**24.00 INTRODUCTORY COMMENTARY AND USE NOTE**

The law of contracts often appears to be a collection of incoherent rules. This confusion results from the lack of a dominant theory of contract law in American jurisprudence. Rather, three philosophically different concepts of contract law compete for dominance: classical/neo-classical contract theory, promissory estoppel, and Article 2 of the Uniform Commercial Code. Alaska law of contracts reflects the struggle to reconcile and integrate these three competing doctrinal approaches to the law of contract.

A brief explanation of the philosophical basis underlying each of these sources of contract law illustrates the differences and suggests the difficulty practitioners and courts may have in reconciling them.

Classical contract doctrine gained prominence after the Civil War and was steadfast through the First Restatement of Contracts in the 1930's. (Neo-classical contract doctrine is usually considered to be the modified classical doctrine set forth in the Second Restatement of Contracts.)

Classical (and neo-classical) contract doctrine is firmly based upon the concept that contract law should protect the parties' freedom not to contract unless they clearly agree to be bound. Consequently, a mutual exchange of promises is an absolute requirement in order to form a contract. The contract must clearly state all material terms and the greatest of these is consideration: the mutual exchange of bargained-for promises.

The Statute of Frauds is significant as is the requirement that the terms of the contract must be found within the four corners of the document because the court can not supply missing terms. Likewise, no term can be proved by extrinsic evidence unless there is ambiguity within the document. The resulting contract is binding because in it the parties clearly expressed their mutual intent to be bound.

The recovery of damages is dictated by the same philosophical underpinning. Consequently, expectation (benefit of the bargain) damages are recoverable regardless of whether plaintiff has relied on the contract in any way or whether defendant has received any benefit from it. If a breach of contract is found, at least nominal damages must be awarded.

The breaching party's primary defense either to performing the contract or to paying for the breach is to prove fraud, duress, or coercion in the making of the contract. Proof of any one of these elements in the making means that the contract was not agreement-based, and, therefore, should be voided by the court. Likewise, mutual mistake of fact should also nullify the contract.

The First Restatement of Contracts was the first attempt both to set out in one source the prevailing (classical) contract doctrine and to respond to the many legal scholars such as Corbin who found classical contract doctrine too rigid to facilitate a fluid national economy. Although most of the First Restatement of Contracts is a compilation of agreement-based law, a significantly different concept is set forth in Section 90.

Section 90 of the Restatement sets forth the doctrine of promissory estoppel as a basis for imposing contractual liability upon a party. Section 90, promissory estoppel, is based upon the concept that one party's reasonable reliance upon the other party's promise is legally sufficient to enforce the promise. Thus, the concept of reliance replaces the requirement of agreement as the basis for enforcing promises. The individual's freedom to [from] contract gives way to societal norms of fairness.

However, Section 90 is not a substitute for classical contract "rules." For example, promissory estoppel is not a substitute for bargained-for consideration. It is a separate contract law doctrine which makes a party liable for its promises. Consequently, promissory estoppel is an alternative theory of liability to either a claim that a contract (agreement) was formed and should be specifically enforced, or that a contract was formed and breached.

Defenses to a promissory estoppel claim are usually not an issue because the issues are defined by the doctrine - did the plaintiff reasonably rely on a promise which the defendant should have foreseen would induce reliance. The primary defense is denial.

The recovery of damages is based upon concepts of unjust enrichment (benefit received) by defendant and detrimental reliance (harm incurred by plaintiff). The primary damage measure is restitution. Expectation (benefit of the bargain) and nominal damages are both inapplicable.

The third major body of contract law competing for philosophical dominance arises from legislative enactments beginning in the 1960's known collectively as the Uniform Commercial Code ("UCC"). The model UCC has a different philosophical basis than either classical/neo-classical doctrine or promissory estoppel. It developed in the 1940's and 1950's as a critical response to the rigidity of classical contract doctrines and the reliance concept of promissory estoppel.

Spokespersons such as Karl Llewellyn argued for yet a different set of contracting principles. They agreed with classical/neo-classical law, however, finding them too rigid, technical and "unbusiness" like. Consequently, the major premise of Article 2 of the UCC is that if agreements are reached, they are enforceable regardless of whether the technicalities of contract formation are observed by the parties.

However, the UCC does more than merely relax classical contract rules. It is based on different philosophical concepts. The key considerations are fairness and commercial reasonableness. Consequently, a good faith and fair dealing covenant is implied into every contract. Because business customs and practices are the context in which the parties reach agreement, they become a part of their agreement. Reasonable expectations of the parties as to the terms of their contract are key to enforcement, which lessens the need for technicalities in the parties' written agreement. Parties are given opportunities to cure breaches and to reject the other party's performance. Although developed as a body of law for contracting between merchants, the UCC is widely applied by analogy to non-merchant contracting parties.

This very brief summary of prevailing, competing theories of contract law is set out in order to assist the practitioner and the court to select among what otherwise may appear to be mostly duplicative instructions (compare, for example, Instruction 24.12A (Restitution Promissory Estoppel) and 24.12B (Liability for Restitution and Measure of Restitution Damages to Defaulting Plaintiff)).

Alaska, like other American jurisdictions, has adopted rules from each of these three major contract law doctrines. The task of the practitioner and the trial court is to understand the purpose behind the doctrines in order to properly apply what otherwise are philosophically different rules.

The instructions that follow attempt to set forth Alaska case law. The instructions are numerous and complicated because some, though certainly not all, contract disputes are difficult to resolve. (As anyone who has examined Williston vs. Corbin vs. White and Summers has experienced.)

These contract instructions are designed to cover common law contract principles, not cases arising under the UCC. Some of the instructions may be useful in UCC cases, but as noted above, the UCC changes traditional contract law. Before borrowing an instruction for a commercial code case, the user should take care to ensure that the UCC has merely codified, not changed, classical contract law on the point of law involved.

In some areas, the law of Alaska is not developed, and the direction it will take is not yet clear. Therefore, model instructions have not been provided for these areas.

When using these instructions, the trial court should attempt to make them as suitable as possible for the specific case being tried. Sometimes only one of the issues covered by an instruction will be disputed. When this is the case, the instruction will have to be modified. Throughout the use notes and comments that accompany the instructions, suggestions are made for modifying instructions to recognize the peculiarities of individual lawsuits.

In complex contract cases with counterclaims and cross-claims, the instructions can be especially intricate. In such a case, the use of a special verdict form for each claim is recommended. When special verdict forms are used, the judge can modify the instructions without great difficulty so as to meet many of the needs of complex cases. It might be helpful, for example, to refer to parties by name, rather than as plaintiff, cross-plaintiff, etc., when the parties are numerous. The needs of any case will be readily apparent to the trial judge. Therefore, the suggestions are not very specific in describing what to do in multi-party or multi-issue cases.