

Chapter Nine

Contracts and Consumer Law

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Introduction

RECOGNIZING WHAT CONSTITUTES A CONTRACT is the key to understanding many legal questions. Very often a dispute centers not on whether someone has violated a contract, but whether there was a contract in the first place. Other disputes center on whether a change in circumstances has made the contract unenforceable. This chapter contains five sections. The first section, "A Contract Defined," outlines what contracts are and how people form them. The second section, "What a Contract Is Not," looks at cases where the necessary parts of a contract are missing, and discusses your defenses to other people's claims that they have a contract with you. The third section, "Practical Contracts," focuses on contracts in daily life and highlights issues of interest to consumers. The fourth section, "Special Types of Contracts," discusses leases, warranties, advertising, door-to-door sales, and other special types of contracts. The fifth section, "Breaches and Remedies," discusses ways to deal with disputes arising out of contractual relationships.

A Contract Defined

Q. What is a contract?

A. A contract consists of voluntary promises between competent parties to do, or not to do, something, which the law will enforce. These are binding promises, which may be oral or written. Depending on the situation, a contract could obligate someone even if he or she wants to call the deal off before receiving anything from the other side. The details of the contract who, how, what, how much, how many, when, etc. are called its provisions or terms.

In order for a promise to qualify as a contract, it has to be supported by the exchange of something of value between the participants or parties. This something is called consideration. Consideration is most often money, but can be some other bargained-for benefit or detriment (as explained more fully below). The final qualification for a contract is that the subject of the promise (including the consideration) may not be illegal.

Suppose that a friend agrees to buy your car for \$1,000. That is the promise. You benefit by getting the cash. Your friend benefits by getting the car. Since it is your car, the sale is legal, and you and your friend have a contract.

It is common for the word "contract" to be used as a verb meaning "to enter into a contract." We also speak of contractual relationships to refer to the whole of sometimes complex relationships, which may comprise one or many contracts.

Q. May anyone enter into a contract?

A. No. In order to make an enforceable contract, people have to be able to understand what they're doing. That requires both maturity and mental capacity. Without both of these, one party could be at a disadvantage in the bargaining process, which could invalidate the contract.

Q. What determines enough maturity to make a contract?

A. In this sense, maturity is defined as a certain age a person reaches - regardless of whether he or she is in fact "mature." State laws permit persons to make contracts if they have reached the age of majority (the end of being a minor), which is usually age eighteen.

Q. Does that mean minors may not make a contract?

A. No, minors may make contracts. But courts may choose not to enforce some of them. The law presumes that minors need to be protected from their lack of maturity, and won't allow, for example,

a Porsche salesman to exploit their naivete by enforcing a signed sales contract whose real implications a young person is unlikely to have comprehended. Sometimes this results in minors receiving benefits (such as goods or services) and not having to pay for them, though they would have to return any goods still in their possession. This would apply even to minors who are emancipated - living entirely on their own - who get involved in contractual relationships, as well as to a minor who lives at home but is unsupervised long enough to get into a contractual fix.

Parents who give their children access to home computers hooked up to the Internet should consider the situation that may arise if a child uses their credit card information online. This includes information that may be stored in the computer or at a website that recognizes your home computer and, of course, doesn't know that a minor is the actual "shopper." From the point of view of the website owner, the parent is the customer, and you may have a hard time avoiding liability for a contract (such as for the purchase of merchandise) that your children have entered into using your Internet identity.

Also, a court may require a minor or the minor's parents to pay the fair market value (not necessarily the contract price) for what courts call necessities (what you would likely call "necessities"). The definition of a "necessary" depends entirely on the person and the situation. It probably will always include food and probably will never include CD's, Nintendo cartridges or Porsches. Minors who reach full age and do not disavow their contracts may then have to comply with all their terms. In some states, courts may require a minor to pay the fair value of goods or services purchased under a contract that minor has disavowed.

Q. When does mental capacity invalidate a contract?

A. While the age test for legal maturity is easy to determine, the standards for determining mental capacity are remarkably complex and differ widely from one state to another. One common test is whether people have the capacity to understand what they were doing and to appreciate its effects when they made the deal. Another approach is evaluating whether people can control themselves regardless of their understanding.

Q. May an intoxicated person get out of a contract?

A. Very often someone who is "under the influence" can get out of a contract. The courts don't like to let a voluntarily intoxicated person revoke a contract with innocent parties this way - but if someone acts like a drunk, the other party probably wasn't so innocent.

On the other hand, if someone doesn't appear to be intoxicated, he or she probably will have to follow the terms of the contract. The key in this area may be a person's medical history. Someone who can show a history of alcohol abuse, blackouts, and the like, may be able to void the contract, regardless of his or her appearance when the contract is made. This is true especially if the other party involved knows about the prior medical history. The reasoning goes back to mental capacity, and whether a person is able to exercise self-control.

Capacity

We've discussed the fundamental requirements for competence to make a contract - maturity and mental capacity. Of course, it should go without saying that there's an even more fundamental requirement: that both parties be people. In the case of a corporation or other legal entity, which the law considers a "person," this could be an issue. A problem in the formation or status of the entity could cause it to cease existing legally, thus making it impossible to enter into a contract. In that case, however, the individuals who signed the contract on behalf of the legally nonexistent entity could be

personally liable for fulfilling the contract.

Historically, the law has had other criteria for capacity. Slaves, married women and convicts were at one time not considered capable of entering into contracts in most states. Even today, certain American Indians are regarded as "wards" of the U.S. government for many purposes, and their contract-law status is similar to that of minors.

Q. Do I need a lawyer to make a contract?

A. If you satisfy the maturity and mental capacity requirements, you don't need anyone else (besides the other party). But it probably is a good idea to see a lawyer before you sign complex contracts, such as business deals or contracts involving large amounts of money.

Q. Must contracts be in writing?

A. Many types of contracts don't have to be written to be enforceable. An example is purchasing an item in a retail store. You pay money in exchange for an item that the store warrants (by implication, as discussed later) will perform a certain function. Your receipt is proof of the contract. And, in fact, with some important exceptions (discussed below) virtually any transaction agreed to orally could be enforceable.

As with a written contract, the existence of an oral contract must be proved before the courts will enforce it. But as you can imagine, an oral contract can be very hard to prove - you seldom have it on video. An oral contract is usually proved by showing that outside circumstances would lead a reasonable observer to conclude that a contract most likely existed. Even then, there is always the problem of what the terms of the oral contract were. The courts typically look only to unrefuted (uncontested) testimony to help them "fill in the blanks," and are hesitant to add words or terms to any written document.

Q. Are there any advantages to putting a contract in writing?

A. Although most states recognize and enforce oral contracts, the safest practice is to put any substantial agreement in writing. Get any promise from a salesperson or an agent in writing, especially if there already is a written contract - even an order form, printed receipt, or a handwritten "letter of agreement" or "understanding" -- covering any part of the same deal. Otherwise that order form or other paper probably will be regarded by the law as a complete statement of all understandings between the parties. Anything not in that written contract would be deemed not to be part of the deal.

Writing down the terms of a good-faith agreement is the best way to ensure that all parties are aware of their rights and duties - even if no party intends to lie about the provisions of the agreement.

Q. Does clicking a "YES" or "I AGREE" box on a computer screen at the bottom of a screen full of contractual terms constitute a written contract?

A. The overwhelming consensus of the courts is that it does. This applies when the "click box" is part of a software package that you may download from the Internet or even off discs that you purchase. A few years ago courts agreed that even without click boxes, the terms of a software license (see below) were an enforceable written contract, even though you could not have read the terms before you bought the package. This was called a "shrink wrap" license, since plastic shrink wrap prevents store browsers from opening up boxes containing software. Now most software comes with a click box that also requires you to affirmatively agree to the terms of the license by clicking. The software won't load unless you do so. Similar click boxes are used for

registration at certain websites and for other Internet benefits that businesses may offer. They are usually enforceable.

Law Evolves to Meet E-Commerce Demands

State and federal law is adapting to the new world on electronic commerce. All 50 states have passed laws relating to electronic commerce, and there is a new Uniform Electronic Transactions Act that some states have adopted.

In addition, most consumer protection laws apply online as well, often supplemented in the states by laws aimed specifically at Web merchants. These often require the web merchant to prominently post the legal name of the business, its return and refund policy, and the street address where they conduct business. Sometimes procedures for resolving complaints must be included as well.

Other laws deal with protection of privacy online, including the collection and use of personal information for marketing purposes. Special guidelines apply to selling stock over the Web.

Any company maintaining a website would be well advised to check with their lawyers about the rules and laws that apply—and to be aware that the legal framework is highly likely to continue to evolve.

Q. Which contracts have to be in writing?

A. Under statutes (laws passed by legislatures) in most states called "statutes of frauds," the courts will enforce certain contracts only if they are in writing and are signed by the parties who are going to be obligated to fulfill them. In most states, these contracts include:

- any promise to be responsible for someone else's debts--often called a surety contract or a guaranty; one example would be an agreement by parents to guarantee payment of a loan made by a bank to their child;
- any promise, made with consideration, to marry (though this rule has been eliminated in many states);
- any promise that the parties cannot possibly fulfill within one year from when they made the promise;
- any promise involving the change of ownership of land or interests in land such as leases;
- any promise for the sale of goods worth more than \$500 or lease of goods worth more than \$1,000;
- any promise to bequeath property (give it after death);
- any promise to sell stocks and bonds.

Some states have additional requirements for written contracts. These statutes are designed to prevent fraudulent claims in areas where it is uniquely difficult to prove that oral contracts have been made, or where important policies are at stake, such as the dependability of real estate ownership rights.

The last few years have seen a trend in many states away from concrete list above and toward allowing claims that traditionally had to be based on written contracts to be maintained even without a writing. So if you are facing a serious financial issue and fear that the statutes of frauds could prevent you from recovering, a lawyer may be able to help you.

Q. What are the rules regarding signatures?

A. A signature can be handwritten, but a stamped, photocopied, or engraved signature is often valid

as well, as are signatures written by electronic pens. Even a simple mark or other indication of a name may be enough. Furthermore, if there is sufficient evidence of trustworthiness, many states now permit e-mail from a specific account to be regarded as "signed." Other states have set out specific requirements for electronic mail signatures, and a worldwide standard may eventually be established. (You can find out the latest developments in this area at <http://www.abanet.org/scitech/ec/isc/dsg-tutorial.html>.) What matters is whether the signature is authorized and intended to authenticate a writing, that is, indicate the signer's execution (completion and acceptance) of it. That means that you can authorize someone else to sign for you as well. But the least risky and most persuasive evidence of assent is your own handwritten signature.

E-Signature Bill Becomes Law

A new federal law gives online signatures the same legal validity as a signature in pen and ink for most—but not all purposes. The bill, which is expected to further e-commerce, will permit consumers to sign a mortgage or insurance contract online, as well as perform other tasks, such as opening a brokerage account.

The law assures that a contract shall not be denied legal status simply because its signature is electronic, but a safeguard is that most contracts and documents must be capable of being reproduced for later reference if they are to be enforceable.

However, no one is *obligated* to accept electronic signatures, and certain kinds of documents are specifically exempted from the law. These include wills, codicils and testamentary trusts, adoptions, divorces or other family law matters, notices of foreclosures or evictions from one's primary residence, and cancellation of health or life insurance benefits.

Q. Do contracts have to be notarized by a notary public?

A. In general, no. Notary publics or notaries, once important officials who were specially authorized to draw up contracts and transcribe official proceedings, act now mostly to administer oaths and to authenticate documents by attesting or certifying that a signature is genuine. Many commercial contracts, such as promissory notes or loan contracts, are routinely notarized with the notary's signature and seal to ensure that they are authentic, even where this is not strictly required. Many technical documents required by law, such as certificates of incorporation, must be notarized if they are going to be recorded in a local or state filing office.

IN CONSIDERATION

The doctrine that consideration is a central element of a contract is of relatively recent origin. Until the last few centuries, elaborate formality rather than consideration was the chief requirement to form a contract. The necessary formalities were a sufficient signed writing, a seal or other attestation of authenticity, and delivery to whomever would have the rights under the contract. A seal could be an impression on wax or some other surface, bearing the mark of a notary public or other official. The vestiges of the seal remain in some contracts, where the initials "L.S." (for the Latin *locus sigilli*, "place of the seal"), or simply the word "seal" is printed to represent symbolically the authentication of the contract's execution. Even today, traditional Jewish wedding contracts are made on these formal bases: a writing, an attestation by witnesses, and delivery.

Q. Do both sides have to give consideration?

A. Yes. There's a crucial principle in contract law called mutuality of obligations. It means that both sides have to be committed to giving up something. If either party reserves an unqualified right to bail out, that person's promise is not enforceable.

Q. What is an offer?

A. Offer and acceptance are the fundamental parts of a contract, once capacity is established. An offer is a communication by an offeror of a present intention to enter a contract. (The offeror is the person making the offer.) It is not simply an invitation to bargain or negotiate. For the communication to be effective, the offeree (the one who is receiving the offer) must receive it. In a contract to buy and sell, for an offer to be valid, all of the following must be clear:

- Who is the offeree?
- What is the subject matter of the offer?
- How many of the subject matter does the offer involve (quantity)?
- How much (price)?

Let's say you told your friend, "I'll sell you my mauve-colored Yugo for one thousand dollars." Your friend is the offeree, and the car is the subject matter. Describing the car as a mauve Yugo makes your friend reasonably sure that both of you are talking about the same car (and only one of them). Finally, the price is \$1,000. It's a perfectly good offer.

Q. Is an advertisement an offer?

A. No. Courts usually consider advertisements something short of an offer. They are an "expression of intent to sell" or an invitation to bargain. The section on consumer law later in this chapter discusses this further.

Give and Take

A contract can only come about through the bargaining process, which may take many forms. This article discusses the definitions of consideration, offer, and acceptance. All the principles discussed here will have to be present, in some form, in any contract.

Q. Does an offer stay open indefinitely?

A. Not unless the offeree has an option, an irrevocable offer for which the offeree bargains (discussed below). Otherwise, an offer ends when:

- the time to accept is up - either a "reasonable" amount of time or the deadline stated in the offer;
- the offeror cancels the offer;
- the offeree rejects the offer;
- the offeree dies or is incapacitated.

An offer is also closed, even if the offeree has an option, if:

- a change in the law makes the contract illegal;
- something destroys the subject matter of the contract (see below).

Q. What is an option contract?

A. An option is an agreement, made for consideration, to keep an offer open for a certain period. For example, in return for fifty-dollar consideration today, you might agree to give your friend until next Friday to accept your offer to sell her your Yugo for \$1,000. Now you have an option contract, and you may not sell the car to someone else - even for \$1,200 without breaching that contract. Selling an option puts a limit on your ability to revoke an offer, a limit that the optionee (the option-holder) bargains for with you.

Q. What constitutes the acceptance of an offer?

A. Acceptance is the offeree's voluntary, communicated agreement or assent to the terms and conditions of the offer. Assent is some act or promise of agreement. An easy example of an assent might be your friend saying, "I agree to buy your mauve Yugo for one thousand dollars."

Generally, a valid acceptance requires that every term agreed to be the same as in the offer. Thus, if the offer requires acceptance by mail, you must accept by mail for the offer to be effective. If there's no such requirement, you just have to communicate your acceptance by some reasonable means (not by carrier pigeon or smoke signals but by telephone, mail, or maybe facsimile). On the other hand, an assent that is not quite so specific but is crystal-clear would also suffice - such as, in the Yugo example, saying, "It's a deal. I'll pick it up tomorrow." Once again, the standard is whether a reasonable observer would think there was an assent.

Q. Can silence make up an acceptance?

A. In most cases, the answer is no. It isn't fair to allow someone to impose a contract on someone else. Yet there are circumstances where failure to respond may have a contractual effect. Past dealings between the parties, for example, can create a situation in which silence constitutes acceptance. Suppose a fire insurance company, according to past practice to which you have assented, sends you a renewal policy (which is in effect a new contract for insurance) and bills you for the premium. If you kept the policy but later refused to pay the premium, you would be liable for the premium. This works to everyone's benefit: If your house burned down after the original insurance policy had expired but before you had paid the renewal premium, you obviously would want the policy still to be effective. And the insurer is protected from your deciding not to pay the premium only after you know what claims you might have.

Q. Can acts make up an acceptance?

A. Yes. Not only words, but any conduct that would lead a reasonable observer to believe that the offeree had accepted the offer qualifies as an acceptance. As discussed above, the act of clicking "YES" or "I ACCEPT" on a computer screen can constitute acceptance of an offer. Another example: Suppose you say, "John, I will pay you fifty dollars to clean my house on Sunday at nine o'clock a.m." If John shows up at nine o'clock a.m. on Sunday and begins cleaning, he adequately shows acceptance (assuming you're home or you otherwise would know he showed up).

To take another example, you don't normally have to pay for goods shipped to you that you didn't order (a later section will discuss this in more detail). But if you were a retailer and you put them on display in your store and sold them, you would have accepted the offer to buy them from the wholesaler and you would be obligated to pay the invoice price. You otherwise would only have to allow them to be taken back at no cost to you. Sometimes this is called an implied (as opposed to an express) contract. Either one is a genuine contract.

THE REASONABLE PERSON

Throughout this and any other law book, the word "reasonable" will appear many times. Very often you'll see references to the "reasonable man" or the "reasonable person." Why is the law so preoccupied with this mythical being?

The answer is that no contract can possibly predict the infinite number of disputes that might arise under it. Similarly, no set of laws regulating liability for personal or property injury can possibly foresee the countless ways human beings and their property can harm other people or property. Since the law can't provide for every possibility, it has evolved the standard of the "reasonable" person to furnish some uniform standards and to guide the courts.

Through the fiction of the "reasonable person," the law creates a standard that the judge or jury may apply to each set of circumstances. It is a standard that reflects community values, rather than the judgment of the people involved in the actual case. Thus a court might decide whether an oral contract was formed by asking whether a "reasonable person" would conclude from people's actions that one did exist. Or the court might decide an automobile accident case by asking what a "reasonable person" might have done in a particular traffic or hazard situation.

Q. When is the acceptance effective?

A. The contract usually is in effect as soon as the offeree transmits or communicates the acceptance - unless the offeror has specified that the acceptance must be received before it is effective, or before an option expires (as discussed previously). In these situations, there's no contract until the offeror receives the answer, and in the way specified, if any.

Q. What is the "meeting of the minds"?

A. This term describes an offer that the offeree accepts in all its critical or material terms. This phrase also implies that both parties understand (or reasonably should understand) these terms in the same way. The "meeting of the minds" is a useful phrase to help determine in your own mind whether you ever got past the bargaining stage of negotiations.

Q. Is an "agreement to agree" a contract?

A. Generally not, because it suggests that important terms are still missing. Rarely will a court "supply" those terms itself. An agreement to agree is another way of saying that there has not yet been a meeting of the minds, although the parties would like there to be.

Q. Can a joke be the basis for a contract?

A. It depends on whether a reasonable observer would know it's a joke, and on whether the "acceptance" was adequate. In our Yugo example, you probably couldn't get out of the contract by saying, "How could you think I'd sell this for \$1,000? I meant it as a joke!" On the other hand, if someone sued you because you "backed out" on your "promise" to sell her France for fifteen dollars, the joke would be on her - no one reasonably could have thought you were serious.

Q. What is a condition?

A. People often use the word "condition" to mean one of the terms of a contract. A more precise definition is that a condition is an event that has to occur if the contract is to be performed. In our earlier example, your friend might have said, "I'll buy your mauve Yugo for one thousand dollars only if you can deliver it to me by tonight." At this point, you are still negotiating; there is no contract. But if you reply, "It's a deal I'll be there tonight," you have a contract, with a condition of delivery by tonight. If you fail to deliver the car by tonight, you have breached the contract. (Breaches of

strike but now the job will cost \$650. You need the house painted before you leave for the North Pole on Friday, and there's no time to hire another contractor, so you agree to the new price. But the new agreement is not enforceable by him. He already had to paint your house for \$500. He should have figured the possible increased costs into the original price. You didn't get anything of benefit from the modified contract, since you already had his promise to paint the house. Therefore, you only owe \$500.

Q. Does that mean I can't renegotiate a contract?

A. No, it only means that no one can force you to renegotiate by taking advantage of an existing agreement. In the previous example, you might have decided that the painter deserved more money than you had originally bargained for. More realistically, you might have agreed that he would do some work not included in the original contract. You could want to use the contractor later, or you might feel that he does the best job at any price. (Considerations like these allow many sports stars to renegotiate their contracts.)

Keep in mind that whenever you get involved in a deal, you are taking a risk that it might be less beneficial for you than you planned when you agreed to the contract terms. The other party doesn't have to ensure your profit, unless the two of you included that in your bargain.

Q. Is a promise to make a gift a contract?

A. Not if it truly is only a promise to make a gift, because a gift lacks the two-sided obligation discussed above. But if the person promising the gift is asking for anything in return, even by implication, a contract may be formed. The key, again, is consideration.

Q. What if someone makes a promise without consideration, but I rely on it?

A. Remember that consideration may be a disadvantage to one party. From that idea, the law has developed the concept of promissory reliance - that a contract may be formed if one party reasonably relies on the other's promise. That means that he does more than get his heart set on it. He has to do something he wouldn't have done, or fail to do something he would have done, but for the promise. If that reliance causes some loss, he may have an enforceable contract.

Suppose that rich Uncle Murray loves your kids. On previous occasions he has asked you to buy them expensive presents and has reimbursed you for them. This past summer, Uncle Murray told you he would like you to build a swimming pool for the kids, and send him the bill. You did so, but moody Uncle Murray changed his mind. Now he refuses to pay for the pool, and claims you can't enforce a promise to make a gift. The pool, however, is no longer considered a gift. You acted to your detriment in reasonable reliance on his promise, by taking on the duty to pay for a swimming pool you would not normally have built. Uncle Murray has to pay if you prove that he induced you to build the pool, especially if this understanding was consistent with many previous gifts. Remember, however, that you still have to live with your Uncle Murray.

Q. May someone else make a contract on my behalf?

A. Yes, but only with your permission. The law refers to such an arrangement as agency. We couldn't do business without it. For example, when you buy a car, you bargain and finally cut a deal with the salesperson. But she doesn't own the car she's selling you. She might not even have a car. She is an agent, someone with the authority to bind someone else - in this case, the car dealership - by contract. The law refers to that someone else as the principal.

To take another common example, real-estate brokers typically act as your agent when you sell a home. As the principal, you generally establish the terms or range of terms he is authorized to

accept. (For example, "I'll sell if they will come up to one hundred thousand dollars and agree to close the sale by July.") Then your agent goes into negotiations on your behalf.

As long as agents do not exceed the authority granted them by their principals, contracts they make bind their principals as if the principals had made the contracts themselves. If something went wrong with the contract, you would sue the principal - not the agent - if you couldn't resolve the dispute in a friendly manner. An agent normally does not have any personal obligation.

While acting on behalf of principals, agents are required to put their own interests after those of the principal. Therefore, they may not personally profit beyond what the principal and agent have agreed to in their agency contract. That means they cannot take advantage of any opportunity which, under the terms of the agency, is meant to be exploited for the principal.

Q. What happens when an agent does exceed the authority granted by a principal?

A. That depends on the circumstances. Suppose an agent exceeds her authority, but the person she's dealing with reasonably doesn't understand that she's exceeding it. If the principal knew (or reasonably should have known) that the agent has exceeded her authority in similar circumstances, but has done nothing about it, the principal may be bound by the contract negotiated by the agent. On the other hand, if the principal is not aware of the agent's actions exceeding her authority, they will only be enforceable against the principal if it was reasonable for the other person to believe the agent was acting within her authority.

For example, suppose the teenage boy wearing a service station uniform who fills your gas tank and checks your oil - and who appears to be an agent, to some limited degree, of the service station - offers to sell you the whole service station in trade for the sleek mauve Yugo you are driving. It's not reasonable for you to assume he has that power when common sense tells you he can only sell you his boss's gasoline and oil for a fixed price.

In contrast, if an insurance agent wrote you an insurance policy from his company that exceeded the policy amount he was authorized to write, but the insurer never told you this, you would be acting reasonably to assume he was authorized, and you probably could collect on a claim above his limit.

AGENTS WHO EXCEED THEIR AUTHORITY

On occasion, while making a contract, an agent might exceed the authority granted by the principal. An example might involve an automobile salesperson who signs a contract on behalf of a car dealer which, without the dealer's authority, gives the customer a warranty for 40,000 extra miles. In that case, the dealer might very well be bound by the contract.

Q. May I transfer my duties under a contract?

A. Yes, unless the contract prohibits such a transfer. The law refers to a transfer of duties or responsibilities as a delegation. If, however, someone contracts with you because of a special skill or talent only you have, you may not be able to transfer your duty. Such cases are quite rare. There are arguably no car mechanics who are so good at tuning an engine that they may not delegate someone else to do it for them unless they specifically promise to do it themselves. On the other hand, if you hire well-known entertainers to perform at your wedding, they may not send other entertainers (no matter how talented) as substitutes without your permission.

Q. May I delegate my rights?

A. A delegation or transfer of rights, called an assignment, is more flexible than a transfer of duties. For example, you may wish to transfer the right to receive money from a buyer for something you

have sold. Generally, a contract right is yours to do as you wish with it, as long as you didn't agree in the contract not to assign the right. You can sell it or give it away, though most states require you to put an assignment in writing, especially if it is a gift.

There are exceptions to the rule that assignments may be made freely. If an assignment would substantially increase the risk, or materially change the duty of the other party to the contract, the contract may not be assignable, even if its terms contain no explicit agreement to the contrary. Such an assignment would be regarded as unfairly upsetting the expectations the other party had when he or she entered the contract.

For example, suppose you made a contract for fire insurance on a garage for your Yugo. Then a notorious convicted arsonist and insurance cheat contacted you upon release from prison and asked you to sell the garage and assign your rights under the garage's fire insurance policy to the arsonist. You would probably be in for a disappointment, even if the insurance policy didn't prohibit assignment. Since the insurer made its decision to insure in part based on your solid citizenship, insuring the arsonist would greatly increase its burden by taking on a risk it never anticipated.

WHAT A CONTRACT IS NOT

Bars to a Contract

Q. May someone make a contract to do or sell something illegal?

A. No. The courts will not help someone collect an illegal gambling debt, or payment for illegal drugs or prostitution. The law treats these contracts as if they never existed - they are unenforceable or void. This is the contract defense of illegality.

Similarly, some contracts that are not specifically outlawed nonetheless will not be enforced if a court determines that enforcement would violate public policy. An example would be a contract to become a slave, which may not be prohibited by any specific statute but offends the law's view of what kinds of contracts society will permit.

MONEY ON THE LINE

What if it is illegal to gamble in your state, but you go on line and gamble over the Internet using your credit card? Chances are you will still have to pay your losses. The website operator may be in violation of local law, and you may be also. But your credit card agreement probably requires you to pay your gambling debts regardless, and until this area is regulated and controlled you must assume that when you put your money on the line, online, that you may never see it again – exactly the bargain you make whenever you gamble.

Q. What if the contract became unenforceable because something made it illegal after the people agreed to it?

A. Generally speaking, the Constitution forbids lawmakers from passing laws that would impair the rights people bargain for in contracts. Therefore, a contract is usually considered by courts in light of the law which applied at the time the contract was made *-unless the change in the law involves a compelling public policy.*

For example, a contract between a railroad and a property owner who leased a right-of-way to the railroad provided that the railroad was not responsible for any fire damage to the property caused by locomotives. Later, the state legislature made it illegal to fail to keep certain precautions

against fire damaging an adjoining property. The court held that, even if that law would have made the contract illegal (because it didn't include the newly-required precautions), because it was passed after the contract was made it did not affect the contract.

Typically, however, courts say that because of a change in *public policy* as a result of the change in the law, they will not enforce the old contract. Obviously, a contract to sell someone a slave could not be enforced after slavery became illegal; neither could you enforce a contract to purchase a banned assault rifle that was made before the ban went into effect. This works both ways: a contract that was illegal when made usually will not be enforced, even though it would be legal if entered into today. One case involved a contract which violated wartime price-controls, entered into when those controls were in effect, which one of the parties wanted enforced after the war. The court ruled that a contract that was so damaging to the public good when made (and when no change in the law was anticipated) should never be enforced. To do so would have been to provide an incentive to enter into illegal contracts in the hope that they will someday be enforceable a bad prescription for effective public policy.

Q. Does the same hold true for a contract to do something immoral?

A. The courts will only enforce a moral code that the law (or "public policy") already reflects, such as laws against prostitution or stealing. You may feel that X-rated movies or fur coats are immoral, but as long as they're legal, they can be the subjects of enforceable contracts.

IS IT OR ISN'T IT A CONTRACT?

The principles discussed will go a long way toward determining if people have formed a contract. You now know that a contract has to be made between willing, competent parties. Also, the contract must concern a legal subject matter. The preceding section also discussed many aspects of consideration.

Applying these principles isn't always easy. Sometimes special protections in the law complicate matters. If successfully invoked, only one of these may be needed to provide a complete defense against someone claiming you owe him or her money or something else you supposedly promised. It would prompt a court to resolve the dispute as if there never were a contract. Since the contract is void, neither party may enforce its terms in court against the other.

Other contracts are voidable, but not automatically void. What's the difference? A contract produced by fraud is not automatically void. People who are victimized by fraud have the option of asking a court to declare that contract void, or to reform (rewrite) it. On the other hand, if they went along with the contract for a substantial period of time, they could lose their right to get out of it. This is called ratification, and is based on the idea that they have, by their actions, made it clear that they are able to live with the terms. A checklist of contract defenses appears in this section.

Q. May a contract that I am a party to but that was made against my will be enforced against me?

A. No. A contract that someone agrees to under duress is void in most states. Duress is a threat or act that overcomes someone's free will. The classic case of duress is a contract signed by someone "with a gun to his head." Because this kind of duress is very rare - and often very hard to prove - the defense of duress is rarely successful.

Duress goes beyond persuasion or hard selling. Persuasion in bargaining is perfectly legal. It also isn't duress when you say, "I would never pay that much for a Yugo if I had a choice." You do have

a choice - to buy a nice Taurus instead. But if you want that mauve Yugo, you "have to" pay what the owner demands. In contrast, duress involves actual coercion, such as a threat of violence or imprisonment.

Q. Are there other kinds of duress besides physical threats?

A. Duress is a suspension of your free will. Besides being done by threats of physical violence, it may be duress to threaten to abuse the court system to coerce your agreement.

There is also economic duress. That was alluded to earlier when the contractor demanded more money after his workers went on strike and you needed your house painted before you left the country. This isn't the same as "driving a hard bargain." Rather, the contractor had already made a deal. When the contractor threatened to withhold his part of the deal, he left you with no practical choice but to agree. The classic case is where the supplier of a necessary ingredient or material threatens, on short notice and at a critical time, not to deliver it - in violation of an existing contract - unless he or she gets more favorable terms. Courts have set aside contracts made under such economic duress.

Q. What should I do if someone forces me to sign a contract under duress?

A. Once you get out of danger, see a lawyer who can tell you how to protect yourself. The lawyer can help you determine whether you have assumed any obligation, and what legal rights you might have besides disavowing the contract. It's important to act quickly. The courts are especially skeptical of a claim of duress made long after the danger has passed.

Q. Are there other uses of unfair pressure, less severe than duress, that void a contract?

A. There is a contract defense called undue influence, which doesn't involve a threat. Rather, it's the unfair use of a relationship of trust to pressure someone into an unbalanced contract. Undue influence cases usually involve someone who starts out at a disadvantage, perhaps due to illness, age, or emotional vulnerability. The other person often has some duty to look out for the weaker one's interests.

An example would be a court-appointed guardian who "persuades" his twelve-year-old charge to lend him \$25,000 from his trust fund, free of interest. The loan contract would be unenforceable because of undue influence, regardless of whether the minor otherwise had the capacity to make a contract.

Q. What is fraud?

A. A contract can be canceled by a court because of fraud when one person knowingly made a material misrepresentation that the other person reasonably relied on and that disadvantaged that other person. A material misrepresentation is an important untruth. In many states, it doesn't have to be made on purpose to make the contract voidable.

Consider our earlier example involving a car sale. You offered to sell your Yugo to a friend. Suppose you knew it had no transmission, and you knew she wanted it for the usual purpose of driving it. You told her it was working fine, and she relied on your statement. Then the contract you made may be set aside on the grounds of fraud.

Here, there is no issue of the statement being merely the seller's opinion, or exaggerated "sales talk" puffery which people know not to believe literally. You didn't merely say it was a great car when really it was a mediocre car. Saying it's "great" is just an opinion, while fraud requires an outright lie, or a substantial failure to state a material fact about an important part of the contract. For that reason - and because corrupt people often know well the fine line between fraud and puffing -

could be set aside.

Q. Does that mean that contracts always have a built-in guarantee against mistakes?

A. No. As you can imagine, this is a very tricky and unpredictable area. After all, many people make purchases on the understanding that the object is worth more to one person than to the other. You wouldn't pay \$80 for a cow if she were not worth at least \$80.01 to you. That is, you figure you're somewhat better off with the cow than with the \$80. (Economists call this amount the "marginal benefit.") Similarly, the seller would not sell her if she were worth more than \$79.99 to the seller. Both people have to be getting some benefit to agree to the sale. In the case of the cow, both buyer and seller understood clearly -- but mistakenly - that the cow could not get pregnant. It's as if they made the contract for a subject that turned out not to exist.

Various courts draw the line between \$80.01 and \$800 at different places, if they are willing to draw it at all. Competent legal advice about the law in your state is crucial if you are considering voiding a contract because of a mistake.

Q. What are statutes of limitations?

A. These are laws setting time limits during which a lawsuit can be brought. The typical deadline for bringing a contract action is six years from the time the breach occurs. The idea of this policy is that everyone is entitled, at some point, to "close the book" on a transaction. It encourages people to move on and reduces the uncertainty that, for example, businesses would face if they could be sued for breaching contracts that no one alive in the organization remembers.

Changing Situations

Q. What if it becomes physically impossible to perform a contract?

A. Suppose that you hire a contractor to paint your house on Thursday, and it burns down Wednesday night through no fault of your own. Then the contract will be set aside, because there's no way to perform it. You won't have to pay the painter, under the doctrine of impossibility of performance. Both of you are out of luck. The same is true if the contract covers a specific kind of product, and it becomes unavailable because of an act of God, such as an earthquake or blizzard. Courts usually will not enforce such a contract.

For example, suppose you contract to deliver one hundred barrels of a specific grade of oil from a specific Arabian oil field by a certain date. Then an earthquake devastates the oil field, making recovery of the oil impossible. You're probably off the hook under these circumstances.

This doctrine is also known as impracticability of performance, which reflects the fact that it may apply even if performance is not literally impossible, but is still seriously impractical.

Q. What if changing circumstances make it much more costly to fulfill the contract, but it's still possible to do what the contract promised?

A. The courts probably would enforce the contract, on the grounds that the new circumstances were foreseeable, and that the possibility of increased costs was or could have been built into the contract. For instance, suppose again that you contract to deliver one hundred barrels of Arabian oil. This time, fighting breaks out in the Persian Gulf, interrupting shipping and greatly increasing the cost of the oil. When a court considers these facts, it's likely to say that you should have foreseen the possibility of fighting and built that risk into the price. The contract will stand.

Q. What if the contract can be performed, but to do so would be pointless?

A. Sometimes a change in conditions doesn't make performance impossible or impractical, but it does make performance meaningless. The legal term for this is frustration of purpose. One famous case decided around a century ago involved a party that rented an apartment in London to view the processions to be held in connection with the coronation of the King of England. Because of the King's illness, the coronation was postponed. The court excused the renter from paying for the room. Through no fault of his own, the whole purpose of renting it - which the people who owned the room knew - had disappeared. Such cases, though, are rare indeed. More typically, you take your chances when you make a contract in expectation of some third party's or outside force's action; many contracts have a term to that effect built in.

There are three important criteria for a contract to be set aside for frustration of purpose. First, the frustration must be substantial - nearly total, and with almost no chance at improved benefit. Second, the change in circumstances must not be reasonably foreseeable. Third, the frustration must not have been your fault.

SHOULD THE BUYER STILL BEWARE?

The well-known Latin maxim caveat emptor"--let the buyer beware"--is a strict rule placing the risk in a transaction with the buyer. Under this rule each party is protected only by inspecting and analyzing a potential transaction, because there is no remedy if there is a hidden problem. In fact, this "ancient" law really predominated only in the 19th and early 20th centuries, when the idea of "the sanctity of the contract" reigned. More common are the principles of "just prices" and fair dealing in transactions. They are part of religious law, medieval law, and more recently statutory law - particularly the consumer fraud acts prohibiting unfair or deceptive acts and practices. Having said that, every buyer should recognize that the first line of defense is common sense, and not depend on a sympathetic judge to save him or her from a bad deal.

Q. May someone have a contract set aside because it simply isn't fair?

A. It is possible, but not likely. Courts have a powerful weapon called unconscionability (from the word "conscience") at their disposal. Unconscionability means that the bargaining process or the contract's provisions "shock the conscience of the court." For example, selling \$10,000 worth of rumba lessons to a ninety-five-year-old widow living on social security would probably be held unconscionable. An unconscionable contract is grossly unfair. Its terms suggest that one party took unfair advantage over the other one when they negotiated it. The courts are reluctant to use this weapon, but consumers have a better chance with it than anyone else, especially in installment contracts.

The important thing to remember is that you shouldn't rely on unconscionability in making a contract. Though courts sometimes will void contracts on these grounds, the application of unconscionability is uncommon and uneven. Make the effort to understand all the terms of a contract. After all, it's also "unconscionable" to let someone take advantage of you.

FILL IN THE BLANKS

There are many kinds of form contracts. One is the kind you simply have to sign if you want to get insurance or a loan, or if you're financing a car. These are called contracts of adhesion - if you want the deal, you have to "adhere" or stick to the terms. "Click box" contracts for software or other computer-related merchandise, or access to websites, are also contracts of adhesion.

Another common kind of form contract is one with numerous blanks on it, which can be filled in

A. These leases, usually on preprinted forms with very few blanks, often offer little room for bargaining. Hence, it is very important that you understand the terms and are sure you'll be able to meet them, especially where there's an option to buy. Make sure that the lease states the price at which you'll be able to buy the item. The lease may specify the price as a dollar figure or as a percentage of some amount that you should be able to figure out easily. Obviously, be sure that at least from where you stand now, it's a price worth paying. If you have no intention of buying, of course, then there's no problem - but you should be able to get a less expensive deal by not including an option to buy in the contract.

Q. Why would I lease something instead of buying it?

A. Leasing doesn't usually require you to invest as much of your money up front as buying because you are not paying for ownership of the item. You must return the item to the owner at the end of the lease period. A lease also cushions you from the risk of owning a piece of equipment that may become obsolete in a few years. The drawback is that your payments never add up to equity (an ownership interest) in the property. Leases also normally come with service contracts of some sort (a later section will discuss these contracts more fully).

Q. Are there laws designed to protect renters under residential leases?

A. Yes. Most states have laws that protect people who lease their homes. The chapter on rental property discusses them fully. Many states also have laws that require special disclosures (information statements) and other protection for people who enter into other types of consumer leases. These laws may even cancel out what the contract states.

Q. What are surety contracts?

A. A surety contract is an agreement where one party, called the surety, accepts the responsibility for someone else's contractual obligations. For example, you might agree to pay back your son's bank loan if he does not. Usually a surety is bound with the other person (the principal) on the same promise, often on the same document; under such an arrangement the surety is sometimes called a co-signer. A guaranty contract is similar, but with a guaranty the person who's vouching for the principal - led the guarantor - makes a separate promise and is liable only if the principal breaches and it is impossible to collect from him or her. In many cases, the terms "surety" and "guaranty" are used interchangeably, since their practical effects are nearly identical.

Warranties

Q. Is there any difference between a guarantee and a warranty?

A. In law, there is a very fine difference. But for consumers the two terms mean essentially the same thing. Both words have the same root, which means "to protect." Each represents obligations taken on by the provider or imposed on the provider by law. Some warranties deal with the quality of the goods: Will they do a specific job or meet certain specifications? Are they reasonably fit for their intended purpose? Other warranties might deal with the ownership of the goods: Does the seller have good title or ownership rights that may be lawfully transferred to the buyer?

A federal law, the Magnuson-Moss Act, covers written warranties for consumer goods costing more than a few dollars. It does not require that merchants make written warranties. If they do make such a warranty, however, it must meet certain standards. The warranty has to be available for you to read before you buy. It must be written in plain language, and must include the following information:

- the name and address of the company making the warranty;
- the product or parts covered;
- whether the warranty promises replacement, repair, or refund, and if there are any expenses (such as shipping or labor) you would have to pay;
- how long the warranty lasts;
- the damages that the warranty does not cover;
- the action you should take if something goes wrong;
- whether the company providing the warranty requires you to use any specific informal (out-of-court) methods to settle a dispute;
- a brief description of your legal rights.

Consider all these warranty terms when you shop. The terms of a warranty are seldom negotiable, especially the length of the warranty, whether it covers only parts or certain problems, and what you must do to use your rights. But some elements, such as the price of an extended warranty, may be negotiable. Many companies offer such extended warranties (sometimes called service contracts) for varying lengths of time and for varying amounts of money (see below).

Some states have warranty laws that provide consumers with greater protection than the Magnuson-Moss federal warranty law.

Q. What is the difference between a full warranty and a limited warranty?

A. Magnuson-Moss requires all written warranties for consumer products costing more than a few dollars to be designated as either a "full" warranty or a "limited" warranty. A full warranty is a promise that the product will be repaired or replaced free during the warranty period. State and federal laws require that if the warrantor (the company making the warranty) will repair the item, it must be fixed within a reasonable time and it must be reasonably convenient to get the item to and from the repair site. Many stores will offer a short full warranty of their own (thirty to ninety days), above what the manufacturer offers, and some premium credit cards will double a warranty for up to a year for products purchased with the card. Repairs or replacement during the extended warranty period become the responsibility of the card issuer after the manufacturer's warranty expires.

A limited warranty is much more common. Not surprisingly, it covers less - usually only parts, and almost never the cost of labor.

WARRANTY SENSE

The best-made products usually have the best warranties, because they're less likely to need them. Thus the manufacturer can guarantee a long period with little risk. A warranty is a statement about the maker's confidence in its products; because it involves the manufacturer's pocketbook, it's a statement you should take seriously. Try to figure the value of a warranty into the price of a product and make it part of your formula. Also remember that the dealer that sells you merchandise is not the only source of extended warranties – you can search online and elsewhere for companies that may offer you a better deal.

Q. What are express and implied warranties?

A. Express warranties are any promises to back up the product that a warrantor expresses either in writing or orally. Suppose your friend bought your Yugo and you said, "I guarantee you'll get another ten thousand miles out of this transmission." That's an express warranty. It isn't an opinion about

quality or value, such as, "This Yugo is the best mauve used car for sale in town." Rather, it's a specific statement of fact or a promise.

A warrantor does not state implied warranties at all - they're automatic in certain kinds of transactions. There are two main types of implied warranties: The implied warranty of merchantability and the implied warranty of fitness for a particular purpose.

Q. What is the implied warranty of merchantability?

A. When someone is in the business of selling or leasing a specific kind of product, the law requires that the item must be adequate for the purpose for which it is purchased or leased. This is a general rule of fairness that what looks like a carton of milk in the supermarket dairy case really is drinkable milk and not sour or unusable. The implied warranty of merchantability wouldn't apply, however, to someone buying your car, unless you were in the business of selling cars.

Q. What is the implied warranty of fitness for a particular purpose?

A. It means that any seller or lessor (even a nonprofessional) is presumed to guarantee that an item will be fit for the purpose for which you are getting it, as long as you make that purpose known. Even when you sell your used Yugo to your friend you make this warranty as far as your general understanding of her purpose (basic transportation). Suppose your friend told you she needed a car that could tow a trailer full of granite up steep mountains in the snow. When you sell the Yugo to your friend with this knowledge, you make an implied warranty that it can do that. When the car fails in that purpose, your warranty will have been breached. On the other hand, if your friend tells you she's buying your car only because she needs spare Yugo parts, you can sell your Yugo to her--even if it's sitting out back on cinder blocks--without breaching a warranty of fitness for the intended purpose.

READ WARRANTIES BEFORE YOU BUY

Don't wait until a product needs repair to find out what's covered in any written warranty you get. Compare the terms and conditions of the warranty before you buy and look for the warranty that best meets your needs.

There are several points to consider. How long is the warranty, and when does it start and end? Will the warranty pay 100 percent of repair costs? Does it cover parts but not labor? What kinds of problems are covered? What do you have to do to enforce your warranty rights? And when do you have to do it? Are regular inspections or maintenance required? Do you have to ship the product to the repair center? If so, who pays for shipping? What about a loaner? Who offers the warranty - the manufacturer or the retailer? How reliable is each?

Q. How long do warranties last?

A. It depends on the type of transaction and warranty involved, and the applicable law. In most states, you have up to four years to enforce an implied warranty after the start of the transaction. In cases involving written warranties the period may be much shorter. A written warranty will disclose how long it lasts. It may be as short as ninety days for a portable radio. A warranty on a new car, on the other hand, may last several years or many thousand miles.

Q. May a merchant disclaim a warranty?

A. Not after you've made the purchase. But before you buy, unwritten express warranties and (in

you probably were misled.

Q. What about contests and investment schemes?

A. The rule is this: Any contest or get-rich-quick scheme that requires you to part with money probably is a losing proposition. Often these are "pyramid schemes." Someone may contact you by mail or over the phone, promising you some huge return on your money and telling you of real people who made a bundle in the scheme. That part is true, actually. Some did get a lot of money. But they did it illegally - by inducing people like you to pony up. The only way you could do the same is to con a large number of people to make the same mistake you did. The courts have held these scams - and any promotion that promises an unrealistic return - to be false advertising; if they involve mail, they are postal violations. Some cases might involve violations of securities laws. One good rule of thumb is that no legitimate speculative investment will ever promise or even strongly suggest a specific return to you.

If you are contacted by mail regarding what seems like a fraudulent scheme, contact the office of the U.S. Postal Service Inspector General. Otherwise, report such a pitch to your state or city's consumer protection office or state attorney general. Virtually all states now provide a way for shutting down these scams and recovering victims' money, but the process may be long and may not always be successful.

Finally, exercise the most care when participating in contests or the like over the Internet. It is difficult and often impossible to tell whom you are dealing with on the word wide web, and virtually impossible for a private citizen to get satisfaction after being swindled by someone on line who may not even be in this hemisphere.

Q. What is "bait and switch"?

A. The bait is an advertisement luring you with the promise of an unbeatable deal on an appliance or auto. The switch occurs when you walk into the store and the salesperson tells you that the advertised model isn't available or is "not for you," but a more expensive model is. The salesperson has "switched" you from the one you wanted to buy. This practice is illegal in most states if the advertised model was never available in reasonable quantities. You have a right to see the model that appeared in the newspaper ad. If the store is "fresh out of them," it also may be guilty of false advertising. You're allowed to be persuaded, but keep up your guard, and don't let someone talk you into buying a model you can't afford. If insisting on your rights gets you nowhere, keep the ad, get the salesman's name (and that of anyone else you spoke to) and report the matter to the state or local consumer protection office.

Door-to-Door Sales

Q. What are the problems in door-to-door sales?

A. Most people feel secure in their homes. Ironically, that feeling makes them especially vulnerable to door-to-door salespeople. That's particularly true of homebound people, such as the elderly or invalids. You have few facts by which to judge a door-to-door salesperson. There is no manager, no showroom, and no immediate way to assess the company that the salesperson represents (if there is one).

Q. Do any laws protect purchases made as a result of door-to-door sales?

A. Federal law now requires a three-day "cooling-off period" for door-to-door sales. During that time, you can cancel purchases you make from someone who both solicits and closes the sale at

Q. What about unordered merchandise I receive in the mail?

A. Federal law requires the sender of an unordered item sent through the mail to mark the package "Free Sample." (The law permits charities to send you Easter Seals, Hanukkah candles, and the like, and ask for a contribution.) Consumers who receive unordered merchandise in the mail should consider it a gift. They have no obligation to pay for the merchandise, and they may keep it. Sending you a bill for such merchandise may be mail fraud, which is a federal crime. Report such practices, or any harassment or threats to force you to pay the bill, to the Postal Service and your state consumer protection bureau. But first make sure you, or a family member, didn't actually order the item in question.

CATALOG PURCHASES

Shopping via catalogs, whether printed or on line, has grown tremendously in the last few years. It has been a blessing for consumers with little time to browse in stores. But there are occasionally some drawbacks, including delays in receiving orders, uneven customer service, and inconvenience if repair or replacement is necessary. In addition, there is a possibility of fraud, since it's hard to assess the company without seeing a showroom or salespeople. Try to find established merchants that have been in business for at least a few years. Placing an order for an inexpensive item is a good way to check a company's performance before investing in more costly merchandise. Payment by credit card also is highly recommended - it usually makes it easier to resolve disputes.

Q. Does the same rule about unordered goods apply to merchants?

A. A merchant who receives unordered merchandise from a supplier doesn't have to pay for it, but the sender must be allowed to arrange for its return. If, however, the merchant does something that shows that he or she is willing to buy the merchandise, such as selling or displaying it, then the merchant must pay for it.

ON-LINE SHOPPING

Much of what has been said above regarding mail and catalog sales applies to shopping for merchandise over the Internet – only more so. It is remarkably easy to put up a slick website that has nothing real, or nothing legitimate, behind it. Do not assume that because a merchant displays an authentic trademark or accepts credit cards that it is what it seems to be. Nothing could be easier than copying these marks or arranging for a third party to act as a credit card clearing house with little or no accountability. Avoid buying luxury goods over the Internet except from established merchants you know from the "real world." Chances are they are counterfeits.

Time-shares

Q. What should I be aware of when buying a time-share?

A. Time-shares are a period of time, maybe a week or so per year, that you can buy for a specific property (usually a residence at a resort), during which the right to use the property belongs to you. The idea is that you benefit by "prepaying" for a vacation place rather than renting it, as you otherwise might do. The profit that would have gone to the owner supposedly stays in your pocket.

One problem is that the savings are often offset by expenses. If, like most people, you

finance your time-share purchase over time, the interest costs alone may eat away that supposed profit. Even if you pay cash, you lose the interest you could otherwise have earned on that money.

And unlike renters, who have the option of coming or not from season to season as a resort becomes more or less desirable, time-share owners are generally locked in. In some cases they may be able to exchange their property, but that involves a formal exchange program and costs money. They usually cannot sell the property except at a substantial loss.

Furthermore, your time-share contract will make you responsible to pay any increases in taxes, maintenance or repairs. If you think any of these amounts are going to decrease, you're in for a big surprise.

Q. Don't time-shares eventually "break even"?

A. Time-share sellers will often point out that, notwithstanding these problems, once you pay off the time-share you will have "free" vacationing, so at some point you will break even with the cost of renting and eventually be in the black. But that break-even point, which takes in account all of your costs, including interest, may not come for ten to twenty years. Ask yourself whether you are prepared to vacation in the same place every year for the next decade so you can eventually save on your vacation expenses.

Q. If I don't like the time-share deal, though, can't I just sell it?

A. In theory, yes. Practically speaking, though, many people who bought time-shares in the 1980s when any investment involving real estate looked like a winner - are finding themselves with white elephants on their hands. You may have to unload the time-share for much less than you paid, if you can find a buyer at all. You may be stuck agreeing with the sponsors that they will take back the time-share during the payment period and you will be off the hook for the rest of the term. You would get nothing back for what you've already paid in (which might be several times what you would have paid in rent) but you would have no further obligations.

Pets

Q. What may I ask about a pet before I buy it?

A. You may ask anything. You have a right to know about the pet's health, family history or pedigree, training, and medical care, both normal and unusual.

Q. Do states have pet laws that cover an owner's rights?

A. Many states do have such laws. If your state doesn't, then general warranty laws apply.

BUYING SICK OR INJURED PETS

Suppose you buy a pet, and it turns out that it's sick or injured. Legally, what can you do? The answer may depend on whether you bought the pet from a pet shop or a private owner. It also may depend on whether you had a written contract, and what express and implied warranties exist under your state's laws. It also matters whether you bought this pet for a specific purpose, such as breeding it for competition. In general, it's best for you and the seller to sign a written agreement about your pet that will clarify most of a new owner's questions.

Another way of avoiding problems is to ask the seller for the name of the pet's veterinarian. Ask the vet for an opinion on the pet's health, which may alert you to potential problems before you complete

the purchase.

Q. What should I do if I am dissatisfied with my pet purchase?

A. Immediately notify the seller in writing, keeping a copy for yourself. Keep all contracts, papers, and even the original advertisement, if there was one. If you have not received a replacement or refund within thirty days, consider filing a small-claims lawsuit. Don't worry about becoming an expert on pet law. The judge will probably base a decision on the fairness of the case, not on technicalities.

Home and Home Appliance Repair and Improvements

Q. Does the law protect consumers who contract for home repairs or improvements?

A. Yes. The Federal Trade Commission and federal truth-in-lending laws police this area. To a certain extent, the states regulate home repairs, too. Generally, as in any other contract, home-repair contractors may not mislead you in any way to get the job. Be aware of these tricks:

- promising a lower price for allowing your home to be used as a model or to advertise their work;
- promising better quality materials than they will use (beware of "bait and switch" here as well);
- providing "free gifts" - find out when you will receive them, or try to get a price reduction instead;
- not including delivery and installation costs in the price; starting work before you sign a contract, to intimidate you;
- claiming that your house is dangerous and needs repair;
- claiming that the contractor works for a government agency;
- offering you a rebate or referral fee if any of your friends agree to use the same contractor.

Q. How may I protect myself?

A. Get several written estimates. Check into a contractor's track record with other customers before you sign a contract. Don't pay the full price in advance, and certainly not in cash. Don't sign a completion certificate or receipt until the contractor finishes the work to your satisfaction - including cleanup.

Q. Are there special things to look for in a home-improvement contract?

A. Yes. Be sure the contract has all the details in writing. Too often a contract of this type will read "work as per agreement." Instead it should specify who will do the work, and include a detailed description of the work, the materials to be used, and the dates of starting and completion. It also should contain all charges, including any finance charges if you are paying over a period of time. In addition, the contract should include the hourly rate on which the total cost is to be based. Be sure any "guarantee" is in writing.

Be especially wary of any mortgage or security interest the contractor takes in your home, which means that you may lose your home if you don't meet the payments for the work. (If the contractor takes a mortgage or security interest, federal law gives you three days to change your mind and cancel.)

Consider having a lawyer look at the contract, especially if there's a security agreement. If problems do arise that threaten your rights to own your home, see a lawyer immediately. (For more on this topic, see the chapter on home ownership.)

The Top 10 Consumer Problems

The State of New Jersey's Office of Consumer Protection published a list of the 10 most troublesome consumer problems in that state, which unfortunately exist in every state. The list also includes basic advice for handling each problem.

- Fly-by-night home repair contractors (as discussed previously in this chapter).
- Telephone solicitations. Always ask the caller to send written information. Also, determine your total obligation before agreeing to anything. Don't give credit-card information to strangers over the telephone.
- Furniture delivery delays. Do not take "ASAP" (as soon as possible) as a delivery date in a sales contract. Get an exact date. If the merchandise doesn't show up by that date, you would then have the right to cancel.
- Free vacation offers. An example is the postcard telling you about a "free vacation" you have won: Just call a toll-free number and "confirm" your credit card number. Later the vacation is not as free as you thought. Play it safe--book your travel arrangements through a reliable agent or directly with travel carriers.
- "Bait and switch" tactics (see the section above on advertising).
- Mail-order rip-offs. When shopping by mail, you're always taking a risk. When the offer sounds too good to be true, it probably is.
- Work-at-home schemes. Usually aimed at young mothers and the disabled, these schemes promise to help you "earn money in your spare time." They'll ask you for twenty dollars in "startup" costs. What you'll get is information about how to rip someone else off the way they just cheated you.
- Detours around contract cooling-off periods (see the section above on door-to-door sales). Federal law only protects you if you sign the contract in your home or somewhere other than the normal place of business. Even at home, don't depend on a cooling-off period - think before you sign.
- Health spa memberships. Most complaints center on high-pressure sales tactics. A year's membership can cost quite a bundle--make sure that you'll use it, and that all "understandings" and assurances are in writing.
- Time-share lures. People often buy time-sharing vacations on impulse. Be sure you're ready to go to the same place during the same period of time for years to come. If the time-sharing resort (or condominium or whatever) is not fully built, make sure all occupancy dates are in the contract and review these contracts with a lawyer. High-pressure time-share sales pitches have led to a federal law giving consumers some protections. The federal Interstate Land Sales Full Disclosure Act gives you the right, in some circumstances, to get out of a time-share contract.)

MORE TOP SCAMS

A listing of the "top scams" compiled by the Better Business Bureau of Mainland British Columbia (Canada) adds the following:

- phony invoices that look authentic but are really solicitations;
- advertisements offering "big money" overseas jobs which are really selling nearly worthless listings;
- look-alike postal notices asking for payment to release unsolicited merchandise held at a warehouse in the recipient's name;
- offshore lotteries implying that you've won even before you buy your tickets;
- loan brokers who charge hefty up-front fees but seldom deliver;

BREACHES AND REMEDIES

Breach of Contract

Q. What is a breach of contract?

A. A breach of contract - also called a default - is one party's failure, without a legally valid excuse, to live up to any of his or her responsibilities under a contract. A breach can occur by:

- failure to perform as promised;
- making it impossible for the other party to perform;
- repudiation of the contract (announcing an intent not to perform).

Q. What qualifies as a failure to perform?

A. One party must not have performed a material part of the contract by a reasonable (or stated) deadline. Suppose your friend promised to buy your Yugo for \$1,000, and to pay you "sometime early next week." It would be a material breach for your friend never to pay you, or to pay you six months later. If your friend paid you on Thursday of next week, however, it probably would not be a breach. You did not explicitly make time an essential part of the contract - the source of the phrase "time is of the essence."

Q. How is a contract breached by making performance impossible?

A. Suppose you hire a cleaning service to clean your house on Sunday at a rate of ninety dollars for the day. Early Sunday morning you go out for the day, neglecting to make arrangements to let the cleaning people into the house. You've breached by making performance impossible, and would owe the money since the cleaning service was ready and able to clean your house and presumably turned down requests to clean for other clients.

Q. What if someone partially breaches a contract?

A. That happens when the contract has several parts, each of which can be treated as a separate contract. If one of those parts is breached, you could sue for damages even though there isn't a total breach. An example of this would be a landowner hiring a contractor to perform a construction project within certain deadlines. These deadlines have already been missed, but overall the project is going well. As long as the delay (the breach) is not material, the owner can continue the contractual relationship but sue for whatever damages were suffered as a result of the delay (for example, canceled leases). On the other hand, if the delay is material - so damaging to the project that it seriously undermines its value - the breach strikes at the heart of the contract and is total. The owner may terminate it and pursue remedies against the builder while hiring someone else to finish the job.

Q. What is a breach by repudiation?

A. Repudiation is a clear statement made by one party before performance is due that the party cannot or will not perform a material part of that party's contract obligations. Suppose that on the day before your friend was to pick up the Yugo that you promised to sell to her, you sent her a message that you decided to sell the car to someone else. That would be a repudiation. It's not repudiation if one party will not perform because of an honest disagreement over the contract's terms.

Remedies for Breach of Contract

Q. What are the main types of remedies for a breach?

A. When someone breaches a contract, the other party is no longer obligated to keep its end of the bargain, and may proceed in several ways:

- urging the breaching party to reconsider the breach;
- if it's a contract with a merchant, getting help from local, state, or federal consumer agencies;
- bringing the breaching party to an agency for alternative dispute resolution;
- suing for damages or other remedies.

Q. What's the point of asking the breaching party to reconsider?

A. One advantage is that it's cheap. Often the only cost is the price of a telephone call and a little pride. The breaching party may have breached the contract because of a misunderstanding. Perhaps the breaching party just needs a little more time. Or maybe you could renegotiate. That would almost certainly leave both of you better off than if you went to court. If you do hire a lawyer, the first thing that lawyer is likely to do is try to persuade the breaching party to perform.

Q. Should I keep records of my communications with a breaching party?

A. Yes. Once you see you're in for a struggle, make a file. Keep copies of any letters you send and move all receipts, serial numbers, warranty cards, and the like to this file.

Q. Assuming the breaching party does not budge, what else can I do?

A. If the dispute is between you and a merchant, you might want to contact the manufacturer of the product. If it involves a large chain of stores, contact the management of the chain. This goes for services, too.

If that doesn't help, contact a consumer protection agency, either in your city or state. The Federal Trade Commission is less likely to get involved in small disputes. If, however, the FTC believes that what happened to you has occurred to many people nationwide, it might be interested. The FTC's involvement carries a lot of weight. The same goes with your state attorney general or local consumer agency. Another resource is your local post office, where you can report any shady business practices that took place through the mail.

Q. If these methods don't work, what else can I do short of filing a lawsuit?

A. The first and second chapters of this book discuss many different types of alternative dispute resolution systems, such as arbitration. Note that the contract itself may include a specific type of alternative dispute resolution that you must use. You may have already agreed not to go to court to resolve disputes.

Stopping Payment

Q. What if I want to cancel a contract or void a purchase that I made, but I already paid with a check?

A. First, you should call the seller and ask for a cancellation of your contract and the return of your check. If the seller won't do this, you may call your bank and "stop payment" on that check. Remember, you're still liable for the purchase price, and you may be sued by the seller for its amount, unless you have a legal excuse not to pay. Also be aware that when you stop payment, you raise the stakes and diminish the chance of a settlement. Merchants don't take kindly to this technique.

A. The usual legal remedy is a suit for damages, usually compensatory damages. This is the amount of money it would take to put you in as good a position as if there had not been a breach of contract. The idea is to give you "the benefit of the bargain."

Q. What's an example of compensatory damages?

A. Suppose you hired a contractor to paint your house for \$500. This job could cost as much as a \$650, but you're a good negotiator. Now the contractor regrets agreeing to the \$500 price and breaches. If you can prove all the facts just stated, you can recover \$150, or whatever the difference is between \$500 and what it ultimately cost you to have your house painted.

Q. What other kinds of damages are there?

A. The most common ones are:

- Nominal damages, awarded when you win your case but you have not proved much of a loss. The court may award you a small amount as a matter of course.
- Liquidated damages, an amount that is built into the contract. Although one or both parties have effectively breached the contract, this term will stand, as long as it fairly estimates the damages. In contrast, the courts will not enforce a penalty clause, an amount of liquidated damages that is way out of line with the actual loss.
- Consequential damages, as discussed in the section on warranties. These are rarely available in a contract suit, unless they are provided for in the contract.
- Punitive damages, available if the breaching party's behavior was offensive to the court. Punitive damages are virtually never recovered in a suit for breach of contract, but it may be possible to get punitive damages or some form of statutory damages (legal penalties) under a consumer fraud law or in a suit for fraud.

Q. Are there other remedies in a contract suit besides damages?

A. Yes. The main one is specific performance, a court order requiring the breaching party to perform as promised in the contract. Courts are reluctant to award this because it is awkward to enforce. They will impose specific performance only if there is no other remedy available because of the contract's unique subject matter, such as real estate or a unique piece of personal property.

LAWSUITS AS REMEDIES

This section will discuss the different kinds of relief you can ask a court for, considering what you already learned about contract defenses.

Remember: Any time one side can prove one of the contract defenses discussed in the second section, there's no breach of contract because there's no enforceable contract. Then the party that does not or cannot perform merely has to pay back any money or return any goods transferred in the agreement.

Q. What else can a court do?

A. A court may rescind (cancel) a contract that one party has breached. The court may then order the breaching party to pay the other side any expenses incurred; it could also order the return of goods sold. Or, the court could reform the contract. That involves rewriting the contract according to what the court concludes, based on evidence at trial, the parties actually intended. Although these have traditionally been rare remedies, they are being used increasingly under the provisions of many

states' consumer fraud laws (discussed below).

Q. What are consumer protection or consumer fraud acts?

A. Laws prohibiting unfair and deceptive trade practices in consumer transactions have been enacted in every state. They apply to almost all consumer transactions and are both extremely flexible and very potent - often providing for treble (triple) damages where a violation is found. Generally requiring lower legal hurdles than traditional fraud remedies - for example, intent to deceive is usually not a requirement - these laws usually provide both for state action and recovery by private lawsuits. These laws are the ultimate legal reaction to caveat emptor. Their use involves numerous technicalities, though, and competent legal advice is absolutely necessary to take advantage of them.

Q. If I have a contract for services or goods with a company that goes out of business, what can I do?

A. If another firm bought the company, as in a corporate merger, usually the new company must take responsibility for the contract obligations of the old company. If, however, the company went through the bankruptcy process, your contract could legally be disavowed, though any debt owed to you might not be.

If the company has ceased doing business, or is under the protection of the bankruptcy laws, your chances of recovering anything of value are small. If you have a contract that still is in force with a troubled company, you may have to get the rest of your contract needs filled by another company if the one you have a contract with can't come through. Then you may have a damages claim against the first company. If the company is in bankruptcy, you may be contacted by the bankruptcy court, or you may need a lawyer's help to put in your claim. If your claim isn't substantial, though, it's usually not worth the trouble.

Q. I realize that I may have to get goods from another company. What about any money the first company may owe me under the contract?

A. If the company is in bankruptcy, you can file a claim against it through the bankruptcy court. You'll have to "stand in line" with the other creditors, and you may get only a small percentage of what the company owes you, if you recover anything at all. If the business is a corporation that's dissolving under state law, you can file a claim against the corporation through the state agency (usually the secretary of state) for any losses you have accumulated. Whatever assets remain will be divided according to the number of claims filed and their amounts.

Q. If the financially troubled company is holding goods for me on layaway, can I still get my goods?

A. Most companies that go out of business will notify people that they are closing; often they want you to come in and finish the purchase because they need the cash. If they've tried to contact you and you haven't responded, they may sell those goods, and you'll have no way to recover the merchandise, although the law still entitles you to any money you paid toward the purchase.

Q. If the merchandise is gone and I've paid money, how can I recover that money?

A. If the store still is open, it probably will pay you when you present your receipt for payments made toward the purchase price. If the store has closed, you might need to file a claim in the bankruptcy court or with the proper state agency, as described above.

Q. What do I do about merchandise that was under warranty? Who'll cover it now that the

seller has gone out of business?

A. If you've purchased a national brand of goods, there probably will be a service center or a licensed warranty center in your area. It may not be as convenient for you as the seller's store. Almost all manufacturers will stand behind their products regardless of where you purchased them. The only drawback is that you may need to present an original receipt to show that the manufacturer's warranty still covers the product.

Q. I also purchased an additional retailer's warranty when I bought my goods that extended the manufacturer's warranty. What will this extra retailer's warranty cover?

A. Retailers usually offer this warranty to extend parts and labor for a much longer period of time than the manufacturer offers. Unfortunately, the retailer's warranty is useless if the place that made the promise is now out of business, unless its obligations have been taken over by another company.

WHEN IN ROME

Why are there so many foreign legal terms? Many legal concepts trace their roots to Roman legal principles, though the classical Anglo-American judge-oriented legal system - the common law - has less in common with Roman law than does the European "code" system. (The code system is also used in Louisiana, where the Napoleonic code took hold before the territory became part of the U.S.) Also, much of the infamous redundant language of the law - such as "cease and desist," "open and notorious" - is a result of the introduction of Norman French terms alongside Anglo-Saxon ones in legal procedure after the Norman conquest of England in 1066. (English legal proceedings were carried on in the French language until the late 14th century.) Numerous French terms are still in common use, such as *petit* and *grand juries*.

With the decreased knowledge of classical languages and the trend away from elitism, fewer and fewer non-English terms have remained in use over the years. Any lawyer who tries to impress you with his proficiency in Latin legalisms should be taken with what the great Roman advocate and orator Cicero would have called *cum grano salis* with a grain of salt.

MORE ON REASONABLENESS

Earlier we discussed the "reasonable person." There are two principles that extend that fictional person's capacities into the practical realm. One is the concept of the "reasonable observer," a reasonable person who sets the standard of whether an action or statement would reasonably suggest, for example, an offer or acceptance, or a repudiation. This person is not an eagle-eyed expert, but stands for common sense.

Closely related is the concept of "knew or should have known." If parties to a contract are considered to know, or be "on notice" of something - say, that their offer has been accepted - it is not enough to ask whether they actually knew it. If it were, we would have only their word as really reliable evidence that they knew or didn't know. The law will not allow parties who should have known something through the reasonable exercise of their senses and intelligence to fail the use them. Thus it isn't enough to say, "I didn't know the Yugo I sold you had no engine." That's something that someone selling a car reasonably should know.

Conclusion

This chapter has discussed how to make a contract and how to find out if you have unknowingly

made a contract. It also covered some special consumer contract issues, how to identify a breach of contract, and what to do about a breach. Yet this has merely scratched the surface of this highly complex area of law. It has not even dealt in detail with the millions of contracts made every day between merchants and other businesses, or investment-related contractual relationships. While many common contracts don't require the services of a lawyer, be aware of when legal assistance may help avoid serious problems in the future.

WHERE TO GET MORE INFORMATION

The most comprehensive government website on the topic of consumer protection is <http://www.consumer.gov/>. This site is a project of numerous federal agencies and is being updated on a regular basis. The Office of the President also maintains a comprehensive consumer protection website at <http://www.whitehouse.gov/WH/Services/consum.html>.

In most states, a state agency, often the attorney general, has an office of consumer affairs and protection. (In some states this office is under the secretary of state's authority.) These offices are good starting points both for filing complaints and for free literature on consumer protection, and appear in your telephone directory under the state government listings. You can also call any state government information number or search on the Internet for "consumer" and the name of your state.

Also consider contacting specific federal agencies, such as the Federal Trade Commission (<https://www.ftc.gov/ftc/complaint.htm>), if you think you have been subjected to a deceptive practice. (See consumer credit section for the FTC's national and regional offices.)

State and local bar associations often publish free pamphlets and handbooks on legal problems, and can provide lists of lawyers who handle consumer cases. These bar associations are easily located on the Internet by searching for "bar association" along with the name of the state or locality you are searching for. Or access <http://www.abanet.org/barserv/stlobar.html> for a list of bar groups.

The local affiliate of the Better Business Bureau (<http://www.bbb.org/>) can be helpful. The BBB also has a program focusing on consumer protection for the Internet at <http://www.bbbonline.org/>. An ABA guide to safe e-shopping can be found at www.safeshopping.org/.

Some television and radio stations or newspapers have "action lines" which follow up on complaints. They often get results in exchange for being able to use your complaint on the air or in the paper.

The federal government publishes helpful handbooks for consumers. They are available for little or no charge from the Consumer Information Center-N, P.O. Box 100, Pueblo, Colorado 81002, telephone, (719) 948-3334, or at <http://www.pueblo.gsa.gov/>.

Scores of other publications on everything from credit to cars and from weight-loss programs to food products are available from the federal government. For lists of some of these publications, write to the Federal Trade Commission, 6th Street and Pennsylvania Avenue NW, Washington, DC 20580, or log onto <http://www.ftc.gov/ftc/consumer.htm>.

The State of California Department of Consumer Affairs has a helpful site for consumers who want to understand more about vehicle leases, at <http://www.dca.ca.gov/legal/1-6.html>.

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