admits he made this statement, but says NCH takes his remark out of context: "I told her it was a waste of what time we had at that point."

After the meetings, Miller had second thoughts about plaintiff. Casale had been "somewhat ambivalent" about joining NCH from the beginning. Plaintiff seemed more "focus[ed] on his issues in Louisville" than on his license and credential paperwork, which he took roughly three months to complete, resulting in a delayed start. Then, when he arrived for meetings at NCH, Casale had difficulty connecting with defendant's staff. One employee assigned to help with his credentials described their interaction

"as the most difficult meeting she has ever had with a physician." "Any one of these [issues] we'd probably ignore," Miller observed, "but in aggregate, they are perhaps very concerning."

Ultimately, NCH asked plaintiff to withdraw his acceptance. Casale refused. Having "given up everything in Louisville in order to keep [his] commitment to NCH," he requested an in-person meeting with Miller to resolve NCH's concerns. NCH declined his request and formally withdrew its offer of employment. Thereafter, the University of Louisville accepted Casale back onto its faculty as acting Chair of Urology, but with a lower salary and no tenure.

II.

Casale filed suit against NCH in 2011, alleging its actions cost him significant damages and impaired his future employment prospects. After the district court granted its motion to dismiss two of plaintiff's claims, NCH moved for summary judgment on the remaining five: breach of express contract, breach of implied contract, anticipatory repudiation, promissory estoppel, and defamation. While it acknowledged defendant had treated plaintiff "quite shabbily," the district court granted the motion.

Casale timely appeals. He also moves to supplement the record on appeal, while NCH moves to strike "certain portions" of plaintiff's brief.

III.

We review the district court's grant of summary judgment de novo. *Keith v. Cty. of Oakland*, 703 F.3d 918, 923 (6th Cir. 2013). "Summary judgment is proper 'if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Id.* (quoting Fed. R. Civ. P. 56(a)). A dispute is "genuine" if the evidence permits a reasonable jury to return a verdict in favor of the nonmovant, and a fact "material" if it may affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Viewing the evidence in a light most favorable to the nonmoving party, our task is to determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52.

A.

Ohio recognizes the doctrine of at-will employment, meaning the "relationship between employer and employee is terminable at the will of either" and "an employee is subject to discharge by an employer at any time, even without cause." *Wright v. Honda of Am. Mfg., Inc.*, 73 Ohio St. 3d 571, 1995 Ohio 114, 653 N.E.2d 381, 384 (Ohio 1995). It also recognizes two exceptions tempering the general at-will rule: (1) the existence of an express or implied contract altering the terms of discharge; and

(2) promissory estoppel, where the employer makes representations or promises of continued employment. *Id.*; *see also Clark v. Collins Bus Corp.*, 136 Ohio App. 3d 448, 736 N.E.2d 970, 973 (Ohio Ct. App. 2000) (citing *Mers v. Dispatch Printing Co.*, 19 Ohio St. 3d 100, 19 Ohio B. 261, 483 N.E.2d 150, 154-55 (Ohio 1985)). Plaintiff here relies on both, asserting claims for breach of express or implied contract, anticipatory repudiation, and promissory estoppel. Neither party disputes the district court's finding that the offer letter between plaintiff and NCH is a "valid contract" for employment; the only question is whether it guarantees employment for a specific term.

For an individual hired under contract, "there is a strong presumption of at-will employment, unless the terms of the agreement clearly indicate otherwise." *Padula v. Wagner*, 2015-Ohio 2374, 37 N.E.3d 799, 808 (Ohio 2015). On its face, the offer letter does not rebut that presumption. It includes no express durational term and no limit on either party's ability to terminate the relationship. And "[w]here a contract of employment does not state the duration of employment, employment is considered to be at will." *Clark*, 736 N.E.2d at 973.

Still, Casale insists several of the letter's provisions demonstrate an express agreement for an initial term of three years' employment, renewable at his option thereafter. For instance, the letter lists Casale's salary for his initial three years of employment, and guarantees his bonus for the first two years, until he can "build clinical volumes" and earn a bonus based on productivity. Plaintiff is eligible for further salary increases after the first three years, and his pension does not fully vest until after five years. NCH also commits to a million dollar "research start up package" payable "over a three[-]year period," agrees to fund "two urology fellowships (one new fellow per year)," and pledges support for "three educational events per year." Yet, the district court was unconvinced; it concluded "[n]one of the contractual terms Plaintiff relies on raise a genuine issue of material fact as to the duration of the contract." We agree.

"In the absence of facts and circumstances which indicate that the agreement is for a specific term, an employment contract which provides for an annual rate of compensation, but makes no provision as to the duration of the employment, is not a contract for one year, but is terminable at will by either party." *Henkel v. Educ. Research Council of Am.*, 45 Ohio St. 2d 249, 344 N.E.2d 118, 118 (Syllabus by the Court) (Ohio 1976). Plaintiff agrees "[t]he simple statement of an annual rate, without more [i]s not enough . . . to constitute an express term of duration" under *Henkel*. "However," he continues, "it *was* enough" under the Ohio Supreme Court's decision in *Kelly*, "where the letter agreement also provided for a monthly amount, a settling up at year-end, and a guaranteed gross sum every year." Appellant's Br., at 33 (citing *Kelly v. Carthage Wheel Co.*, 62 Ohio St. 598, 57 N.E. 984 (Ohio 1900)). Casale argues the additional terms here—the guaranteed bonuses, potential future raises, and academic support—go further than the "settling up" in *Kelly* to prove NCH's intent to employ him for a specific term. He is incorrect. Ohio's Supreme Court rejected this same reading of *Kelly* in *Henkel*: "Our decision in *Kelly*

does not resolve the issue . . . [of] whether a hiring at a specified sum per year constitutes a hiring for a year." 344 N.E.2d at 121. "The court merely held that because Kelly had initially been hired for one year, absent a new arrangement at the end of that year, he was rehired upon identical terms for a second year." *Id.*

Neither the statement of an annual rate of pay, *Henkel*, 344 N.E.2d at 118, nor the promise of "career advancement opportunities," *Daup v. Tower Cellular*, 136 Ohio App. 3d 555, 737 N.E.2d 128, 133 (Ohio Ct. App. 2000) (citation omitted), such as bonuses and academic funding, modify the presumed at-will relationship. *See id.* at 133-34 (promises to develop "many other ventures together" insufficient to alter at-will employment); *Clark*, 736 N.E.2d at 972-73 (employment contract specifying annual salary and bonus with no mention of duration is an at-will contract); *Shaw v. J. Pollock & Co.*, 82 Ohio App. 3d 656, 612 N.E.2d 1295, 1298 (Ohio Ct. App. 1992) ("The potential of future profitsharing is not a fact or circumstance which transforms a contract terminable at will into a contract for a term of years."). This is so because, as the district court explained, provisions concerning bonuses, raises, and research funding per year ultimately suffer from the same defect as provisions concerning annual compensation: they "refer to how much NCH will support *per year*; they say nothing to guarantee employment for a specific duration."

"The general rule in Ohio is that unless otherwise agreed to by the parties, an employment agreement purporting to be permanent or for life, or for no fixed time period is considered to be employment terminable at the will of either party." *Humphreys v. Bellaire Corp.*, 966 F.2d 1037, 1040 (6th Cir. 1992) (citing *Henkel*, 344 N.E.2d at 118). Because the offer letter does not "clearly indicate" a specific term of employment, plaintiff has failed to rebut the "strong presumption" in favor of an at-will relationship. *Padula*, 37 N.E.3d at 808. NCH's withdrawal of the employment offer was therefore not a breach of an express contract.

B.

While failure to specify duration in the offer letter may be fatal to a claim for breach of express contract, the same cannot be said of a claim for breach of implied contract. *See, e.g., Wright*, 653 N.E.2d at 384. Contractual limits on an employer's right to discharge an employee need not be in writing; they can also be implied from "the 'facts and circumstances' surrounding the employment-at-will relationship." *Id.* (quoting *Mers*, 483 N.E.2d at 154). "These facts and circumstances include the character of the employment, custom, the course of dealing between the parties, company policy," oral representations, and "any other fact which may illuminate the question." *Id.* (internal quotation marks omitted).

Plaintiff argues that even if NCH did not expressly promise him a specific term of employment, the facts and circumstances here nevertheless support the finding of an implied contract for a specific term of employment. In this regard, Casale compares his case to *Miller v. Lindsay-Green, Inc.*, 2005-Ohio-6366, 2005 WL 3220215 (Ohio Ct. App. 2005), and

Wright, 73 Ohio St. 3d 571, 1995 Ohio 114, 653 N.E.2d 381. Neither comparison is apt.

Miller involved an employee who claimed his employer made an oral promise to employ him for a ten-year period. *Miller*, 2005-Ohio-6366, 2005 WL 3220215 at *1, *4. Plaintiff cites *Miller* for the proposition that parol evidence, such as oral promises of employment, can supplement a written agreement which is silent as to duration in order to establish an implied promise of a specific term of employment. But the oral promise in *Miller* did not support a breach-of-contract claim. It supported a promissory estoppel claim. 2005-Ohio-6366, [WL] at *4-6, *8. The distinction is significant, because "[p]romissory estoppel . . . is not a contractual theory but a quasi-contractual or equitable doctrine designed to prevent the harm resulting from [an employee's] reasonable and detrimental reliance . . . upon the false representations of his employer." *Karnes v. Doctors Hosp.*, 51 Ohio St. 3d 139, 555 N.E.2d 280, 283 (Ohio 1990) (per curiam); *see also Dunn v. Bruzzese*, 172 Ohio App. 3d 320, 2007 Ohio 3500, 874 N.E.2d 1221, 1228-29 (Ohio Ct. App. 2007) (distinguishing promissory estoppel as a "tool of equity" or contract implied-in-law, from a contract implied-in-fact). A claimant proceeding on a theory of promissory estoppel can, for instance, prevail without demonstrating a "meeting of the minds" between the parties. *Dunn*, 874 N.E.2d at 1228-29 (citation omitted).

But a claimant proceeding on a theory of an implied-in-fact contract cannot. *Id.* "On the contrary, the existence of . . . [an] implied-in-fact contract[] . . . hinge[s] upon proof of all the elements of a contract." *Id*. at 1228 (citation omitted). "To establish a contract implied in fact, a plaintiff must demonstrate that the circumstances surrounding the parties' transaction make it reasonably certain that an agreement was intended." *Id*. at 1228-29 (citation omitted).

The employee in *Wright*, who was hired without a written agreement, made that showing. Honda terminated Wright for violating its anti-nepotism policy, but she presented evidence demonstrating "that an implied employment agreement existed [under] which [she] could not be terminated unless she failed to perform her job adequately." 653 N.E.2d at 384. Honda's employee handbook, progress reports, and promotional letters emphasized the plaintiff's "continued growth" with the company, and her supervisor testified "that if an employee performs his . . . job in an acceptable manner," he can "expect to have continued employment with Honda." *Id.* "Once [Wright] became aware of [the anti-nepotism] policy," management at first informed her "that she had no reason to be concerned and that there were other employees who retained their positions under similar circumstances." *Id.* at 385. Despite these assurances, Wright's supervisor sent her home from work to "investigate" the policy violation, then invited Wright back "as if nothing had happened," only to terminate her a month later. *Id.* at 383, 385.

These "[p]articularly egregious" circumstances did not befall Casale. *Id.* at 385. Plaintiff acknowledged he and Miller had no discussions "regarding the circumstances under which [his] employment with [NCH]

could be terminated." Unlike in *Wright*, plaintiff points to no handbook, progress reports, or statements by management suggesting "that if an employee performs his . . . job in an acceptable manner," he can "expect to have continued employment" at NCH. *See id.* at 384. Further, the circumstances plaintiff does identify are unrelated to duration. For instance, plaintiff notes that NCH introduced him in internal emails, letters to staff, and marketing materials as its "new Chief of Urology." He also complains that NCH required him to undergo extensive "pre-employment onboarding," such as attending meetings and obtaining his Ohio medical license and staff credentials. These circumstances prove only the undisputed fact that defendant hired plaintiff—not that it intended to limit its ability to terminate him.

Finally, plaintiff argues that to accept NCH's offer, he left a secure, lucrative position at the University of Louisville, one he would not have abandoned if he understood defendant was offering only at-will employment. Here again, Casale confuses facts that may support the finding of an equitable remedy, such as promissory estoppel, with facts necessary to demonstrate an implied-in-fact contract. *See Dunn*, 874 N.E.2d at 1228-29; *see also* Clark, 736 N.E.2d at 973 (no anticipatory repudiation where the at-will plaintiff "made [the] necessary arrangements to leave his former employer, move to the new employer's city, and pursue his job duties," and the defendant withdrew its employment offer before he started). As the district court put it, plaintiff's "citation to his own testimony that he would not have accepted an at-will offer or that another chief was given a contract with a term of five years does nothing to assist a trier of fact in determining whether *both parties to this agreement* mutually assented to a guaranteed period of employment of three years."

Because plaintiff has failed to demonstrate an express or implied contract for a specific term of employment, the district court did not err in granting defendant summary judgment on his claims for breach of contract and anticipatory repudiation.

C.

Invoking equitable remedies more directly, plaintiff also alleged a claim of promissory estoppel. To prevail on this claim, Casale must show: (1) a clear and unambiguous promise on the part of NCH; (2) his reliance on the promise; (3) that the reliance was reasonable and foreseeable; and (4) that he was injured as a result of his reliance. *Dunn*, 874 N.E.2d at 1227. Although plaintiff's willingness to "giv[e] up his . . . secure employment in reliance upon [NCH's] representations" may well establish the second element, *see Patrick v. Painesville Commercial Props., Inc.*, 99 Ohio App. 3d 360, 650 N.E.2d 927, 931 (Ohio Ct. App. 1994), the district court found Casale failed at the first, having cited no evidence "of any promise of employment for a specific term." Casale argues this decision was in error, because Ohio does not require that a promise for continued employment be "for a specific term."

Plaintiff misinterprets the district court's holding. As explained in its order denying plaintiff's motion to alter or amend the judgment, the court used the phrase "specific term of employment" merely to "repeat[] Plaintiff's theory of the case, not [to] stat[e] that Ohio law requires a promise of a specific term." "Elsewhere, the Court phrased the standard as whether there had been a detrimental reliance on a 'specific promise of job security,' and noted that Plaintiff failed to cite any evidence of a 'specific promise.'"

This was the reason the district court granted defendant summary judgment on Casale's promissory estoppel claim—because plaintiff failed to identify the "clear and unambiguous promise" upon which he relied. *Shaw*, 612 N.E.2d at 1298. And the court was right to require that the promise be specific." [V]ague, indefinite promises of future employment or mere representations of future conduct without more specificity do not form a valid basis for the application of the doctrine of promissory estoppel." *Daup*, 737 N.E.2d at 134 (internal quotation marks omitted). Likewise, "[i]n the absence of a specific promise of continued employment, a promise of future benefits or opportunities does not support a promissory estoppel exception to the employment-at-will doctrine." *Clark*, 736 N.E.2d at 974 (internal quotation marks omitted).

Plaintiff now argues he demonstrated a specific promise of employment for "a minimum three-year term, renewable by him, through age 70," based on the offer letter, and a discussion he had with Miller about working to age 70 before signing it. However, Casale did not press either point below, and "the failure to present an issue to the district court forfeits the right to have that argument addressed on appeal." *600 Marshall Entm't Concepts, LLC v. City of Memphis*, 705 F.3d 576, 585 (6th Cir. 2013) (citation omitted). "Our function is to review the case presented to the district court," not "a better case fashioned after a district court's unfavorable order." *Id.* (citation omitted). And the result in this case would be no different if we did. The offer letter includes no specific promise of employment for any term, and "promissory estoppel does not apply to oral statements made prior to the written contract where the contract covers the same subject matter." *Clark*, 736 N.E.2d at 974 (citation and brackets omitted). Accordingly, the district court did not err in granting summary judgment on plaintiff's promissory estoppel claim.

D. [OMITTED]

Questions

1. What are the exceptions to the "at-will" employment doctrine?
2. What is the difference between a breach of contract claim and one for promissory estoppel?
3. What is the significance of a contract that does not indicate a specific termination?

McCabe v. ConAgra Foods, Inc.

681 Fed. App'x 82 *; 2017 U.S. App. LEXIS 3755

I. Background

ConAgra Foods, Inc. ("ConAgra") conducted an annual promotion to help end child hunger from 2011 to 2015. The company would donate a certain amount—up to a yearly maximum—to a non-profit organization called Feeding America for every code entered on its website from certain ConAgra products' packaging. Kevin McCabe filed suit in the Eastern District of New York, alleging that ConAgra's promotion created a contract. He brought claims for breach of contract and violation of the District of Columbia Consumer Protection Procedures Act ("DCCPPA"), D.C. Code §§ 28-3901-3913.

A. Contract Claim

Pursuant to New York law, on which both parties rely in connection with this contract claim, the elements of a cause of action for breach of contract are: the existence of an agreement, performance by the plaintiff, breach of contract by the defendant, and resulting damage. *Eternity Glob. Master Fund Ltd. v. Morgan Guar. Trust Co. of N.Y.*, 375 F.3d 168, 177 (2d Cir. 2004). An agreement stems from "a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms." *Express Indus. and Terminal Corp. v. N.Y. State Dep't of Transp.*, 93 N.Y.2d 584, 715 N.E.2d 1050, 1053, 693 N.Y.S.2d 857 (N.Y. 1999); *see also Arbitron, Inc. v. Tralyn Broad., Inc.*, 400 F.3d 130, 137 (2d Cir. 2005). An agreement generally requires an offer and an acceptance. The general rule in New York is that a promotion or advertisement is not an offer. *Leonard v. Pepsico, Inc.*, 88 F. Supp. 2d 116, 122-23 (S.D.N.Y. 1999), *aff'd*, 210 F.3d 88 (2d Cir. 2000). An advertisement can constitute an offer when it is "clear, definite, and explicit, and leaves nothing open for negotiation." *Id*. at 123 (quoting *Lefkowitz v. Great Minneapolis Surplus Store, Inc.*, 251 Minn. 188, 86 N.W.2d 689, 691 (Minn. 1957)); *Amalfitano v. NBTY Inc.*, 128 A.D.3d 743, 744, 9 N.Y.S.3d 352 (N.Y. App. Div. 2d Dep't 2015), *leave to appeal denied*, 26 N.Y.3d 913, 22 N.Y.S.3d 165, 43 N.E.3d 375 (N.Y. 2015).

We agree with the district court that McCabe failed plausibly to allege the existence of a unilateral contract for each year from 2011 through 2014. A unilateral contract was not formed, *inter alia*, because the promotion was limited to a certain maximum donation per year. *See Amalfitano*, 128 A.D.3d at 744 (promotion was an invitation for offers, not an offer, because it expressly stated that supplies were limited). An individual entering a code would have no knowledge whether the maximum donation had been reached in 2011, 2012, 2013, or 2014. *Cf. Lefkowitz*, 86 N.W.2d at 691 (potential customer knew that he was the first one in line for a "first come,

first served" opportunity). Thus, ConAgra's promotion was not an offer because McCabe and the other plaintiffs had no "power of acceptance." *See Leonard*, 88 F. Supp. 2d at 123 (quoting *Mesaros v. United States*, 845 F.2d 1576, 1580 (Fed. Cir. 1988)).

The district court also concluded that McCabe did not plausibly allege the existence of a bilateral contract for each year from 2011 through 2015, and we agree. Under McCabe's bilateral contract theory, the terms of participation constituted an invitation for an offer. The entry of a code by a promotion participant then was an offer which ConAgra supposedly accepted by acknowledging the code's receipt. ConAgra's supposed invitation for offers, however—made prior to any code entry—was insufficiently definite to set the terms of the "offer" supposedly made on entry of a code, and McCabe fails to allege facts suggesting that the code entry in any way clarified the terms on which an alleged bilateral contract was created.

McCabe alleges that, in 2015, an individual entering an online code would know whether the yearly maximum donation had been reached because of a counter used during that year's promotion on the promotion website. Thus, he claims, a unilateral contract was formed at least as to this year. But even assuming *arguendo* that the individual was aware of whether the yearly maximum donation had been reached and that the terms of the offer were sufficiently definite, McCabe fails to allege that ConAgra breached that contract. Nowhere does he state that ConAgra did not make the 10-cent or 20-cent monetary donation to Feeding America upon the entry of an online code—the only promotion term arguably definite enough to constitute an offer. He merely criticizes the methodology that Feeding America used to calculate the cost of providing a meal. Therefore, McCabe fails to state a claim for breach of contract even as to the 2015 promotion.

B. DCCPPA Claim [OMITTED]

III. Conclusion

We have considered McCabe's remaining arguments and find them to be without merit. Accordingly, we AFFIRM the judgment of the district court.

Questions

1. What are the requirements for maintaining a breach of contract claim?
2. What facts led to McCabe losing his claim?
3. What is the court's interpretation of ConAgra's advertisement?