

Law of contract: genuine consent essay



**ASSIGN
BUSTER**

Although the contract may have the essentials of a valid offer, acceptance, legal intentions and consideration, its validity or enforceability may be affected by a number of factors. The agreement may be wanting in genuine consent between the parties. That is, although the parties may appear to have reached an agreement, it may not have been genuinely achieved because of misconduct, pressure, unfairness, or fear by those involved.

As separate issues to genuine consent, the law allows minors and others lacking legal capacity to be relieved of contractual obligations in certain circumstances; additionally, the validity of the contract is affected if the subject matter of the contract is illegal at law, or the contract is not in the required form under a particular statute.

For the purposes of this course, we focus on the topic of 'absence of genuine consent' and specifically the issues of misrepresentation (both innocent and fraudulent), undue influence, duress and unconscionable conduct. In such circumstances, the parties have not entered into the contract voluntarily or with real agreement, although on the face of it, the rules for offer and acceptance may appear satisfied. Here, the law allows the innocent party to 'avoid' the contract, involving the return of the parties to the pre-contractual position. Such a remedy is known as rescission. Please note that the issue of 'mistake', which is also falls under the category of 'genuine consent' or 'lack of true agreement', is not part of this course.

On successful completion of this lecture, you should (within the scope of the course) be able to:

explain the significance of 'an absence of genuine consent' in relation to a simple contract define misrepresentation and describe the key elements of misrepresentation distinguish between fraudulent and innocent misrepresentation, and identify the respective remedies for each define duress, describe the key elements of duress and identify the remedy for duress define undue influence, describe both types of undue influence and identify the remedy for undue influence define unconscionability, describe the key elements of unconscionability and identify the remedy for unconscionability

Effect on Contract Before we begin our discussion, it is important to revisit the notions of void and voidable contracts which were defined at the beginning of the lectures on contract. Void contracts are those which have no legal effect whatsoever and hence cannot be enforced in a court. Voidable contracts, on the other hand, include those which can be rescinded, if possible, at the option of one of the parties on the basis that they did not genuinely consent to the agreement.

Rescission (the noun from the verb rescind) returns the parties to their original pre-contractual positions. In the case of voidable contracts, the innocent party can either expressly or impliedly affirm the contract or otherwise exercise the option to rescind it. The right to rescind might not be available if: it is not exercised within a reasonable time

the parties cannot be restored reasonably close to their original positions third parties acting in good faith and for valuable consideration have acquired intervening rights (such as the goods that were the subject of the

contract being later on-sold to a 3rd party) if the contract has been expressly or impliedly affirmed by the innocent party

The grounds for alleging a lack of genuine consent include:

1. Misrepresentation 2. Duress 3. Undue influence 4. Unconscionability

Background Generally, when contracts are being negotiated, pre-contractual statements are made between the parties in the natural course of discussion, some of which may become part of the contract, and others which may serve only as inducements to one party or the other to enter the contract. Statements which are intended by the parties to have contractual effect are known as 'contractual representations' or 'terms'. Statements which induce a contract but are not intended by the parties to become part of the contract are known as 'non-contractual representations' or 'mere representations'.

For the purposes of this course, and to avoid possible confusion, we shall use the word 'representation' in the latter sense, namely those pre-contractual statements intended to induce a contract but which do not form a part of the contract. Hence, representations must be distinguished from statements that become part of the terms of a contract and will therefore give the innocent party a right to terminate and/or sue in the event of their breach.

Representations must also be distinguished from the self evident exaggerations in sales talk and mere advertising "puff", such as "the best little car in town." In certain circumstances, a representation may amount to a misrepresentation, and allow the contract to be avoided by the party to whom it was made.

Definition A misrepresentation is a pre-contractual (i. e. it is stated before the contract is made) false statement of fact made by one party which induces the other party to enter into the contract.

Rules as to misrepresentation

1) must be a false statement The general rule is that silence cannot constitute a misrepresentation where there is no obligation to divulge information. However, if silence distorts an existing representation, then it may constitute misrepresentation. Hence, a misrepresentation will not be constituted by silence unless: the statement made is a half-truth -for example, a seller of a building says it has tenants but omits to disclose they have been given notice to quit. no disclosure of the fact that a true statement has subsequently become false in the time between the making of the statement and the making of the contract. the contract is one of utmost good faith (for example, a contract of insurance) when full disclosure must be made. there is a fiduciary relationship (one that involves trust and confidence, such as that of a partner in a partnership, of an agent to a principal, and of a director and company)

2) must be of fact not of opinion The statement must be of a factual nature, rather than belief or opinion. For example, consider a statement which falsifies the details of past profits. Profits made in the past are of a factual nature as they can be objectively determined. Hence, the statement is one of fact, albeit false. Contrast this with an opinion or prediction of a future event, such as an estimate of future profits

3) must be relied upon in entering into the contract. The statement must be relied upon: that is, it was not only intended to induce but it did in fact induce the other party to enter the contract. Hence, there must be an intention by the person making the statement for the other person to rely or act on the statement. Further, the statement must be one of the reasons inducing the other party to enter the contract. A statement will likely have no effect if the other party never knew of its existence, or did not allow it to affect his or her judgement, or they were aware of its untruth.

Innocent v Fraudulent Misrepresentation

Innocent Misrepresentation is one made honestly, with a genuine belief in its truth and without any intention of deceiving the other party. From *Derry v Peek* (1889) 14 App Cas 337, fraudulent misrepresentation is defined as one made knowingly or without believing in its truth or recklessly (careless whether it be true or false) with deliberate intention to deceive.

Therefore, once misrepresentation has been established (that is, false statement of fact which was intended to induce and did induce the person to enter the contract), for it to be fraudulent, it must be shown that the defendant knew it to be false, or had no belief in its truth, or made it recklessly, careless whether it be true or false. The person making the statement need not actually know that the representation is in fact untrue. Liability arises if the person makes the false statement when he or she has no knowledge whether it is true or false or when he or she fails to verify the statement. There is no fraud if the person making the statement genuinely believed the statement to be true.

Remedies for Misrepresentation For innocent misrepresentation, the other party can rescind but has no right to damages. The common law does not specify any formal action by the courts to effect rescission (for example, the need for court orders), and accepts that the contract comes to an end upon the decision to rescind and not to affirm. Court involvement occurs where the right of rescission is disputed, which is conceivably not uncommon.