**Mutual Assent**

Welcome to this podcast on Mutual Assent brought to you by CALI. I am Professor Jennifer S. Martin. The topic of this podcast is the basic concepts related to mutual assent to a contract. In particular, we will look at the requirements for contract formation, particularly the promises that indicate assent. We will also look at what is a sufficient manifestation of assent.

A contract is a promise or set of promises which the law enforces. That is, in order to have a contract, we need promises, basically a manifestation of intention to act or refrain from acting in a specified way. This exchange of promises results in a manifestation of mutual assent. Ordinarily, the manifestation of mutual assent takes place by virtue of an offer by the offeror, which is then followed by an acceptance by the offeree. Most of the time we will be looking at the events that occur in a factual situation to see if a party has, in fact, manifested assent to the contract.

Since we don’t know what is going on in someone’s mind, it’s a mistake to describe contract formation as a “meeting of the minds.” Instead of looking for the parties’ subjective intent– that is, what’s going on in their mind, modern contract law requires proving assent to a contract on an objective basis. Objective intent here means a manifestation of intent as viewed from the vantage of the reasonable person in the position of the other party. Applying an objective intent to determine mutual assent means that parties are bound by their conduct, usually their words, that communicate their intent to others. This means that parties should be careful in their dealings with others because contract law will judge them on an objective basis. As one judge commented, “the law will also take the joker at his word, and give him good reason to smile.”

In the well-known case of *Lucy v. Zehmer*, the Supreme Court of Virginia considered a claim by Lucy that he contracted with Zehmer to purchase Zehmer’s farm for $50,000. While at a local tavern having some whiskey, Lucy and Zehmer discussed the farm purchase at length and ultimately made an agreement on the back of a restaurant check for the sale of the farm, which was signed by Zehmer and Zehmer’s wife. When Lucy brought suit to enforce the contract, Zehmer claimed there was no contract because he intended the agreement as a jest. The court concluded that Zehmer was not joking in light of the signed agreement, details, and length of time discussed. However, in some useful dicta, the court considered what the result would be if it found that Zehmer had in fact been joking. On the objective basis, the court concluded that what mattered was not the subjective intent of Zehmer to make a joke, but what a reasonable person in the shoes of Lucy would have believed in the circumstances. Since a reasonable person would have thought Zehmer was serious, it doesn’t matter that he actually was joking. Let’s look at another example.

Samantha, Miranda and Carrie meet for lunch at Chez North. Carrie often joins Samantha and Miranda for lunch but often does not have enough money and sometimes forgets her wallet completely. When the lunch bill arrives and Carrie has no money, she asks to borrow $20 from Samantha. Samantha responds sarcastically “Sure, and you pay me back tomorrow, just like you did last time!” Samantha paid the bill and the ladies all laugh, knowing that Carrie did not pay Samantha back last time. In this case, there would be a contract for the $20 if a reasonable person would believe that Samantha was serious about the return of the money. However, if a reasonable person would simply think Samantha was joking and did not want repayment of the money, then it would seem that there would be no mutual assent here.

It’s worth noting that although mutual assent is seen as a contractual requisite, the parties do not have to manifest an intention to be bound or intend the legal consequences that might go with the formation of a contract. So, in the casual lunch conversation, what is important is whether there’s mutual assent to a contract, not whether Carrie and Samantha intended legal consequences. Of course, sometimes parties do not intend that their assent will create a legal obligation. This is often true of social engagements.

For example, Country Club invites its members to a Thank You For Being A Member happy hour celebration on Thursday with free beer, wine and hors d’oeuvres. Member accepts the invitation but does not attend, having to work late. It would seem that there’s not mutual assent to a contract here as the parties seem to intend a social obligation, and not a legal obligation. Thus, the same would be true if Country Club cancels the event.

Of course, a different result might entail if the event had a $20 per person fee, reservations required and had a 48-hour cancellation policy. If Member accepts the invitation and does not attend in this case, having to work late, it would seem that there is mutual assent to a contract and Member would be bound to pay the $20, whether or not she attends. A reasonable person would not see this as a casual social engagement.

You might wonder whether there would be a contract if Lucy and Zehmer were really joking but a reasonable person sitting at the tavern thought they were engaging in a serious business discussion. As it turns out, there’s no mutual assent to contract where both parties intend not to be taken seriously. This would be true even if others would believe it to be serious. Look at an example.

Samantha and Carrie meet for lunch at Chez North. Charlotte, who is a well-to-do busybody, is sitting at the table next to them. Samantha and Carrie know that Charlotte is listening to the conversation and want to play a joke on her. For 10 minutes, Samantha and Carrie discuss in earnest the sale of Carrie’s fabulous limited edition Prada stilettos to Samantha for $2000. They discussed the pros and cons of the shoes, how wonderful they are, and how nice it is to wear expensive shoes. At the end of 10 minutes, Carrie exclaims “We have a deal!” and the two ladies shake on it. When Charlotte walks up to their table and exclaims “I can’t believe you agreed to sell those shoes to Samantha,” Carrie and Samantha respond that it was all a joke. Here there’s no contract even if a reasonable person in the shoes of Charlotte, applying the objective theory, would believe that a contract was made. In this case, there’s no mutual assent, so a contract is not formed when both parties intend not to be taken seriously.

The objective approach to assent applies whether or not there’s a joker involved. Instead, it applies in all situations to determine mutual assent. Let’s look at another example.

Tony sends a letter to Leeland that says, “I’ve decided to host a mountain climbing personal 1 on 1 experience for two weeks camping on the Ausable Lake this summer beginning June 25 for the price of $1500. I’m sending this letter to all prior campers.” Leeland, upon receiving this letter writes to Tony, “I accept your offer for the camp.” In this case, there would not be a contract. Under the objective theory, we would determine whether a reasonable person would conclude that Tony’s letter and Leeland’s response constituted mutual assent to a contract. Where Tony’s letter was sent to multiple people and Tony had limited spots for the camp (perhaps only 1), a reasonable person would conclude that there is not mutual assent here.

The objective theory explains why we are bound when we enter online contracts and form contracts. By clicking “I accept” or otherwise manifesting assent, we are bound even if we have not read the contract and have no idea what it says. What matters is our objective manifestations, not what’s in our heads.

At this point, you should be able to describe the objective “reasonable person” standard applied to determine whether parties have manifested assent to a contract, particularly where a party has a different subjective intent, or social engagement is intended.

I hope you’ve enjoyed this podcast on Mutual Assent.

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