'Leveling the Playing Field' with Contract Principles

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Distracted driving in Arizona

I’ll admit it. I have checked emails, responded to emails, and texted while driving. I know this is dangerous, I know I shouldn’t do it. I get mad at other drivers I see doing the same thing. I would never advocate doing it, but I do. I’ll also bet that I am not the only one, and that in reality many fellow young lawyers have done the same. I also know that it is not against the laws of the state of Arizona to do any of the above. That’s right—there are no state-wide bans on talking on the cell phone or texting while driving. Only bus drivers are restricted from using cell phones per Arizona law. That said, the City of Phoenix and the City of Tucson have primary offense regulations against texting and driving; however, the punishment of violation is only a fine ($100 for texting, $250 if texting caused an accident).

Compare this to the 10 states that ban handheld cellphone use while driving (California, Connecticut, Delaware, Maryland, Nevada, New Jersey, New York, Oregon, Washington, and West Virginia) and the District of Columbia, or the ban of cellphone use by novice drivers in 32 states and the District of Columbia, or even the ban on text messaging for all drivers in 39 states and the District of Columbia, and five more states that ban it for novice drivers.

Why is Arizona seemingly behind the curve in passing distracted-driver legislation? It isn’t for lack of trying. Apparently the Legislature has attempted to introduce bills regarding some form of distracted driving legislation every year since 2009. This year a number of bills were introduced, including the following:

- SB 1056/HB 2311: Would prohibit use of wireless communications devices by drivers with learner’s permits and drivers under 18 years old who have had their class G licenses for less than six months. Fines: $75 then $100 plus restriction extensions and possible license suspension. Secondary enforcement.
- HB 2125: Measure originally sought to make unrelated changes to accident reporting procedures, but a statewide texting ban was added to the bill March 2. It was approved by the House in a 45-15 vote, but then reconsidered and rejected in a 28-31 vote when legislators realized it included the texting ban (guess they don’t read the legislation before voting!).
- HB 2512: Would ban texting while driving. Primary enforcement, non-moving violation. Fines: $50 (no accident), $200 (accident).
- HB 2312: Seeks to outlaw driving while distracted “in any manner.”
- HB 2321: Would outlaw text messaging while driving in Arizona.

Some kind of distracted driving legislation seems like a no brainer to me—especially for novice drivers. The main argument against such legislation seems to revolve around enforcement, i.e., how can you prove that someone is texting vs. dialing a number vs. emailing while they are driving or causing an accident? But wouldn’t this be easy to determine by simply looking at the text, call, or email history with the time stamps on the phone?

In any event, perhaps the question isn’t “How do we enforce this?” but “How do we truly make our streets safer?”

Maybe it is better education about the dangers of distracted driving. Perhaps it is regulating the phone companies or car manufacturers to require them to come up with a texting email blocking program that doesn’t allow your phone to utilize certain features if you are in the driver’s seat. Or perhaps it is legislation, but maybe with even stricter penalties and fines.

Whatever the solution, I make a promise to myself and to all of you: I will keep my phone in my purse while I am driving and no more text or emailing until I am safely off the road.

‘Leveling the playing field’ with contract principles

By Stephen A. Gerst and Amanda L. Jakisch

Introduction

This article highlights well-established contract doctrines and principles that will be of assistance to practitioners in serving the disadvantaged. Each contract doctrine is briefly described with a citation to an illustrative Arizona case. A fuller version of this article, with an expanded description of each case is posted on the MCBA web site at www.maricopalaw.org. The doctrines are divided into the following three categories:

I) Doctrines for rescinding a contract or defending against contract enforcement, including Fraud, Duress, Undue Influence, Unconscionable Behavior and Incapacity due to age or mental condition.

II) Doctrines of contract Interpretation. These include the doctrine of Reasonable Expectations and rules dealing with Ambiguities and Indefiniteness.

III) Doctrines that allow tort remedies arising out of contracts. These include Fraud as a Tort and Breach of the Implied warranty.

I. Doctrines for rescinding a contract or defending against contract enforcement

Fraud

One of the most common client complaints is that a contract was based on important facts that were misrepresented, concealed or undisclosed. The doctrine of fraud may be the basis for rescission or a defense against a contract claim.

In Arizona, the party alleging fraud, either as a claim or defense, must plead and prove the following nine elements: 1) a statement of fact, 2) made intentionally or recklessly, 3) is false, 4) is known by the maker to be false, 5) is material to the contract, 6) is intended to be relied on, 7) is relied on, 8) the reliance was reasonable, and, 9) caused legally recognized damages. A failure to allege and prove any of the elements may be fatal to a fraud claim or defense. A fraud claim or defense may also be based on the failure of a party to disclose important information or by the active concealment of material facts. In Hill v. Jones, 725 P.2d 1115 (Ariz. Ct. App. 1986), the Buyer sought to rescind a contract for the sale of a house based on Seller’s alleged failure to disclose past termite infestation and property damage.

Duress

The doctrine of duress as a means of rescinding a contract, or raising it as a defense to a contract claim, is generally based on allegations of threats inducing the making of a contract. Generally, the threats are of an economic nature or any type that would interfere with the voluntariness of entering into a contract. In Inter-tel, Inc. v. Bank of America, 985 P.2d 956 (Ariz. Ct. Apps. 1999), the court found that duress could be based on threatened financial difficulties created by the bank which compelled a customer’s assent to the bank’s terms, including the waiving of all claims against the bank.

Undue influence

The ability to rescind a contract or defend against its enforcement, based on the doctrine of undue influence involves a party in a confidential or trust relationship, who has overpowered the will of the other party so that a court is able to find a lack of voluntariness. The weaker party may have suffered from mental decline due to illness or age and no longer has the ability to exercise independent judgment. Proof of undue influence almost always necessitates the testimony of a mental health expert to overcome the presumption of voluntariness at the time of the transaction. No Arizona appellate case was found where undue influence was in issue to rescind a contract or defend against its enforcement. For a case which involves a claim of undue influence in a will contest see, Evans v. Liston, 506 P.2d 1116 (Ariz. Ct. App. 1977).

Unconscionability

The doctrine of unconscionability involves conduct that is “shocking to the court.” Unconscionable conduct, in the context of contract law, requires an examination into both the procedural circumstances and the substantive fairness of the contract. If a court finds a contract to be unconscionable it may allow the remedy of rescission of the contract. Alternatively, the court may use its equitable powers to eliminate the unconscionable parts. In most cases where the doctrine has been applied, the judge makes the decision as a matter of law, however, in Vonk v. Dunn, 775 P.1088 (Ariz. 1989), the issue of unconscionability was determined to be an issue for a jury where property was foreclosed on a claim of unpaid property taxes in a minor amount.

Incacity due to age

The doctrine of incapacity due to age males adults who deal with minors strictly liable for knowing the age of the persons with whom they are contracting. This is true even when there is misrepresentation of age by the minor. Much of the common law in this area has been modified

The spacing war: the final frontier of typesetting

By Tamara Herrera

One of the highly debated style choices in legal writing is the number of spaces needed after a period at the end of a sentence. Most legal style manuals now suggest using one space after a period for one simple reason: type and typesetting have changed.

Specifically, two spaces were needed when typewriters were monospaced, meaning that the width of an “I” in a word was the same width as the “w.” The two spaces allowed for greater aesthetics and readability by keeping the spacing as uniform as possible.

The most common monospaced font is Courier, which some legal writers still use. Modern type, like Times New Roman and the type in this newspaper, are proportional fonts. With proportional fonts, each character takes up a different space so the two spaces after a period do not add to the readability of the document.

In fact, many modern style guides suggest that two spaces after a period detracts from a document’s readability, especially if the spacing is not consistent. A two-space gap suggests a pause—a long pause—for the modern reader, which is usually not what the legal writer intended.

So what is a legal writer to do? Especially one trained to type when two spaces were part of the keyboarding drill and hitting the space bar twice is now a habit?

If you are using Word 2010 as your word processor, the easiest thing is to set the program to check for spacing issues. To set this option, click on the “Review” tab at the top of the document. On the far left of the tool bar is an option for “Spelling & Grammar.” Click on this option to bring up a specific menu box for spelling and grammar. In this box is a button on the bottom left for “Options.”

Once you click on this “Options” button, a series of correction options appear under the tab for “Properties” (which should come up automatically), and you can change them all. About two-thirds down the page is a button for writing style “Settings.” If you click on this button, you will find an option for checking spacing after periods and a pull-down menu allowing you to pick how you want the program to review spacing.

There are similar options for earlier versions of Word and for other word processing programs. A quick Google search was all I needed to find them.

Regardless of which side of the spacing war you find yourself on, remember that consistency in spacing is key.
Finders not necessarily keepers

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dead or unknown.
The cash found by the worker and claimed by Jennings and McCallum was mislaid. Portley ruled, affirming the superior court's judgment. "[I]t is undisputed that Spann placed the cash in the ammunition cans and then hid those cans in the recesses of the house," he wrote. Consequently, it belonged to the true owner—Spann's estate—not to the house's new owners.

Jennings and McCallum retorted that the true owners had abandoned the previously mislaid cash when they sold the house "as is." Portley didn't buy it.

The superior court's finding that the money had been mislaid, he ruled, precluded the funds from being considered abandoned. In any event, abandonment cannot be presumed but must be shown. "[T]he facts are undisput- ed that the estate did not know that the money was mislaid, and did not intend to abandon the funds," he wrote. "In fact, the evidence is to the contrary; once Grande learned of the discovery, she filed a probate petition to recover the property."

"[T]he fact that neither party knew of the existence of additional cans filled with cash and secreted inside the walls of the house," Portley continued, "is precisely why we cannot conclude that Grande abandoned the funds." "[T]he house," he concluded, "was not sold with the thought that there may be cash within its walls. The only evidence presented to the trial court was that Grande was unaware that anything else of value remained in the house."

The jury finding Portley in affirming the judgment were Judges Ann A. Scott Timmer and Andrew W. Gould.

... Trial judges may instruct jury on lesser-included offenses on their own

The Arizona Supreme Court has ruled that a trial judge in a noncapital criminal trial may instruct the jury on lesser-included offenses, even if both the prosecutor and the defendant object. State v. Gipson, No. CR-11-0282-PR (Ariz. May 31, 2012).

Gary Wayne Gipson, Jr., and Billy Joe Huff Jr. had a business dispute. Huff went to Gipson's house to discuss matters. The two exchanged words and then punched Gipson, who then pulled out a gun and shot Huff dead. The state charged Gipson with first-degree murder but did not seek the death penalty. After the trial, the judge instructed the jury on second-degree murder—over Gipson's objec- tion. He also instructed the jury on manslaughter—over the state's objection.

The jury convicted Gipson of manslaughter, having acquitted him of first-degree murder and hung on the second-degree-murder charge. Gipson appealed, arguing that the trial court had erred in giving the lesser-included instructions over the parties' objections. The court of appeals affirmed in a memorandum decision, and the supreme court granted Gipson's petition for review.

Gipson conceded that the evidence sup- ported the manslaughter instruction. He nev- ertheless argued that he had an absolute right to a "no-evidence" defense. The supreme court, in an opinion by Vice Chief Justice Andrew Hurwitz, disagreed.

Gipson relied on State v. Krone, where the supreme court had stated that "[a] defendant should not have a lesser included instruction forced upon him," and State v. Rodriguez, where it had said that "[i]f [the defendant] objects, the instruction should not be given."

According to Hurwitz, Gipson's argument that he had an absolute right to an all-or-noth- ing offense went too far. "Indeed," he wrote, "our rules make clear that the State is entitled to lesser included instructions when the evi- dence so warrants." The rule of Krone and Rodriguez was limited to capital cases, Hurwitz concluded, and therefore did not apply to Gipson's case.

As a backup, Gipson asserted that the trial court had erred by giving the instructions when both parties had objected. Although judges were once required to give lesser-includ- ed-offense instructions in all homicide cases, the court noted that the approach, ensuring the contrary rule in an amendment to the rules of criminal procedure. Gipson argued that because judges in noncap- ital cases are now no longer absolutely required to give the instructions, they are now prohibit- ed from doing so over the parties' mutual objections.

Again, Hurwitz disagreed. He noted that Criminal Rule 23.3 actually requires the court to submit forms of verdict for all lesser-includ- ed offenses. "Although Rule 23.3 does not mandate that a lesser included offense instruc- tion be submitted over the objections of the defendant and the state," Hurwitz wrote, "it plainly does not preclude the trial judge, in the exercise of his discretion, from doing so."

Hurwitz noted that he did not mean to sug- gest that the trial court should ignore the par- ties' objections. "In general," he wrote, "quasi- a federal court, "the trial judge should withhold charging on lesser included offense[s] unless one of the parties requests it, since that charge is not inevitably required in our trials, but is an issue best resolved, in our adversary system, by permitting counsel to decide on tac- tics."

"When both parties object to a lesser included offense instruction," he continued, "the trial court should be loath to give it absent compelling circumstances, such as fairness to the defendant. Nevertheless, he concluded, the trial court is not completely hamstringed by the parties' desires. ["[i]f the instruction is given and sup- ported by the evidence, a resultant conviction for the lesser included offense does not violate the Fifth Amendment's due process or contra- vene any Arizona statute or rule."

Joining Hurwitz in affirming the convic- tion were Chief Justice Rebecca White Berch and justices W. Scott Bales, A. John Pelander, and Robert M. Brutinel.

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by statute. (Arizona Revised Statutes §44-131 through §44-140) Arizona's early commit- ment to the common law view that a minor who lacks capacity due to age may rescind a contract, even though the minor may not be able to provide restitution to the other party, is found in Worman Motor Co. v. Hill, 94 P.2d 865 (Ariz. 1939).

Incapacity due to mental condition

Incapacity due to mental condition may result from natural disability, illness or injury. It may also result from substance abuse in certain circumstances. Unlike the doctrine of incapaci- ty of a minor, a person over the age of majority is presumed to possess contractual capacity. The presumption, however, is rebuttable with the burden of proof on the person alleging incapaci- ty. The issue focuses on the time the contract was formed and is often raised by a guardian or co-employee's resignation was a contract, even though terms were missing or left open to be agreed upon.

II. Tort doctrines arising out of contract

Fraud as a tort

In addition to fraud being a legal basis to rescind a contract or defend against its enforcement, fraud may also form the basis of a civil tort action. The successful party may be entitled to attorney fees applicable to contract actions, and tort remedies for non-economic damages caused by the fraud. In Echols v. Beauty Built Homes, Inc., 647 P.2d 629 (Ariz. 1982), the court held that where a developer intentionally misled buyer regard- ing eligibility for a tax credit for their home purchases, there was a prima facie case of fraud that may support punitive damages even in the absence of monetary loss.

Good faith and fair dealing

In Arizona, the duty of good faith and fair dealing is implied in every contract. A breach of this implied covenant may support a cause of action in tort as well as contract. Although tort claims for breach of the implied covenant have been recognized in other types of actions, such claims are usually between an insurance company and its insured. The leading case discussing these principles is Rawlings v. Apodaca, 726 P.2d 565 (Ariz. 1986). In Rawlings, the court held that, even though the express covenants of an insurance contract were fully performed, the covenant of good faith and fair dealing was breached due to the insurance company acting in a conflict of interest.

Conclusion

It is hoped that the identification and descriptions of the contract doctrines and prin- ciples which are included in this article, together with case examples, will be helpful to the practitioner in representing clients who were not "on a level playing field" at the time their contracts were formed.

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Senate confirms Hurwitz for Ninth Circuit

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Judge Hurwitz said he is looking forward to the new opportunity for public service but will miss working with his colleagues in Arizona. "I will miss working on a daily basis with my wonderful colleagues on the Arizona Supreme Court and those serving the Arizona Judicial Branch throughout this great state," he said.

Arizona Supreme Court Chief Justice Rebecca White Berch said she considered Hurwitz a judge of "vision, great intellect, and honor" as well as one who is "practical and hardworking."

Hurwitz was appointed to the Arizona Supreme Court by former Gov. Janet Napolitano in 2003. A native of New York, Justice Hurwitz earned his A.B. in 1968 from Princeton University, where he graduated cum laude and Phi Beta Kappa. He earned his J.D. in 1972 from Yale University, where he was a note and comment editor from 1971 to 1972, and served on the Board of Editors from 1969 to 1971.